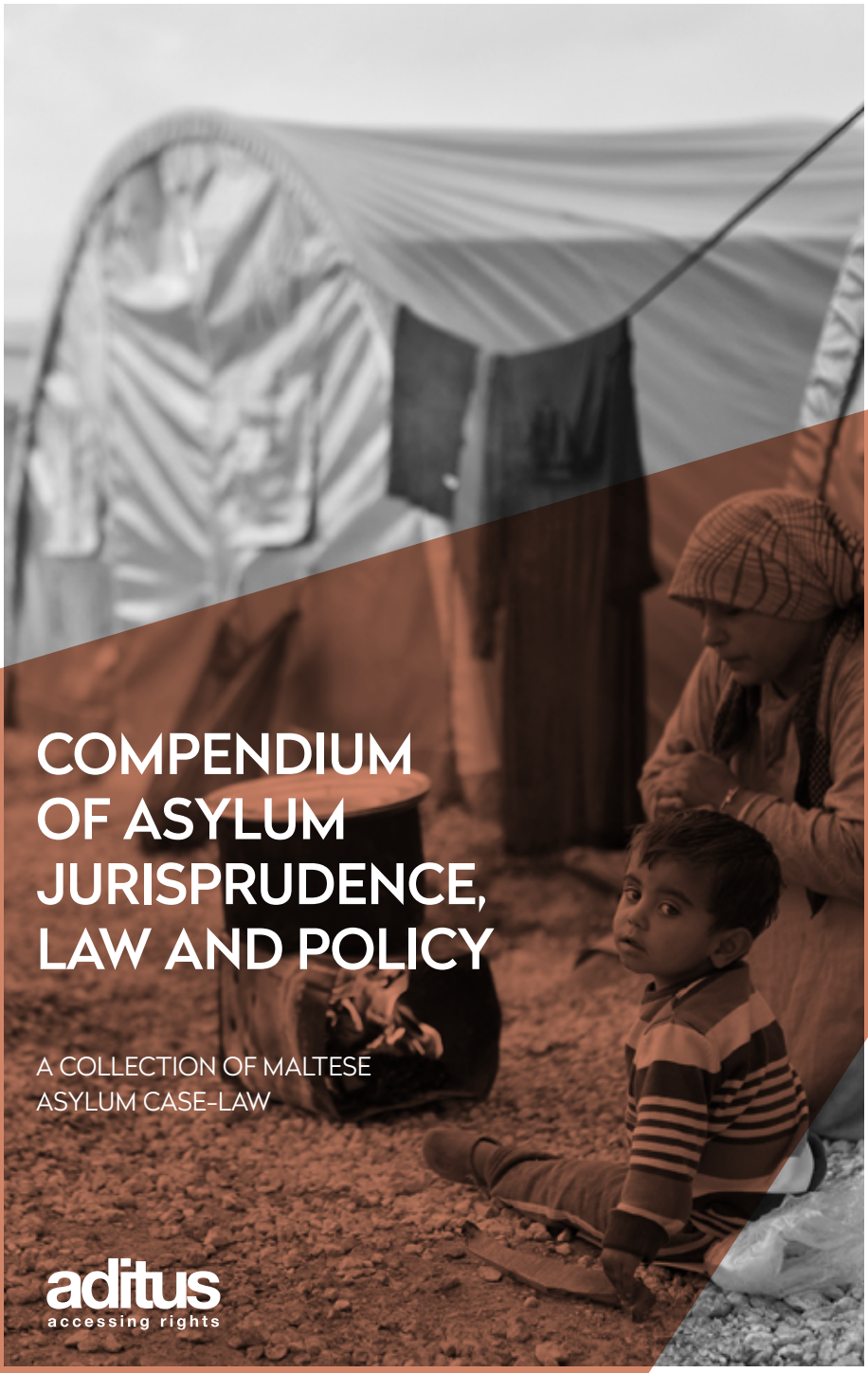

COMPENDIUM OF ASYLUM JURISPRUDENCE, LAW AND POLICY

A COLLECTION OF MALTESE ASYLUM CASE-LAW

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Compendium of Asylum Jurisprudence, Law and Policy:
A collection of Maltese asylum case-law

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

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Malta Council for the VOLUNTARY SECTOR

Small Initiatives Support Scheme

... nhar it-30 ta' Settembru 2004, iż-żewġ rikorrenti u 24 persuna oħra ppruvaw jaqsmu mil-Libja għall-Ewropa...mal-wasla tagħhom huma ittieħdu d-Depot tal-Floriana. Huma qalu lill-Pulizija illi kienu mis-Somalia u ġejjin mill-Libja. Ir-rikorrenti kienu fotografati u ingħataw 'police immigration number'. Huma qatt ma ngħataw l-opportunita' li japplikaw għall-asil f'Malta.

...wara għoxrin jum fid-Depot huma ġew infurmati illi ddetenuti kollha bejn in-numru 04-OO-005 u 04-OO-010 kellhom jippakkjaw l-affarijiet tagħhom...Huma staqsew sabiex jitkellmu mar-rappresentant tal-UNHCR f'Malta iżda din it-talba ma ġietx accettata u l-pulizija qalulhom li l-ordnijiet kienu illi jitpoġġew fuq l-ajruplan anki bil-forza jekk kien neċessarju. Huma irrifjutaw iżda l-pulizija uzaw il-forza u tellgħu id-detenuti abbord.

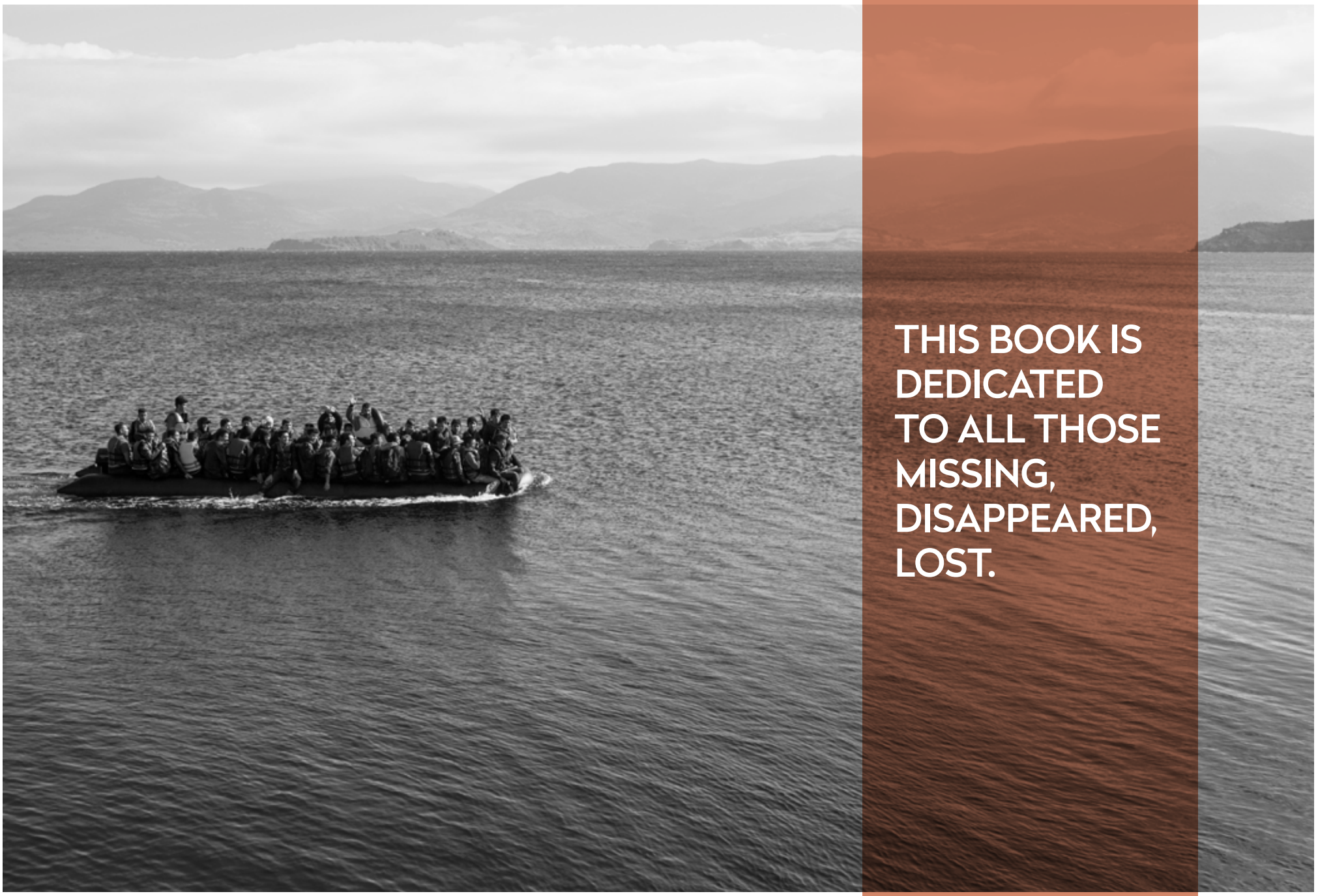
...meta waslu Tripoli, l-awtoritajiet Libiċi żammewhom arrestati fl-ajruport imbagħad tpoġġew f'van fejn kienu mgħamda. Waslu ġewwa post fejn kienu interrogati, imsawta u ittorturati. Wieħed mir-rikorrenti ġie msawwat fil-qasba tas-sieq u 'electrocuted' fil-partijiet intimi tiegħu. Dan kien ukoll imdendel wiċċu 'l isfel.

...f'Novembru 2005, ir-rikorrenti u s-Somali l-oħra tpoġġew ġo jeep u wara tlett ijiem vjaġġ fuq dan il-jeep tħallaw fid-dessert. Huma għaddew 14-il ġurnata fid-deżert mingħajr ikel jew ilma. Wara ġimgħa Sadak u Mohammed mietu u wara ftit ġranet Hashi u Abdishukur ma kellhomx is-saħħa jkomplu jimxu. Ir-rikorrenti baqgħu jimxu u iltaqgħu ma' xi nies Berberi illi għenuhom. Huma rnexxielhom jaslu Tripoli u fit-23 ta' Ġunju 2006 reggħu waslu Malta.

...l-initimati kisru d-drittijiet fundamentali tar-rikorrenti, hekk kif sanċiti f'artikolu 36 tal- Kostituzzjoni ta' Malta u artikolu 3 tal-Konvenzjoni Ewropea għall-Protezzjoni tad-Drittijijet tal-Bniedem (Kap. 319) minħabba l-aġir tagħhom fid-deportazzjoni tar-rikorrenti u bil-mod kif aġixxew mal-istess."

Abdul Hakim Hassan Abdulle u Kasin Ibrahim Nur v Ministru tal-Gustizzja u Intern Kummissarju tal-Pulizija,

First Hall Civil Court (Constitutional Jurisdiction), CN. 56/2007, 29 November 2011.



THIS BOOK IS DEDICATED TO ALL THOSE MISSING, DISAPPEARED, LOST.

FOREWORD

aditus foundation's mission is to improve the quality of human rights enjoyment of all persons in Malta. On the one hand, we focus our attention on the legal and policy regimes established to ensure Malta's fulfilment of its international human rights obligations, suggesting improvements and promoting the introduction of new norms where existing instruments are insufficient or inexistent. Together with this institutional approach, we also offer legal support to people seeking - and often failing - to access their fundamental human rights by providing information and representation. In the area of asylum or, more accurately, of protecting refugees, engaging with the complex web of relevant legal norms is a challenge for asylum-seekers and refugees, as well as for legal practitioners, the judiciary and academia.

With Malta's 2004 accession to the European Union, the Common European Asylum System measures and other EU norms were uncomfortably interlaced with Malta's nascent asylum regime, the latter loosely based on the 1951 Refugee Convention and - for some matters - strengthened with the European Convention on Human Rights. Together with regulating the national refugee status determination procedure, these norms are relevant to other important areas of refugee protection: non-refoulement, access to territory, border control, reception conditions, administrative detention, non-discrimination, integration rights, and vulnerability. Yet, despite this broad legal landscape and the documented serious challenges faced by asylum-seekers and refugees in Malta, there is surprisingly very little jurisprudence for legal practitioners to refer to as we search for interpretative clarity, norms and principles, and - generally - judicial guidance. Reasons for this vary and include the reluctance or fear of refugees to seek judicial recourse, the actual or perceived futility of judicial action, the law's preference for non-public proceedings before administrative tribunals, and - ultimately - an institutional refusal to allow for higher levels of accountability, transparency and review of asylum-related decision-making.

It is from this professional need to seek judicial pronouncements to support our advocacy and casework that the idea for this publication was born. This Compendium is thus the first and only publication that gathers most judicial pronouncements in the area of asylum, in relation to Malta. As such, it seeks to present and expose judicial decisions and their impact on refugee protection. We want the strong cases to be underlined, quoted and referred to, whilst we believe that an improved level of access to justice requires the weaker cases to be criticised, their flaws exposed with a view to future improvement. We also want to urge the Maltese authorities to revisit their decision to shroud the vast majority of asylum-related decisions in secrecy: proceedings and decisions of the Immigration Appeals Board and the Refugee Appeals Board should be published, with measures in place to protect refugees' identities and sensitivities.

Ultimately, we hope that the Compendium strengthens the quality of those judicial decisions that determine the extent to which refugees are able to effectively enjoy their fundamental human rights. We hope that readers of this Compendium will take from it the wealth of knowledge gathered in its pages, and also appreciate the struggles refugees face as they seek to secure their human dignity in Malta.

Dr. Neil Falzon
Director
aditus foundation
May, 2018

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ABBREVIATIONS

AAT	AGE ASSESSMENT TEAM
ATD	ALTERNATIVES TO DETENTION
AWAS	AGENCY FOR THE WELFARE OF ASYLUM-SEEKERS
CHARTER	CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION
COCP	CODE OF ORGANISATION AND CIVIL PROCEDURE
CPT	COMMITTEE FOR THE PREVENTION OF TORTURE
ECHR	EUROPEAN CONVENTION ON HUMAN RIGHTS
ECTHR	EUROPEAN COURT OF HUMAN RIGHTS
EU	EUROPEAN UNION
IAB	IMMIGRATION APPEALS BOARD
IRC	INITIAL RECEPTION CENTRE
MHAS	MINISTRY FOR HOME AFFAIRS AND NATIONAL SECURITY
NCPE	NATIONAL COMMISSION FOR THE PROMOTION OF EQUALITY
PIO	PRINCIPAL IMMIGRATION OFFICER
PQ	PRELIMINARY QUESTIONNAIRE
RAB	REFUGEE APPEALS BOARD
REFCOM	REFUGEE COMMISSIONER
SC	SEPARATED CHILDREN
TCN	THIRD COUNTRY NATIONAL
UNHCR	UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
UAM	UNACCOMPANIED MINORS

INTRODUCTION

The ***Compendium of Asylum Jurisprudence: A collection of Maltese asylum case-law*** is the first legal publication that gathers the large collection of case-law from Maltese courts and from the European Court of Human Rights (ECtHR) with respect to Malta, in the field of asylum.

In recent years the volume of asylum-related laws, policies and jurisprudence has enriched the Maltese legal system, yet this area of law remains an extremely complex and ambiguous field for legal practitioners, students and other professionals alike. The lack of legal academic publications focusing on national law and its interpretation by the local Courts remain a problem for most practitioners that work in this field.

Through the work of legal professionals working in the private sector and in non-governmental organisations, a large amount of knowledge and case-law has been amassed. By collecting this information in an accessible and clear publication, we aim to improve legal knowledge to the benefit of one of the most marginalised groups in Maltese society.

Improved knowledge would ultimately result in better-informed lawyers and an improved access to justice for asylum-seekers and beneficiaries of international protection. The publication offers the tools to enforce their rights, to give guidance on how to source the best information available and, most importantly, to improve access to the national courts.

aditus foundation believes that access to justice is of fundamental importance for all individuals and is an essential component of the rule of law, especially when a right is violated, or damage is suffered. Such access can only be effective when legal professionals are aware of the relevant legal provisions and the case-law interpreting such provisions. Ultimately, the Compendium aims to address the knowledge gap that exists in the sector of asylum and immigration.

CHAPTER OUTLINE

This publication is divided into six chapters. Chapter I on Procedural Issues takes into account the vast number of judgements that examined the nature of judicial review and constitutional review in the field of asylum and immigration and the implications of challenging decisions by the Refugee Appeals Board (RAB) and the Immigration Appeals Board (IAB). Chapter II examines the restraints that our Courts have in reviewing decisions relating to asylum on the merits. The grounds for detention, the remedies available at law for challenging detention and judgments on detention in the light of claims of breaches of fundamental right are tackled in Chapter III. Chapter IV explores the importance of access to the territory and surrounding issues, such as border control and the principle of non-refoulement, and associated judgements. The Age Assessment procedure is examined in Chapter V. Finally, Chapter VI explores the Rights of Beneficiaries of International Protection in the light of the available Court jurisprudence and Ombudsman decisions.

METHODOLOGY

The author, together with the research assistant, carried out extensive desk-research through the online judgements database of the Courts of Malta[1], the Office of the Ombudsman's Case Notes[2] and reports of the National Commission for the Promotion of Equality (NCPE)[3]. Therefore, the subjects covered by this publication were those that have emerged through asylum-related case-law publicly available through desk research that was carried out over several months using key search terms. The researchers did not limit their research to a specific time-period and included all publicly available judgements from as early as 2004 to date. In addition, leading local asylum lawyers were consulted in order to identify the key judgements and principles emerging therefrom.

There have been a number of difficulties in compiling this publication which need to be highlighted. It should be noted that decisions from the RAB and the IAB are not public and are not accessible. Therefore, a complete study of substantive asylum decisions could not be conducted. This problem is exacerbated by the fact that no further appeals are allowed from decisions of the RAB and the IAB, resulting in only a very small number of cases reaching the Courts of Law. This renders impossible academic and judicial scrutiny. The cases that reach the Maltese courts are those that involve judicial review of administrative decisions through proceedings instituted by virtue of Article 469A Code of Organisation and Civil Procedure[4] (COCP), claims of breaches of principles of natural justice under Article 32 of the COCP or breaches of fundamental rights found in the Constitution[5].

Secondly, the authors are also aware that the Court's online database does not contain all judgements, and that therefore there may have been some asylum-related judgements which were not included in the database. In order to mitigate these problems, the authors have also carried out research through available publications and academic writings.

ACKNOWLEDGMENTS

We would like to thank Dr. Michael Camilleri in assisting us with highlighting some key judgments and also in bringing many of the cases in front of the Maltese and Strasbourg Courts.

1 http://www.justiceservices.gov.mt/.
2 https://www.ombudsman.org.mt/category/case-notes/.
3 https://ncpe.gov.mt/en/Pages/NCPE_Home.aspx.
4 Code of Organisation and Civil Procedures, CAP 12 of the Laws of Malta, http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577.
5 Constitution of Malta, http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566.

CHAPTER I
PROCEDURAL ISSUES

> [H]U PRINCIPJU TA' DRITT, PERÒ, LI L-ĠURISDIZZJONI INERENTI TAL-QRATI TA' "JUDICIAL REVIEW" MA TISTA' TITNEĦĦA MINN EBDA LIĠI, GĦAX MA JISTAX JIGI AĊĊETTAT LI L-LEĠISLATUR QATT JISTA' JIPPERMETTI LI DEĊIŻJONI TITTIEĦED BI KSUR TAL-PRINĊIPJI TA' ĠUSTIZZJA NATURALI JEW KONTRA L-LIĠI"

Paul Washimba v Refugee Appeals Board, the Attorney General and the Commissioner for Refugees, 65/2008/1, 28 September 2012

This Chapter will discuss the procedural issues involved in litigating asylum-related matters with reference to a substantial amount of jurisprudence from local Civil and Constitutional Courts. The case-law spanning almost two decades covers questions relating to jurisdictional issues, the legitimate parties to a case, the applicability of otherwise of Constitutional or Convention articles[6] and also the application of norms of natural justice. It is also significant that there has been a recent overhaul of local asylum legislation and policies pursuant to the implementation of the European Union's recast asylum Directives[7], a number of ECtHR judgements against Malta, and a drastic decrease in the number of maritime arrival of asylum-seekers. These changes account for the incongruity that may at times arise between the quoted jurisprudence and the asylum procedures as described below.

It is important to have a clear picture of the procedure that is involved in an asylum application from the moment of entry into Malta, and the main actors in such procedure. The recent ***Strategy for the Reception of Asylum-seekers and Irregular Immigrants***[8] lays down that migrants intercepted attempting to enter Malta irregularly are immediately accommodated at an Initial Reception Facility (IRC) following a brief interview with the Malta Immigration Police. During their stay at the IRC, all migrants are medically screened. In terms of the Strategy, unaccompanied minors, family groups and children, and other manifestly vulnerable people should

6 It should be noted that the European Convention for the Protection of Human Rights and Fundamental Freedoms was incorporated into national law, thus making it enforceable in Malta, through the European Convention Act, CAP 319 of the Laws of Malta.

7 Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0032; Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0033; Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0095.

8 Ministry for Home Affairs and National Security, Strategy for the Reception of Asylum Seekers and Irregular Immigrants, 2015, https://gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx

be identified at this stage. Migrants may be kept in this centre for up to seven days, unless health-related considerations so dictate[9]. Persons not applying for international protection may be detained under the Immigration Act[10]. Asylum-seekers, including those using false documentation to enter Malta and some of those returned to Malta on the basis of a Dublin decision, have also been detained[11]. Asylum-seekers that have been apprehended using false documentation may also face criminal prosecution and imprisonment[12].

Asylum applications are lodged at the Office of the Refugee Commissioner (RefCom)[13], the only authority responsible for examining and determining such applications at First Instance. The asylum-seekers are required to complete the Preliminary Questionnaire (PQ), and if the asylum-seeker gives evidence that he or she has already sought protection in another EU country or satisfies other relevant criteria, thus rendering him or her eligible to being transferred to that country according to the Dublin III Regulation[14], the examination of such application for protection is suspended pending the outcome of the Dublin Procedure[15]. If there are no Dublin III implications, an interview is scheduled with the asylum-seeker. Once the applicant is called for the interview, he or she is first asked to fill in an Application Form that contains questions similar to those previously answered in the PQ. The Application Form is considered to be the official application for international protection. The full recorded substantive interview follows.

An applicant may file an appeal with the Refugee Appeals Board (RAB) within two weeks from the date he or she receives a negative decision from Refcom[16]. The RAB has the power to hear and determine appeals on both fact and law against a negative decision on an application for refugee status or subsidiary protection, inadmissibility decisions, subsequent applications, safe third country decisions, withdrawals of international protection, Dublin III decisions and refusals to re-open

9 aditus foundation & Jesuit Refugee Service Malta, edited by the European Council for Refugees and Exiles, AIDA (Asylum Information Database) Country Report: Malta, 2017, http://www.asylumineurope.org/reports/country/malta

10 Article 14(1)(2) of the Immigration Act, CAP 217 of the Laws of Malta. Issues relating to the detention of asylum seekers are examined separately in Chapter III below.

11 Access to the territory and border control are discussed in Chapter IV. See also aditus foundation & Jesuit Refugee Service Malta, edited by the European Council for Refugees and Exiles, AIDA (Asylum Information Database) Country Report: Malta, 2017, op cit.

12 Aspects relating to the use of false documentation are also discussed in Chapter IV.

13 Article 8 of the Refugees Act, CAP. 420 of the Laws of Malta. See Fig. 1: Asylum Procedure Flowchart

14 Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III).

15 More information on the Dublin Procedure is contained in Chapter IV.

16 Article 7(2) of the Refugees Act, op.cit.

withdrawn applications. Decisions of the RAB are final[17] and conclusive and "may not be challenged and no appeal may lie therefrom"[18].

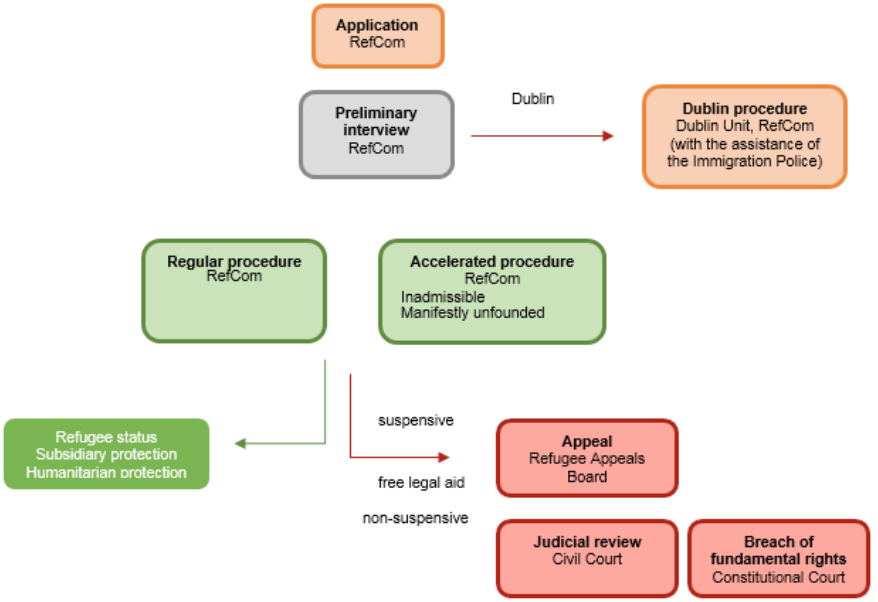


Fig. 1: Asylum Procedure Flowchart - Source aditus foundation & Jesuit Refugee Service Malta, edited by the European Council for Refugees and Exiles, AIDA (Asylum Information Database) Country Report: Malta, 2017 (http://www.asylumineurope.org/reports/country/malta/asylum-procedure/general/flow-chart)

17 The concerns relating to the restrictions of further judicial review in asylum proceedings were voiced during review of the system in the United Kingdom. In 2004, extensive discussions were held in the United Kingdom on a proposed "Asylum and Immigration (Treatment of Claimants etc.) Bill" which sought to establish a single tier of appeal against Home Office decisions in relation to asylum and immigration to replace the two tiers which existed and to preclude judicial review by the courts. The House of Commons Select Committee on Constitutional Affairs had stated that "As a matter of constitutional principle some form of higher judicial oversight of lower tribunals and executive decisions should be retained. This is particularly true when life and liberty may be at stake" (HC211-I 26th Feb 2004.). In written submissions to the Constitutional Affairs Committee, the Council on Tribunals also commented that "It is of the highest constitutional importance that the lawfulness of decisions of public authorities should be capable of being tested in the courts. ... In the Council's view it is entirely wrong that decisions of tribunals should be immune from further legal challenge." Finally, Lord Chief Justice Woolf in a lecture to the Faculty of Law at Cambridge University in 2004 said that "a clause of the nature now included in the Bill was fundamentally in conflict with the rule of law and should not be contemplated by any government if it had respect for the rule of law."

18 Article 7(9) of the Refugees Act, op.cit.

JUDICIAL REVIEW OF RAB DECISIONS BY THE CIVIL COURTS

Although the Refugees Act stipulates that RAB decisions are final, it is possible to submit an application to the Civil Courts in order to review decisions that allegedly breach principles of natural justice or that are manifestly contrary to the law. In a number of cases the Maltese Courts have rejected the plea presented by the government that RAB decisions are final and that therefore the Courts should decline from taking cognisance of the case.

In **Washimba**[19], the applicant filed a suit before the First Hall of the Civil Court asking that court to declare that the RAB's decision was null and void because it was based upon a wrong interpretation of the law. In June 2009, the First Hall dismissed Mr Washimba's case on the basis of Article 7(9) of the Refugees Act which states that decisions of the RAB are final and cannot be appealed. An appeal was then filed in the Court of Appeal which overturned the judgement of the First Hall and held that it is an established principle at law that the power of the Courts to review can never be removed:

"[h]u principju ta' dritt, però, li l-ġurisdizzjoni inerenti tal-qrati ta' "judicial review" ma tista' titneħħa minn ebda liġi, għax ma jistax jigi aċċettat li l-leġislatur qatt jista' jippermetti li deċiżjoni tittieħed bi ksur tal-prinċipji ta' ġustizzja naturali jew kontra l-liġi"[20].

The Court of Appeal confirmed that the Civil Courts have the jurisdiction to examine the workings of any tribunal, firstly in order to ensure that the principles of natural justice were adhered to, and secondly to ensure that there is a correct and complete application of the law *"fis-sens li għandhom jassiguraw mhux biss li d-deċiżjoni innifisha ma tkunx waħda "wrong at law", iżda li t-Tribunal jew Bord ikollu ssetgħa legali jagħti dik id- deċiżjoni."*[21]

This reasoning was echoed in **Saed Salem Saed**[22]. Saed had applied for refugee status after the time period prescribed by law[23], however RefCom – due to the special nature of the case – used its discretion to allow the application. The asylum application was eventually rejected and the applicant appealed to the RAB. The RAB dismissed his appeal on the basis he had applied for refugee status long after the peremptory period of two months. The Civil Court (First Hall) dismissed the application as it felt that all the RAB did was to confirm RefCom's decision on the basis of more precise reasoning[24]. The Court of Appeal overturned the judgment of the Civil Court (First Hall) and held that the RAB did not take into account RefCom's use of discretion allowed by law in allowing the application due to special and exceptional reasons. The Court said that, in such a case, the RAB should have proceeded with hearing the appeal and it should not have decided on the validity or otherwise of the asylum application. The Court of Appeal, in deciding whether or not it had the power to annul the decision of the RAB, referred to the Washimba case and held that the RAB *"ma kellux is-setgħa jissindika l-użu tad-diskrezzjoni mill-Kummissarju, u lanqas ma kellu s-setgħa jiddeċiedi hu jekk l-applikazzjoni kenitx valida jew le"*[25]. The Court of Appeal decided in favour of the applicant and annulled the RAB's decision.

The Maltese Courts, even where the law stipulates that certain decisions are final and may not be challenged or appealed, have held a conviction *"that not even the legislator had in mind granting such unfettered immunity to the Board as would make it unaccountable for breaches which, in the case of other administrative tribunals, ground an action for judicial review."*[26] In **Sadek Mussa Abdalla**, the Civil Court (First Hall) went so far as to say that breaches of any of the recognized rules of natural justice are, in essence, breaches of a right to a fair hearing as upheld in the relative provisions of Chapter IV of the Constitution as well as Article 6 of the European Convention on Human Rights (ECHR)[27]. In addition, to the claim by the respondents that there existed no action for review on the basis of the wrong application of the law by an administrative judicial tribunal, the Court ruled that the applicant was alleging a breach of the RAB's duty to observe a rule of natural justice, as well as requesting a finding that either the Board applied the law wrongly

19 Paul Washimba v Refugee Appeals Board, the Attorney General and the Commissioner for Refugees, 65/2008, 26 June 2009.

20 Paul Washimba v Refugee Appeals Board, the Attorney General and the Commissioner for Refugees, 65/2008/1, 28 September 2012.

21 Paul Washimba v Refugee Appeals Board, the Attorney General and the Commissioner for Refugees, ibid.

22 Saed Salem Saed v Refugee Appeals Board, the Commissioner of Police as Principal Immigration Officer and the Attorney General, 1/2008/2, 5 April 2013.

23 The former Article 8(2A) of the Refugees Act stipulated that an application for asylum had to be filed within two months of the person's entry into Malta, however RefCom had the discretion to accept late applications due to special and exceptional circumstances. This Article was deleted and Regulation 8(1) of the 2015 Procedural Standards for Granting and Withdrawing International Protection Regulations, S. L. 420.07 lays down that applications for international protection should not be rejected or excluded from examination on the sole ground that they have not been made as soon as possible.

24 "li għamel il-Bord kien li wettaq id-deċiżjoni tal- Kummissarju għalkemm b'espożizzjoni ta' raġunijiet aktar preċiża u aktar ekonomika minn dik tal-Kummissarju u forsi wkoll aktar teknikament korretta għax ma tax raġunijiet li ma kinux strettament relevanti, għalkemm forsi utli għas-sodisfazzjon tal-attur stess biex dan ikun jaf illi t-talba tiegħu ma ġietx miċħuda biss għax għamilha wara żżmien" Saed Salem Saed v Refugee Appeals Board, the Commissioner of Police as Principal Immigration Officer and the Attorney General, 1/2008, 3 November 2009.

25 Saed Salem Saed v Refugee Appeals Board, the Commissioner of Police as Principal Immigration Officer and the Attorney General, 1/2008/2, 5 April 2013.

26 Sadek Mussa Abdalla v Refugee Appeals Board and the Attorney General, 511/2013, 22 October 2013 partial judgement on preliminary pleas. The case is still pending for final judgment at the time of writing. See also Sive Teshome Berhanu Asbu (ID No 0049820A) v Refugee Appeals Board and the Attorney General, 65/2010, 30 November 2010 where the Court held that "hemm il-principju ghola mill-ligi konsistenti fi stat ta' dritt, li jghid li hadd ma hu 'l fuq mil-ligi, u li huma l-qrati tal-gustizzja l-organu fdat bis-setgha u bid-dmir li jghid jekk il-ligi tharsitx."

27 Sadek Mussa Abdalla v Refugee Appeals Board and the Attorney General, 511/2013, 22 October 2013, partial judgement on preliminary pleas. The case is still pending for final judgment at the time of writing.

in its decision or else the law as applied falls short of what the Directive on which it is based prescribes. The proceedings were stayed in 2016, pending the outcome of the applicant's appeal from a RefCom decision, and the case was still pending the final judgment at the time of writing.

In **Abrehet Beyene Gebremariam**[28] the applicant had filed an appeal to the RAB against a RefCom decision rejecting her application for international protection. In her appeal submissions to the RAB she submitted that she qualifies for subsidiary protection, however the RAB declared her appeal inadmissible in that *"you have no case for refugee status, the same Board concluded that in view of the request made by your legal aid lawyer in the appeal submissions 'for the grant of subsidiary protection', over which it has no jurisdiction and competence, to this effect you are hereby being informed that the Board will not take further cognizance of your appeal."*[29] Gebremariam filed an application in the Civil Court (First Hall) requesting the Court to declare that the RAB decision was based on a wrongful interpretation of the law, that she had a right to appeal a decision rejecting her request for subsidiary protection, and that the decision breached the principles of natural justice in its failure to give reasons for its decision. One of the preliminary pleas submitted by the respondent was that this action was simply one to attack the decision of the RAB on its merit, yet the Court rejected this plea on the basis that the applicant's complaint related to the procedures carried out by the RAB and *"l-azzjoni attriċi hija proprju intiża sabiex din il-Qorti tistħarreġ dwar jekk id-deċiżjoni tal-Bord intimat hijiex milquta minn interpretazzjoni ħażina jew inkompleta tal-liġi u sabiex il-Qorti tistħarreġ dwar jekk il-Bord intimat naqasx milli josserva l-prinċipji tal-ġustizzja naturali meta wasal għad-deċiżjoni tiegħu u mhux sabiex tiġi attakkata d-deċiżjoni tal-Bord fil-mertu."*[30] It should be noted that the Refugees Act was amended after the filing of this application, and it now specifically states that appeals to the RAB on both facts and points of law are allowed in relation to decisions rejecting an application for refugee status and/or subsidiary protection status[31].

It should be noted that in the national juridical system only the Civil Courts have general jurisdiction to examine the workings of all quasi-judicial tribunals. In **Bashir Abdilalem Saciid**[32] an application was filed before the Administrative Review Tribunal in order to annul a decision of the Refugee Appeals Board on the basis of a breach of Articles 3(2)(a) and 3(2)(h) of the Administrative Justice Act[33]. The

28 Abrehet Beyene Gebremariam v Refugee Appeals Board and the Attorney General, 133/2012, 12 January 2016, partial judgement on preliminary pleas. Case is still pending for final judgment at the time of writing.
29 Abrehet Beyene Gebremariam v Refugee Appeals Board and the Attorney General, ibid.
30 Abrehet Beyene Gebremariam v Refugee Appeals Board and the Attorney General, ibid.
31 Article 7(1A) of the Refugees Act, op.cit.
32 Bashir Abdilalem Saciid v Refugee Appeals Board, 6/16VG, 6 July 2016.
33 Article 3(2)(a) and 3(2)(h) Administrative Justice Act, CAP. 490 of the Laws of Malta.

Administrative Review Tribunal held that it does not have jurisdiction to examine the behaviour of the RAB as it fell within the exclusive competence of the Civil Courts. The Tribunal stated that the fact that the RAB is listed in the First Schedule of the Administrative Justice Act[34] means that the RAB should adhere to the principles of good administrative practice as enunciated in Article 3 of the Act, but it does not mean that the Board's procedures fall under the scrutiny of the Administrative Review Tribunal[35]. The principles of good administrative practice and natural justice found in the Act may be invoked during proceedings examining the workings and/or the decisions of judicial or quasi-judicial boards in front the of the Civil Courts:

"L-Artikolu 3 tal-Kap.490 tal-Liġijiet ta' Malta jistabilixxi l-prinċipji ta' mġieba amministrattiva tajba li kull tribunal amministrattiv hu tenut li josserva, jirrispetta u japplika u bla dubju ta' xejn tali principji jistgħu anzi, fejn qed jiġi allegat li ma ġewx debitament osservati, għandhom jiġu invokati fi proċedura għall-istħarriġ ġudizzjarju ta' l-operat u/jew deċiżjoni ta' bord ġiudizzjarju jew kwazi-ġudizzjarju quddiem il-Prim' Awla tal-Qorti Civili."[36]

The Administrative Review Tribunal ordered that the records of these proceedings be transferred to the Civil Court, First Hall in its ordinary jurisdiction for eventual determination of the applicant's requests, in terms Article 741 of COCP[37].

In the **Teshome**[38] cases the applicant claimed that the RAB failed to give a reasoned decision when rejecting his appeal, and that this breached Article 3(h) of the Administrative Justice Act[39] and guarantees found in the Procedural Regulations[40].

34 First Schedule - List of Administrative Tribunals Respecting the Principle of Good Administrative Behaviour, of the Administrative Justice Act, ibid.
35 See also Teshome Tensae Gebremariam sive Teshome Berhane Asbu v Refugee Appeals Board and the Attorney General, 65/10 RCP, 30 September 2016, relating to the Court's rejection of the plea by the defendant that the complaint should have been filed in front of the Administrative Review Tribunal.
36 Bashir Abdilalem Saciid v Refugee Appeals Board, 6/16VG, 6 July 2016.The case was transferred to the Civil Courts but was eventually withdrawn. See also Clement Okoro v Refugee Appeals Board, 10/16VG, 14 July 2016, currently still pending in the Civil Court First Hall, Clement Okoro v Refugee Appeals Board 10/2016/1.
37 Article 741(b) Code of Organisation and Civil Procedure, CAP 12 of the Laws of Malta. Article 741 allows for the transfer of proceedings when the action, although one within the jurisdiction of the Courts of Malta, is brought before a court that does not have jurisdiction to hear the case. In such cases, if it considers that the plea to transfer the proceedings is justified, the first court must order that the acts of the proceedings be transferred to the court that has jurisdiction.
38 Sive Teshome Berhanu Asbu (ID No 0049820A) v Refugee Appeals Board and the Attorney General, 65/2010, 30 November 2010; Teshome Tensea Gebremariam sive Teshome Berhanu Asbu (ID No 0049820A) v Refugee Appeals Board and the Attorney General, 65/2010, 10 July 2012; Teshome Tensae Gebremariam sive Teshome Berhane Asbu v Refugee Appeals Board and the Attorney General, 65/10 RCP, 30 September 2016.
39 Article 3(h) of the Administrative Justice Act, op.cit. states that "reasons shall be given for the judgment. An administrative tribunal shall indicate, with sufficient clarity, the grounds on which it bases its decisions".
40 Procedural Standards for Granting and Withdrawing International Protection Regulations, Subsidiary Legislation 420.07.

The applicant claimed that the decision contained only the general conclusions of the Board but did not give reasons as to why – on the evidence presented – the applicant did not satisfy the legal definition of a refugee. In terms of the Administrative Justice Act, and on the basis of the fact that RefCom's Evaluation Report[41] on the applicant's claim was not accessible, the applicant also claimed a breach of Article 3(c) relating to procedural equality, 3(d) regarding the obligation to grant access to all documents and information relevant to the case; and 3(e) stating that evidence admitted by such a tribunal shall be made available to the parties with a view to adversarial argument[42]. In addition, he claimed a breach of Article 7(2) of the Procedural Regulations[43], which lays down that the lawyer representing the applicant should have access to the information in the applicant's file upon the basis of which a decision is made.

In its first partial judgement[44], the Court rejected the plea by the defendants that the application should have been filed before the Administrative Review Tribunal as it considered the action to have been filed on the basis of a judicial review and not of the Administrative Justice Act. In its final judgement, the Court held that the fact that neither the applicant nor his lawyer had access to Refcom's Evaluation Report, although this was at the disposal of the RAB, was a clear breach of the Procedural Regulations. In fact, as stated in the acts of the case, lawyers working in the field did not even know of the existence of such Evaluation Report until the filing of **Teshome**'s application in Court[45]. In addition, the Court felt that it was even more serious considering that the RAB was aware that the applicant had not had access to such a report since this was standard RAB procedure and therefore *"li ma hemm l-ebda dubju li din il-prassi hija kompletament illegali u meħuda bi ksur tad-dettami tas-smiegħ xieraq u ta' audi alteram partem u wkoll ksur speċifiku tar-regolamenti indikati fl-azzjoni attriċi".*

41 Evaluation Reports contain detailed and motivated reasons for RefCom's decisions on each individual asylum application. It transpired from the acts of the case that lawyers working in the field were not aware of the existence of these Evaluation Reports, although these reports were accessible by the RAB.

42 In a similar complaint Case No M 0287 filed in 2009 with the Office of the Ombudsman, before the knowledge of the existence of Evaluation Reports, the Ombudsman unequivocally stated that: "The fundamental rule that a person has a right to full access to the evidence produced during the hearing when defending his case, needs to be observed at all stages of the procedure and especially so, when rights are being finally determined. This right of access to evidence is of the essence of the fundamental right to a fair hearing... ". He concluded by recommending the granting of access to the file by complainants and their legal assistants and found that "it is difficult to comprehend the reluctance of the Commissioner to allow free access to procedural information both to the applicant and his legal representative at every stage of these proceedings. Such reluctance necessarily leads to a lack of transparency that generates unnecessary doubts and suspicions. Access to justice inevitably implies openness in procedures and prompt availability of all evidence produced in such a way that, the party to the suit is put in the best position possible to defend his case."

43 Now Regulation 12(2) of the new Procedural Standards for Granting and Withdrawing International Protection Regulations, ibid.

44 Sive Teshome Berhanu Asbu (ID No 0049820A) v Refugee Appeals Board and the Attorney General, 65/2010, 30 November 2010 (partial judgement).

45 Teshome Tensae Gebremariam sive Teshome Berhane Asbu v Refugee Appeals Board and the Attorney General, 65/10 RCP, 30 September 2016.

Access to information which can assist the person appealing a decision, such as the Evaluation Report, is the practical application of the principle of the right to a fair hearing, which includes the concept of *audi alteram partem* and equality of arms[46]. The Court noted that Article 469A(1)(b)(ii) of the COCP states that administrative acts are *ultra vires* when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements, and that the observance of such principles is a basic minimal requirement: *"Fil-fatt dawn il-principji huma tant bażilari li lanqas hemm bżonn li jkun hemm prinċipju legali espressi jew disposizzjoni ad hoc iżda huma prinċipji li għandhom f'kull każ u dejjem jiġu osservati fit-tmexxija ta' amministrazzjoni pubblika u in-nuqqas ta' osservanza ta' l-istess iwasslu għall-irritwalita' tal-eġħmejjel jekk imwettqa u għat-tġassir tagħhom".* At appeal stage[47], the Court of Appeal agreed with the decision of the first Court and confirmed that there was breach of the right to a fair hearing as a principle of natural justice: *"li d-dritt ta' smigħ xieraq bħala prinċipju tal-ġustizzja naturali, u senjatament l-aspett tal-audi alteram partem".*

The Court also attacked the way in which the RAB delivered its decisions, as these were in standard form, short and identical decisions which did not give any indication of the motivation for the decisions. The Court felt the *"cut and paste"* attitude was a manifest negation of justice and that this was a grave matter in every case, but especially in cases where the humanitarian aspect and a person's dignity deserve the highest form of recognition. This particularly in a country where the rule of law should prevail. It held that *"li fil-fatt tali deċiżjoni hija negazzjoni fiha nnfisha tad-dritt ta' smiegħ xieraq u li ċertament lanqas għandha tiġi segwieta darba, aħseb u ara meta l-provi juru li din hija mhux kwistjoni ta' darba, (li hija dejjem ħażina) iżda dak li jista' jissejjah bħala prassi – prassi li hija non sequitur u adirittura perikoluża għall-applikazzjoni tas-Saltna tad-Dritt."*

The Court found for the applicant, annulled the RAB decision and remitted the file back to the RAB to re-examine the case in accordance with the law. The Court of Appeal also confirmed the first Court's reasoning on this count and dismissed all pleas by the appellant[48].

46 It should be noted that the lawyers assisting asylum seekers were not aware of the existence of the Evaluation Reports. Neither RefCom, the RAB nor the Ministry informed the applicant's legal aid lawyer of these Reports: "qatt ma ndenja ruhu jikkomunika mal-avukati tal-għajnuna legali sabiex jinfurmahom li fil-file fl-uffiċju tal-Kummissarju hemm deċiżjoni tal-Kummissarju aktar dettaljata", Teshome Tensae Gebremariam v Refugees Board of Appeal & the AG, 30 September 2016.

47 Teshome Tensae Gebremariam sive Teshome Berhane Asbu v Refugee Appeals Board and the Attorney General, 65/10 RCP, 30 September 2016.

48 The Court of Appeal confirmed the first Court's judgement and dismissed all pleas by the appellant in Teshome Tensae Gebremariam sive Teshome Berhane Asbu v Refugee Appeals Board and the Attorney General, 65/10 RCP, 30 September 2016.

The Exercise of the Courts' Constitutional Discretion

Article 46(2) of the Constitution gives the Civil Court, First Hall, the discretion to decline to exercise its powers to hear and determine any applications alleging a breach of the provisions of article 33 to 45 of the Constitution. This discretion may be used when the Court is satisfied that adequate means of redress for the alleged breach are or have been made available to the complainant under any other law[49]. In a number of cases relating to breaches of the Constitution and the ECHR, the State raised the plea of non-exhaustion of ordinary measures, such as the appeal allowed under Article 25A of the Immigration Act in detention cases or the right to apply for asylum in order to stop a repatriation.

In **Tafarra Besabe Berhe**[50] the applicant was being held in detention as a *"prohibited migrant"* under the Immigration Act, and was in his eighth month of detention at the time of the first judgment in 2007. He had filed an application for a breach of the right to liberty under Articles 34 of the Constitution and 5 of the ECHR, and of the right to protection against inhuman and degrading treatment in terms of Article 36 of the Constitution and Article 3 of the ECHR. In 2007, the Court gave a partial judgment in relation to the respondent's plea that the applicant had not sought to secure his rights through the ordinary measures available at law, and that therefore the Court should decline to exercise its constitutional powers and decline to take cognisance of the case. The final judgment was delivered almost ten years later[51] and, together with the appeal decision[52], will be discussed in further detail in Chapter III.

The Court held that it is only when it is objectively established as a fact there exist other effective remedies available to the applicant, that the Court can decline to exercise its powers to hear the complaint:

"Illi l-eżistenza ta' rimedju ieħor lill-parti li tressaq azzjoni ta' allegat ksur ta' jedd fondamentali taħt il-Kostituzzjoni jew taħt il-Konvenzjoni għandha tirriżulta lill-Qorti bħala stat ta' fatt attwali u obbjettiv, u d-diskrezzjoni li tista' twettaq il-Qorti biex ma teżerċitax is-setgħat tagħha "jekk tqis li jkun desiderabbli li hekk tagħmel" minħabba l-eżistenza ta' rimedju ieħor hija deċiżjoni fuq tali stat ta' fatt."

49 Article 46(2) of the Constitution of Malta.

50 Tafarra Besabe Berhe v the Commissioner of Police as Principal Immigration Officer and the Minister of Justice and Home Affairs, 27/2007, 20 June 2007.

51 Tafarra Besabe Berhe v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs, Case No.12, 27/07JRM, 9 March 2017.

52 Tafarre Besabe Berhe v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs, 27/07JRM, 24 November 2017.

The Court held that such remedy must be accessible, suitable, effective and adequate in order to address the said breach or risk of breach of the fundamental right being complained of. It is not necessary, in order to prove the effectiveness of an existing remedy, that a positive outcome of the complaint is guaranteed, it being sufficient to show that such a remedy is practical, effective and sound. Furthermore, the existence or otherwise of the remedy must be considered at the time of the alleged breach and not at the time of the filing of the complaint. It must be prudent in making this assessment in such a way that where there is a serious breach of a fundamental right, or a risk of such, then the Court should lean towards the exercise of its constitutional powers. In conclusion, the Court felt that the fact that the applicant was still being held in detention under certain conditions, and that he claimed that this breached his rights, was serious and valid enough for the Court to exercise such constitutional powers. Importantly, the Court held that the remedy under Article 25A of the Immigration Act cannot grant a full, effective and certain remedy where the liberty of person is denied *"tqis li r-rimedju li jsemmu l-intimati ma jistax jagħti, fl-aħjar ipoteżi għalih, rimedju sħiħ, xieraq u ċert li l-liġi tistenna f'każijiet fejn il-liberta' tal-bniedem tkun, imqar għal żmien limitat, miċħuda".*

In 2007, in **Abdul Hakim Hassan Abdulle et.**[53] the applicants claimed a breach of Article 36 of the Constitution, Article 3 of the ECHR, and a breach of Article 13 (right to an effective remedy) of the ECHR. The applicants were a group of Somalis who had reached Malta by boat in 2004, together with a number of other people. Six people from the group, including the applicants, were taken to the Police headquarters in Floriana, photographed and given a police number. They were not given the opportunity to apply for asylum. After 20 days in the depot in Floriana, they were forcibly placed on an aircraft and returned to Tripoli. On arriving in Libya they were arrested, blindfolded and taken to a place of interrogation where they were beaten, tortured and, some of them, electrocuted. In November 2005 they were driven for three days into the desert and left there where they spent 14 days without water or food. After a week, two of their compatriots died. The applicants walked until they met some Berbers who helped them. They managed to get back to Tripoli, and in June 2006 they returned to Malta by boat.

One of the preliminary pleas put forward by the respondents was that the applicants had failed to exhaust all ordinary remedies in order to safeguard their rights and they should have applied for asylum under the Refugees Act. The Court dismissed this plea due to the fact that the proceedings were instituted because of their very inability to apply for asylum *"ma jistax jingħad li l-eċċezzjoni ta' eżawriment tar-rimedji ordinarja jista' jkollha success f'din il-kawża, u dan iktar u iktar meta tali allegat rimedju jrid jitqies fid-dawl tal-ksur tal-jedd fundamentali li jkun qed jiġi*

53 Abdul Hakim Hassan Abdulle and Kasin Ibrahim Nur v the Minister for Justice and Home Affairs, the Commissioner of Police in his capacity as Principal Immigration Officer, 56/2007, 29 November 2011.

allegat li ġie miksur, rimedju li għandu jkun aċċessebbli, xieraq, effettiv u adegwat, u din hija proprju l-lamentela tar-rikorrenti".

The exhaustion of domestic remedies in the context of asylum was also the subject of examination in a number of cases against Malta before the European Court of Human Rights (ECtHR). The rule of exhaustion of domestic remedies referred to in Article 35 of the ECHR obliges those seeking to bring their case before the ECtHR to first rely on the remedies provided by the national legal system. The rule is based on the assumption that there is an effective remedy available to deal with the substance of an *"arguable complaint"* under the ECHR and to grant appropriate relief[54].

In **Louled Massoud v Malta**[55] the Government pleaded that the applicant had not exhausted domestic remedies as he had failed to take up any of the available remedies. However, the Court found that the applicant did not have at his disposal under Maltese law an effective and speedy remedy for challenging the lawfulness of his detention, and that this in itself was a breach of Article 5(4) of the ECHR.

Consequently, the Government's objection based on non-exhaustion of national remedies was dismissed.

Again, in **Suso Muso v Malta**[56], the Government claimed that the applicant had failed to exhaust domestic remedies as he had not made a request for bail under Article 25A of the Immigration Act, nor had he instituted constitutional redress proceedings. The Court again confirmed its findings in **Louled** and held that Suso had not had at his disposal an effective and speedy remedy by which to challenge the lawfulness of his detention.

In **Aden Ahmed**[57], the Government again raised the plea of non-exhaustion of national remedies. The applicant claimed that she had had no access to an effective domestic remedy. The Court held that *"it cannot be ignored that the example submitted by the applicant **(Tefarra Besabe Berhe)** concerning the lawfulness of immigrants' detention and the conditions of such detention was still pending six years after it was lodged. The Government's argument that in that case the request had been only for the case to be set down for hearing with urgency and had not been a request for hearing with urgency is out of place and cannot suffice to convince the Court that six years to hear a case about conditions of detention can in any event satisfy Convention standards under any relevant provision...while the Court cannot rule out that where constitutional redress proceedings are dealt with urgently (as should be the case with complaints such as the present one) this may in future be considered an effective remedy for the purposes of complaints of conditions of detention under Article 3, the current state of domestic case-law does not allow the Court to find that the applicant was required to have recourse to such a remedy."*[58]

54 Council of Europe, Guide to good practice in respect of domestic remedies, Directorate General Human Rights and Rule of Law Council of Europe, 2013.

55 Louled Massoud v. Malta, Application No. 24340/08, ECHR 2010, 27 October 2010.

56 Suso Muso v. Malta, Application No. 42337/12, ECHR 2013, 9 December 2013.

57 Aden Ahmed v. Malta, Application No. 55352/12, ECHR 2013, 9 December 2013.

Breaches of right to a fair trial in asylum proceedings

In one of the first cases filed under the then new Refugees Act, a group of migrants that arrived in Malta in an irregular manner tried to challenge the RAB procedures under Article 6 of the ECHR and Article 39 of the Constitution[59]. The applicants claimed that the RAB procedures breached their right to a fair trial as the procedures were held in camera, the appellants were not called to appear although they had specifically asked to be summoned, they were not allowed to attend the sitting to present evidence or submissions, and neither were they allowed to attend for the pronouncement of judgment. The **Hiwot** judgement examined the relationship between Article 7(9) of the Refugees Act and the applicability or otherwise of the Constitution and ECHR articles:

Article 7(9) of the Refugees Act states that *"Notwithstanding the provisions of any other law, but without prejudice to article 46 of the Constitution of Malta*[60] *and without prejudice to the provisions of article 4 of the European Convention Act the decision of the Board shall be final and conclusive and may not be challenged and no appeal may lie therefrom, before any court of law, saving the provisions of article 7A."*

The Court held that it was established Strasbourg jurisprudence that decisions regarding the entry, stay and deportation of non-citizens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge

58 See also Mahamed Jama v. Malta, Application No. 10290/13, ECHR 2015 26 November 2015; Moxamed Ismaaciil and Abdirahman Warsame v Malta, Application Nos. 52160/13 and 52165/13, ECHR 2016 12th April 2016; Abdi Mahamud v Malta, Application No. 56796/13 ECHR 2016, 3th August 2016 and Abdullahi Elmi & Aweys Abubakar v Malta, Application Nos. 25794/13 and 28151/13, ECHR 2017, 22nd February 2017.

59 Abera Woldu Hiwot et al v. Professor Dr. Henry Frendo, Dr. Tonio Grech and Dr Carmelo Testa, Chairman and members of the Refugee Appeals Board, and the Attorney General, 25/2002/1, 18 November 2004.

60 Article 46(1) of the Constitution states that "any person who alleges that any of the provisions of articles 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress".

against him, within the meaning of Article 6(1) of the ECHR[61]. It therefore did not find a breach of Article 39 of the Constitution or Article 6 of the ECHR. The Court clarified that Article 7(9) of the Refugees Act is intended to grant a person who feels that his or her rights have been breached the right to a remedy in the Civil Courts, however it does not grant more rights than are protected under the same Constitution or ECHR.

"Dak l-artikolu jgħid biss illi, għalkemm id-deċizjonijiet tal-Bord ma jistgħux jiġu kontestati quddiem qorti, madankollu, jistgħu jiġu kontestati taħt il-Kostituzzjoni jew taħt il-Konvenzjoni, basta, naturalment, illi l-artikoli tal-Kostituzzjoni jew tal-Konvenzjoni li fuqhom jistrieħ min ikun irid jikkontesta ddeċizjoni jkunu jgħoddu għall-kaz."

The inapplicability to asylum claims of Article 6(1) of the ECHR and Article 39 of the Constitution was resorted to in a number of subsequent judgements[62]. In **Dr Muhammed Mokbel Elbakry**[63], the Constitutional Court followed this reasoning by further clarifying the nature of asylum proceedings and held that *"asylum proceedings under our law are and remain essentially administrative proceedings, and the right granted in sub-article (9) of Article 7 of Chapter 420 to apply for constitutional redress does not mean that those proceedings, whether before the Commissioner or the Board, are proceedings leading to a determination of a civil right or obligation within the meaning of Article 6(1) of the Convention and Article 39(3) of the Constitution."*

In a departure from the above, in **Dilek Sahan et v Ministry for Home Affairs and National Security et**[64] Judge McKeon, presiding over the Civil Court in its Constitutional Jurisdiction, took cognisance of the plea relating to a breach of fair

61 Mamatkulov u Abdurasulovic kontra t-Turkija, Applications nos. 46827/99 and 46951/99, 6 February 2003. Maaouia v. France [GC], no. 39652/98, § 40, ECHR 2000-X; Penafiel Salgado v. Spain (dec.), no. 65964/01, 16 April 2002; and Sardinas Albo v. Italy (dec.), no. 56271/00, ECHR 2004-I. See also M.F.K., S. EL ZEINA and A. SALEH vs. the Netherlands (Application. No 23895/94, 23987/94 u 23988/94) "As regards Article 6 (Art. 6) of the Convention the Commission recalls that, according to its constant case law, proceedings concerning political asylum, a request for a residence permit or expulsion of an alien do not involve a determination of civil rights and obligations or of a criminal charge".

62 Hani Ahmed Shhawi v the Prime Minister, the Minister for Justice and Home Affairs, Attorney General, the Commissioner for Refugees and the Secretary to the Refugee Appeals Board, 57/2005, 13 July 2007, Hekmat Mohammed Moatti El Fraie v the Prime Minister, the Minister of Justice and Home Affairs, the Commissioner for Refugees, Secretary to the Refugee Appeals Board and the Attorney General, 15/2006, 13 July 2007; Dr Muhammed Mokbel Elbakry v the Prime Minister, the Vice Prime Minister and the Minister for Justice and Home Affairs, the Attorney General and Refugee Appeals Board, 43/2006, 6 December 2007, Dilek Sahan, Serif Ali Sahan, Serdar Sahan v the Minister for Justice and Home Affairs, the Principal Immigration Officer, 6/2008/1, 22 February 2013, 22nd February 2013.

63 Dr Muhammed Mokbel Elbakry v the Prime Minister, the Vice Prime Minister and the Minister for Justice and Home Affairs, the Attorney General and the Refugee Appeals Board, 43/2006/1, 29 May 2009.

64 Dilek Sahan, Serif Ali Sahan, Serdar Sahan v the Minister for Justice and Home affairs, the Principal Immigration Officer, 6/2008, 22 November 2011.

trial provisions by the RAB. The applicants complained of the lack of impartiality, that the interpreter was Turkish whilst they were Kurds, that they were not called in for oral submissions and that the decision was not reasoned. The Court held that *"mingħajr l-iċken esitazzjoni, tgħid li d-deċiżjoni tal-Bord mhijiex lesiva għad-drittijiet tar-rikorrenti kif jinsabu tutelati mid-disposizzjonijiet tal-Kostituzzjoni u tal-Konvenzjoni. Waqt il-proċeduri quddiem il-Bord, baqgħu mħarsa d-drittijiet u l-garanżiji kollha tar-rikorrenti għal smigħ xieraq. Ir-rikorrenti ma ġabux provi ċari u inekwivoċi li bil-proċeduri quddiem il-Bord ma kienux garantiti l-istandards ta` ġustizzja li huma vitali għall-esistenża ta` the rule of law."* It should be noted that the Constitutional Court overturned this judgement in 2013, and it found no violation of Article 39 of the Constitution and Article 6 of the ECHR due to the conclusion that asylum procedures are administrative in nature. However, it found a violation of Article 36[65] of the Constitution and Article 3 of the ECHR.

This is not to say that an applicant cannot institute proceedings impugning an RAB decision on the basis of the right to a fair hearing. As seen above the Courts have been willing to find breaches of the right to a fair trial as a principle of natural justice which should always be observed by public bodies when taking administrative action, irrespectively of whether there exist specific legal provisions.[66]

DEFENDANTS IN ASYLUM CASES

In accordance with general procedural rules, when filing a case for judicial review of administrative actions or for breaches of fundamental rights under the Constitution or the ECHR, the aggrieved party must cite the correct defendant. The COCP lays down that the judicial representation of the Government in judicial acts and actions shall vest either *"in the head of the government department in whose charge the matter in dispute fall"*[67] or the Attorney General for *"all judicial acts and actions which owing to the nature of the claim may not be directed against one or more heads of other government departments"*[68]. On numerous occasions, the Court has been called upon to examine whether the RAB itself could be sued in an action for review and whether it is the proper defendant in such cases. The Courts have been persistent in that, whilst they would not deny their competence in reviewing RAB decision, they have consistently refused to accept the legitimacy of directly suing an adjudicating or quasi-judicial tribunal directly in an action for review. According to the Courts, the RAB has no *locus standi* in such as actions since, due to its

65 Article 36(1) of the Constitution "No person shall be subjected to inhuman or degrading punishment or treatment".

66 Sadek Mussa Abdalla v Refugee Appeals Board and the Attorney General, 511/2013, 22 October 2013; Teshome Tensea Gebremariam sive Teshome Berhanu Asbu (ID No 0049820A) v Refugee Appeals Board and the Attorney General, 65/2010, 10 July 2012 (final judgement); Teshome Tensae Gebremariam sive Teshome Berhane Asbu v Refugee Appeals Board and the Attorney General, 65/10 RCP, 30 September 2016 (appeal judgement).

67 Article 181B(1) of the Code of Organisation and Civil Procedure, CAP. 12 of the Laws of Malta.

68 Article 181B(2) of the Code of Organisation and Civil Procedure, ibid.

functions as a quasi-judicial tribunal, it enjoys the same protection accorded to ordinary courts in accounting for the exercise of their judicial functions[69].

The reasoning behind such a procedural immunity lies in guaranteeing the independence that Courts and tribunals require to exercise their judicial functions. This means that for an action of judicial review of a decision of an administrative tribunal or quasi-judicial board, the action has to be filed against the entity that the State has designated to stand in its name in judgment, as per the provisions of the COCP.

Interestingly, in **Sadek Mussa Abdalla**, the Court held that this procedural immunity subsists unless it can be shown that such tribunal or board has acted in a fraudulent manner and that *"this protection is extended to the persons who sit on such tribunals, although in certain cases this immunity is lifted where it transpires that they have acted in breach of the procedures set up at law for that particular tribunal, or where such person has acted in a discriminatory manner or where the actions of such person amount to a breach of the aggrieved party's fundamental rights"*[70].

The Court stated that the proper office to represent Government in proceedings relating to decisions of the RAB is the Attorney General and not the RAB nor the Prime Minister:

"Fil-fehma ta' din il-qorti, il-kawża tallum setgħet issir biss kontra l-Avukat Ġenerali f'isem il-Gvern ta' Malta. Id-dmir illi joħloq l-istrutturi meħtieġa sabiex jitħarsu l-art. 39 tal- Kostituzzjoni ta' Malta u l-art. 6 tal-Konvenzjoni Ewropea dwar id-Drittijiet u l-Libertajiet Fondamentali tal-Bniedem huwa dmir ta' l-istat. Jekk dik l-istruttura mwaqqfa mill-istat tonqos milli twettaq il-ħarsien tal-jeddijiet fondamentali jkun l-istat li jwieġeb għal dak in-nuqqas; it-tribunal innifsu, fl-interess ta' l-indipendenza tiegħu li wkoll hija kwalità meħtieġa għall-ħarsien tal-jeddijiet fondamentali, ma jistax jissejjaħ biex iwieġeb għall-għemil tiegħu.

Għalhekk kontradittur leġittimu skond id-dispożizzjonijiet ta' l-art. 181B(2) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili huwa l-Avukat Ġenerali f'isem il-Gvern ta' Malta."[71]

69 Sadek Mussa Abdalla v Refugee Appeals Board and the Attorney General, 511/2013, 22 October 2013. Partial judgement on preliminary pleas. The case is still pending for final judgment at the time of writing.

70 Sadek Mussa Abdalla v Refugee Appeals Board and the Attorney General, ibid.

71 Abera Woldu Hiwot et al v. Professor Dr. Henry Frendo, Dr. Tonio Grech and Dr Carmelo Testa, chairman and members of the Refugee Appeals Board, and the Attorney General, 25/2002/1, 18 November 2004 as quoted in Dr Muhammed Mokbel Elbakry v the Prime Minister, the Vice Prime Minister and the Minister for Justice and Home Affairs, the Attorney General and Refugee Appeals Board, 43/2006, 6 December 2007; See also: Sadek Mussa Abdalla v Refugee Appeals Board and the Attorney General, 511/2013, 22 October 2013, Abrehet Beyene Gebremariam v Refugee Appeals Board and the Attorney General, 133/2012, 12 January 2016.

In **Abdul Hakim Hassan Abdulle**[72] **et** the applicants filed an application against the Minister for Justice and Home Affairs and the Commissioner of Police in his capacity as Principal Immigration Officer, in relation to an alleged breach of Articles 3 and 13 of the ECHR. The case, as explained above, related to the forced return of the applicants to Tripoli before they could apply for asylum. The First Hall in its Constitutional Jurisdiction rejected the plea that the Minister was non-suited, as he had played an important role under the Refugees Act and also because *"l-operat tal-entitajiet kollha konnessi ma' trattament tal-immigranti llegali, inkluz l-agir tal-intimat l-iehor ovvjament tramite l-persuni adetti mieghu (u f'dan il-kaz mhux personalment) u l-organi kollha li jistghu jinfluwixxu fuq id-determinazzjoni li persuna tinghata l-istatus ta' refugjat jaqghu taht l-istess dekasteru."* However, this was overturned on appeal where the Constitutional Court stated that Article 181B of the COCP clearly states that it is the head of the department responsible for the action in question who holds the judicial representation of the Government. In this case, the head of department was the Commissioner of Police acting as Principal Immigration Officer[73].

72 Abdul Hakim Hassan Abdulle and Kasin Ibrahim Nur v the Minister for Justice and Home Affairs, the Commissioner of Police in his capacity as Principal Immigration Officer, 56/2007, 29 November 2011.

73 Abdul Hakim Hassan Abdulle and Kasin Ibrahim Nur v the Minister for Justice and Home Affairs, the Commissioner of Police as Principal Immigration Officer, 56/2007/1, 28 June 2013.

CHAPTER II
ASYLUM DETERMINATION

> ... THE TERM "REFUGEE" SHALL APPLY TO ANY PERSON WHO: OWING TO WELL-FOUNDED FEAR OF BEING PERSECUTED FOR REASONS OF RACE, RELIGION, NATIONALITY, MEMBERSHIP OF A PARTICULAR SOCIAL GROUP OR POLITICAL OPINION, IS OUTSIDE THE COUNTRY OF HIS NATIONALITY AND IS UNABLE OR, OWING TO SUCH FEAR, IS UNWILLING TO AVAIL HIMSELF OF THE PROTECTION OF THAT COUNTRY; OR WHO, NOT HAVING A NATIONALITY AND BEING OUTSIDE THE COUNTRY OF HIS FORMER HABITUAL RESIDENCE AS A RESULT OF SUCH EVENTS, IS UNABLE OR, OWING TO SUCH FEAR, IS UNWILLING TO RETURN TO IT"

Article 1(A)(2) of the Convention relating to the Status of Refugees, 1951

The 1951 United Nations Convention on the Status of Refugees[74] (the 'Geneva Convention'), together with its 1967 Protocol, is the cornerstone of international refugee protection. The Geneva Convention has been complemented by a number of regional regimes, and international human rights law is also relevant in determining the nature and extent of the rights of asylum-seekers and beneficiaries of international protection. On a European Union level, the recast Qualification Directive[75] sets standards for the definition and content of international protection and introduces common criteria for recognising applicants for asylum as refugees within the meaning of the Geneva Convention. Malta transposed the Qualification Directive through the Refugees Act[76] and the Procedural Standards for Granting and Withdrawing International Protection Regulations[77] (hereinafter the 'Procedural Regulations').

According to Article 1(A)(2) of the Geneva Convention the term 'refugee' shall apply to any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

74 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

75 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

76 Refugees Act, CAP. 420 of the Laws of Malta.

77 Procedural Standards for Granting and Withdrawing International Protection Regulations, Subsidiary Legislation 420.07.

The Qualification Directive almost entirely mirrors the definition found in the Geneva Convention[78] and introduces measures and common criteria relating to the granting of subsidiary protection. The Directive also lays down the rights and benefits to be enjoyed by that beneficiary of subsidiary protection status.

A person eligible for subsidiary protection is defined as a person *"who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm...and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country"*[79].

Articles 8 and 17 of the Maltese Refugees Act[80] set out the standards and criteria for the definition of refugee status and subsidiary protection (collectively referred to as 'international protection') respectively, in accordance with the Qualification Directive. Applications for international protection are lodged with RefCom[81] and assessed within a procedure that consists of the examination and determination of eligibility for refugee status[82]. Applicants may file an appeal with the RAB within two weeks from the date of the decision from Refcom[83], on both fact and law, against a negative decision on an application for refugee status or subsidiary protection, inadmissibility decisions, subsequent applications, safe third country decisions, withdrawals of international protection, Dublin III decisions and refusals to re-open withdrawn applications. As explained above in Chapter I, decisions of the RAB are final and *"may not be challenged and no appeal may lie therefrom"*[84].

The legal prohibition of an ordinary appeal to the higher Courts on substantive matters creates challenges for asylum-seekers and their legal advisors. Firstly, as explained in the previous Chapter, it is only in extremely limited circumstances that an individual may challenge RAB decisions, through judicial review or constitutional procedures. The problems that result from the near impossibility of challenging RAB decisions in Court are further exacerbated by the fact that the RAB is composed of a chairperson and three board members[85] who are not members of the judiciary and therefore are not trained in the same manner as judges and are not bound by any code of ethics for member of the judiciary. The members of the Board are appointed and removed by the Prime Minister, which could have an impact on their

78 Article 2 of the Directive 2011/95/EU op. cit.
79 Article 2 of the Directive 2011/95/EU op. cit.
80 Refugees Act, CAP. 420 op. cit.
81 Article 4 of the Refugees Act, CAP. 420 op. cit.
82 The procedure is explained in more detail in Chapter I above.
83 Article 7(2) of the Refugees Act, op.cit.
84 Article 7(9) of the Refugees Act, op.cit.
85 Article 5(1) of the Refugees Act, op.cit.

independence and impartiality. The only requisite relating to its members, in order for the RAB to be validly constituted, is that one of its members must be a lawyer who has practised for at least 7 years in Malta, and that they are persons of *"known integrity who appear ... to be qualified by reason of having had experience of, and shown capacity in, matters deemed appropriate for the purpose"*[86]. In addition, proceedings in front of the RAB are not regulated in the same manner as Court procedures, which include strict procedural safeguards.

Secondly, since RAB decisions are not publicly available it is impossible to analyse developments, outcomes and trends. This is a considerable limitation when drafting submissions or writing an academic or critical report on Malta's approach to asylum. Finally, the preclusion of the possibility of further appeals negatively impacts the development of Maltese jurisprudence on asylum law by severally limiting the powers of the Court to examine the decisions of the RAB on merit.

JURISPRUDENCE OF THE COURTS

In the **Elbakry**[87] case, the applicant claimed a breach of fair trial rights under Article 39 of the Constitution and Article 6 ECHR, amongst others, due to the *in camera* procedures of the RAB, the method of appointment and removal of the members of the RAB and its interpretation of the term 'torture' and 'inhuman treatment'. The respondents, in their preliminary pleas, submitted that the application was intended as an appeal from a decision of the RAB and, as a request for the court to reconsider the merits of that decision, the action lacked a legal basis since the Refugees Act does not allow any such appeal. The Civil Court in its Constitutional Jurisdiction agreed with the respondents and felt that the request for the Court to examine the RAB's interpretation of the terms 'torture' and 'inhuman treatment' was an attempt at a reconsideration of such decision. The Court concluded that *"the board is empowered by law to decide on those matters, and its decision is not subject to appeal, either to this court or to any other authority. Therefore, in so far as the application requires this court to reconsider the conclusions of the board on the merits, it is making a request which does not lie within the functions and competence of this court"*[88].

One of the few cases that looked into the substantive issues relating to the rejection of an asylum application, the subsequent rejection of the appeal by the

86 Article 5(1) of the Refugees Act, op.cit.
87 Dr Muhammed Mokbel Elbakry v the Prime Minister, the Vice Prime Minister and the Minister for Justice and Home Affairs, the Attorney General and Refugee Appeals Board, 43/2006, 6 December 2007.
88 The Court also dismissed the case on the ground that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 ECHR. The judgment was confirmed by the Constitutional Court in Dr Muhammed Mokbel Elbakry v the Prime Minister, the Vice Prime Minister and the Minister for Justice and Home Affairs, the Attorney General and the Refugee Appeals Board, 43/2006/1, 29 May 2009.

RAB and a possible return to the country of origin was the **Dilek Sahan et**[89] case. The applicants claimed there was a reasonable prospect that their lives would be in manifest danger if they were returned to Turkey and that their removal would breach their right to life in breach of Article 33 of the Constitution and Article 2 ECHR. In addition, they claimed that their return would also constitute inhuman and degrading treatment in terms of Article 36 of the Constitution and Article 3 ECHR. Furthermore, they claimed a breach of the right to family life as protected by Article 8 ECHR, and breach of the right to a fair trial under Article 39 of the Constitution and Article 6 ECHR.

The applicants were Kurds who had left Turkey in 2002 in order to flee persecution from the Turkish authorities due to their Kurdish origin, their strong links with Kurdish human rights organisations and also with the PKK *(Partiya Karkerên Kurdistanê).* The Civil Court in its Constitutional Jurisdiction, presided by Judge Zammit McKeon, dismissed all pleas by the applicants[90]. In relation to the right to life, the Court held that in no way could the refusal to grant status to the application be considered to be an act or omission that intentionally put the life of the applicant at risk and that *"minn qari meqjus u attent taż-żewġ subinċiżi, wieħed jintebah mill-ewwel li l-emfażi qegħda ssir fuq it-tneħħija* ***intenżjonali*** *tal-ħajja u senjatament illi wieħed deliberatament ineħħi jew jipprova jneħħi l-ħajja ta` dak li jkun".* In addition, the allegation that a negative decision could expose the applicants to a risk or danger is not covered by the Constitution nor the ECHR.

The first Court also did not find a breach of Article 36 of the Constitution or Article 3 ECHR as it concluded that, on the evidence presented by the applicants, their forced return to Turkey would not constitute inhuman and degrading treatment. The Court held that there was not sufficient evidence that the applicants suffered any severe suffering or humiliating treatment from the Turkish authorities, nor from the Maltese authorities.

The Court concluded that there was no breach of the right to family life as the Court felt that the applicants did not prove a long and well-established family life in Malta, and the right to family life exists needs to be balanced with the right of the State to control immigration when persons are already in the territory, in particular when these persons enter in an irregular way. In addition, the Court did not find a breach of the right to a fair trial, as discussed in Chapter 1.

89 Dilek Sahan, Serif Ali Sahan, Serdar Sahan v the Minister for Justice and Home affairs, the Principal Immigration Officer, 6/2008, 22 November 2011; Dilek Sahan, Serif Ali Sahan, Serdar Sahan v the Minister for Justice and Home Affairs, the Principal Immigration Officer, 6/2008/1, 22 February 2013.

90 Dilek Sahan, Serif Ali Sahan, Serdar Sahan v the Minister for Justice and Home affairs, the Principal Immigration Officer, 6/2008, 22 November 2011.

The Sahans appealed to the **Constitutional Court**[91] on the basis that, if returned to Turkey, their rights under Article 33 and 36 of the Constitution and Article 2 and 3 ECHR would be breached, even if such treatment was merely at the level of a risk or threat of being persecuted, tortured or even killed. They clarified that they had not claimed that the RAB itself placed their lives in danger, but that as a consequence of the RAB's decision their lives and dignity would be exposed to danger at the hands of the authorities in Turkey. The Constitutional Court held that, although there is no right to asylum under the ECHR and its Protocol, the removal of a person may give rise to claims under Article 3 ECHR when it is shown that removal would result in a real risk to treatment covered by Article 3 and in this *"l-Artikolu 3 huwa assolut u ma hux possibbli li r-riskju ta' trattament ħażin jiġi bilanċjat mar-raġunijiet miġjuba 'l quddiem għall-espulsjoni."* The Court stated that the burden of proof to demonstrate a risk of inhuman and degrading treatment on return lies on the applicant, and that when such proof is presented then the burden to eliminate any doubts of such treatment falls onto the State.

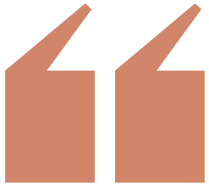
Due to the serious nature of the allegations, the Court decided to re-examine the evidence brought forward by the applicants. The Court allowed certain documents to be presented although they were not authenticated in accordance with the law of procedure as *"tenut kont tan-natura tal-azzjoni odjerna u tal-ilmenti li qed jinġiebu 'l quddiem permezz tagħha, u minkejja li rigward ċerti provi dokumentali prodotti ma saritx prova sħiħa tal-awtentiċita` tagħhom kif normalment tirrikjedi l-liġi ta' proċedura u ta' evidenza, din il-Qorti hi tal-fehma li ma rriżultawlhiex raġunijiet serji sabiex minħabba fihom tirrespinġi xi dokument prodott bħala prova u għalhekk ser tieħu konjizzjoni u tiżen anki dak li jirriżulta mill-istess dokumenti".* The Court re-examined in detail the specific circumstances of both applicants, family connections, military drafting, and the situation of Kurds in Turkey.

The Court did not find a violation of Article 2 ECHR in the event that the applicants would be sent back to Turkey. However, it did find that such return presented a risk of inhuman and degrading treatment as protected by Article 3. The Court found a violation of Article 3 ECHR on the basis of the evidence presented regarding treatment suffered by one of the applicants and of their family members in Turkey, and on the appraisal of what would probably happen if the applicants were returned to Turkey at that point in time. In this case, the Constitutional Court held that they would be subject to the same treatment as their family and other members of the Kurdish community and *"tiddikjara li jeżisti prospett raġjonevoli li t-tneħħija forzata tal-appellanti minn Malta u r-ritorn forzat tagħhom lejn it-Turkija jikkostitwixxi leżjoni tad-drittijiet tagħhom għall-ħarsien minn trattament inuman u degradanti kif tutelati mill-Artikolu 3 tal- Konvenzjoni dwar id-Drittijiet tal-Bniedem u tal-Artikolu 36 tal-Kostituzzjoni."*

91 Dilek Sahan, Serif Ali Sahan, Serdar Sahan v the Minister for Justice and Home Affairs, the Principal Immigration Officer, 6/2008/1, 22 February 2013.

Although the Court did not look into the asylum determination proceedings before RefCom or the RAB, it did look at the consequences of a rejection of an application for asylum. The Constitutional Court was willing to look at alleged breaches of Articles 2 and 3 ECHR in the context of a forced removal of asylum-seekers whose applications for asylum were rejected.

CHAPTER III
DETENTION



... THE COURT FINDS IT HARD TO CONCEIVE THAT IN A SMALL ISLAND LIKE MALTA, WHERE ESCAPE BY SEA WITHOUT ENDANGERING ONE'S LIFE IS UNLIKELY AND FLEEING BY AIR IS SUBJECT TO STRICT CONTROL, THE AUTHORITIES COULD NOT HAVE HAD AT THEIR DISPOSAL MEASURES OTHER THAN THE APPLICANT'S PROTRACTED DETENTION TO SECURE AN EVENTUAL REMOVAL IN THE ABSENCE OF ANY IMMEDIATE PROSPECT OF HIS EXPULSION."

Louled Massoud v. Malta, Application No. 24340/08, ECHR 2010, 27 October 2010, paragraph 68

The Maltese reception and detention systems were completely overhauled in 2015 with the intention of bringing them in line with European Union law and also as a consequence of a number of ECtHR judgements finding Malta in breach of Article 5 ECHR[92], on the right to liberty and security of person. The reform led to the removal of automatic and mandatory detention of asylum-seekers entering Malta irregularly or found to be in an irregular situation, the introduction of exhaustive criteria for detaining asylum-seekers, a mandatory system of review of the lawfulness of detention and stronger safeguards for the identification of vulnerable persons.

Article 31 of the Geneva Convention[93] stipulates that refugees should not be penalized for their illegal entry or stay, recognizing that the seeking asylum may require refugees to breach immigration rules in order for them to gain access to a safe territory, especially where regular access is effectively impossible due to – for example – restrictive immigration policies or difficulties procuring travel documentation and permits. Such prohibited penalties would include criminal sanctions and detention, particularly if arbitrary and purely on the basis of seeking asylum. The Article further provides that restrictions on movement shall not be applied to such refugees (or asylum-seekers) other than those which are necessary and such restrictions shall only be applied until their status is regularised. Therefore, a straightforward reading of the right to seek asylum, the non-penalisation for irregular entry or stay, the right to liberty and security of person, and freedom of movement means that the detention of asylum-seekers should be an exceptional measure of last resort, with liberty being the default position[94]. Any restriction or deprivation of liberty must be in accordance with and authorised by national law in order for it not to be unlawful as well as arbitrary[95].

In addition, Article 5 ECHR provides for the right to liberty and its aim is to ensure that no one be deprived of that liberty in an arbitrary fashion. Article 5(f) allows for the lawful arrest or detention in an immigration context, however such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her

92 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

93 Article 31: (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

94 UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html.

95 Arbitrariness has been given a broad interpretation to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability.

liberty in an arbitrary fashion[96]. Article 5(4) provides detainees with the right to actively seek an effective remedy to challenge the lawfulness of their detention[97]. The application of this procedural safeguard provided by the ECHR has been key in a number of cases in which migrants and/or asylum-seekers challenged the legality of their detention in Malta before the Strasbourg court. The conditions in the detention centres were also put under the scrutiny of the ECtHR for alleged breaches of Article 3 ECHR, which provides for the protection against torture or to inhuman or degrading treatment or punishment. The corresponding provisions under Maltese law are found in Article 34, protection from arbitrary arrest or detention, and Article 36, protection from inhuman treatment, of the Constitution.

GROUNDS FOR DETENTION

The reception, including detention, of asylum-seekers is regulated by the Reception of Asylum-seekers (Minimum Standards) Regulations (the 'Reception Regulations')[98]. These Regulations were amended as part of the transposition of the recast Reception Conditions Directive[99] and the recast Asylum Procedures Directive[100] into Maltese law. In addition to amendments to the law, a new *Strategy for the Reception of Asylum-seekers and Irregular Migrants* was published in 2015[101].

The amended Reception Regulations provide for the possibility to detain asylum-seekers on six limited grounds, which mirror the ones listed in the Regulation 6 of the recast Reception Conditions Directive. The six exhaustive grounds on which asylum-seekers may be detained are:

1. In order to determine or verify the person's identity or nationality;
2. In order to determine those elements on which the application is based which could not otherwise be obtained in the absence of detention, in particular when there is a risk of absconding on the part of the applicant;
3. In order to decide, in the context of a procedure, in terms of the Immigration Act, on the applicant's right to enter Maltese territory;
4. When the applicant is subject to a return procedure and that there are reasonable grounds to believe that the applicant is making the application for

96 Article 5(1) ECHR: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

97 Article 5(1) ECHR: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

98 Reception of Asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06.

99 Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast).

100 Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast).

101 Ministry for Home Affairs and National Security, Strategy for the Reception of Asylum Seekers and Irregular Immigrants, 2015.

international protection merely to delay or frustrate the enforcement of the return decision;

5. When protection of national security or public order so require;
6. When the applicant is subject to a Dublin procedure and there is a significant risk of absconding.

Unlike the situation before 2015, the majority of the asylum-seekers now reaching Malta arrive by plane, both regularly or irregularly. Asylum-seekers that arrive regularly are not detained and usually apply for international protection by going through the standard application procedure via the Office of the Refugee Commissioner. In terms of the new above-mentioned Strategy, asylum-seekers entering in an irregular manner are referred to the Initial Reception Centre (IRC) where an individual assessment ought to be undertaken as to whether grounds to detain the asylum-seeker subsist and whether detention is indeed reasonable and necessary[102]. With regard to vulnerable applicants, including minors and alleged unaccompanied minors, the amended legislation and the new Strategy prohibit their detention[103]. The Reception Regulations state that *"whenever the vulnerability of an applicant is ascertained, no detention order shall be issued or, if such an order has already been issued, it shall be revoked with immediate effect."*[104]

Before the inclusion of the grounds for the detention of asylum-seekers in the Reception Regulation, irregular migrants and asylum-seekers were detained by virtue of the old Article 14(2) of the Immigration Act which read *"Upon such [removal] order being made, such person against whom such order is made, shall be detained in custody until he is removed from Malta".* The new article 14(2) reads *"if ... 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"* and is still used as a ground for detention of irregular or prohibited migrants.

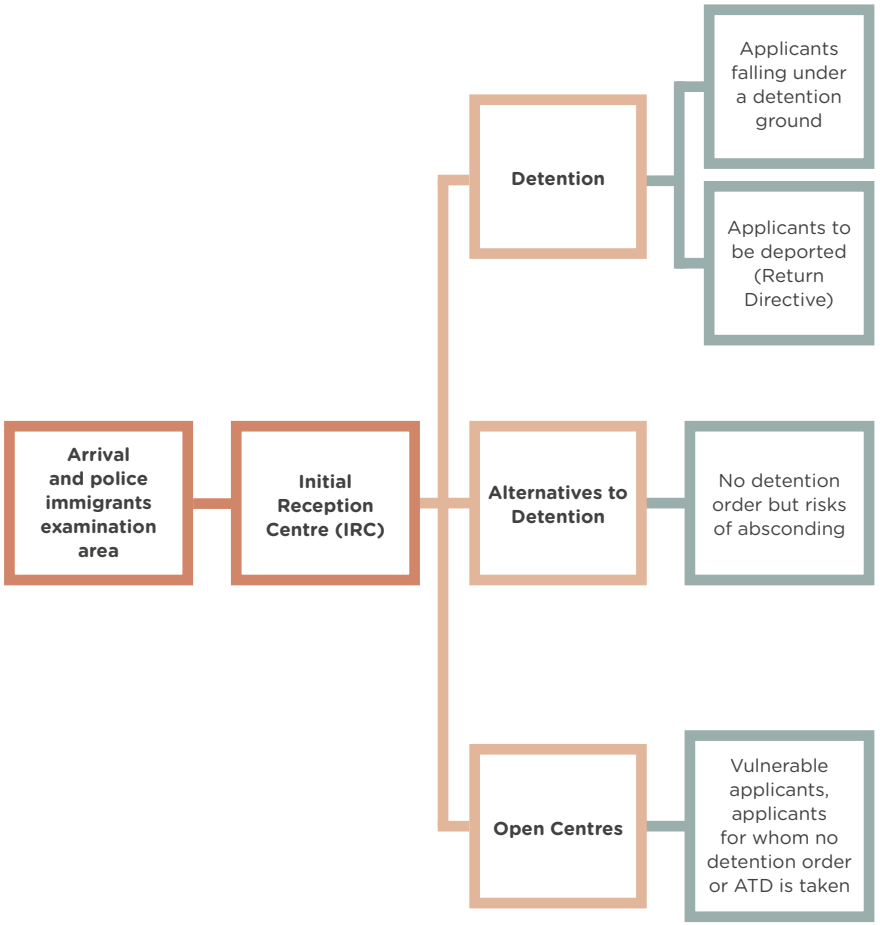


Fig. 2: Detention flowchart for migrants entering irregularly according to the MHAS Strategy for the Reception of Asylum-seekers and Irregular Immigrants, 2015

102 Strategy for the Reception of Asylum Seekers and Irregular Migrants, ibid.
103 See Fig. 2: Detention flowchart for migrants entering irregularly.
104 Regulation 14(3) of the Reception of Asylum-seekers (Minimum Standards) Regulations, op. cit.

REVIEW OF ADMINISTRATIVE DETENTION OF ASYLUM-SEEKERS

Review Under the Reception Regulations

Asylum-seekers who, following an individual assessment are determined by the PIO to fall under a ground of detention under Regulation 6(1), and in respect of whom detention is deemed to be reasonable and necessary, will be detained. They will have the right to an automatic review of the lawfulness of their detention[105] by the Immigration Appeals Board (IAB) after seven working days from the Detention Order, which may be extended by another seven working days by the Board for duly justified reasons[106]. If the applicant is still detained, a new review would be conducted after periods of two months thereafter[107]. The asylum-seeker is entitled to free legal assistance in order to assist with the review. If the IAB rules that detention is unlawful the applicant would then be released immediately. It should be noted that decisions relating to the review of detention, as all other IAB decisions, are neither published nor publicly available and it is therefore impossible to even attempt a complete assessment of this review procedure, and the elements the IAB takes into consideration whilst conducting it.

Regulation 16 of the Reception Regulations also allows for a parallel review under the Immigration Act with the possibility to challenge the Detention Order before the IAB within three working days from the Order, as explained in further detail below.

Appeal under Article 25A of the Immigration Act

In the terms of Article 25A(7) of the Immigration Act, the IAB is competent to hear and determine appeals made by migrants in custody in virtue of a deportation or return decision and removal order. The appeal has to be filed within 3 working days from the date of the decision to be appealed. The Immigration Act stipulates that the Board shall grant release from custody where the detention of a person is not required under the same Act or under the Refugees Act, or where, in the case of a person detained with a view to being returned, there is no reasonable prospect of return within a reasonable time-frame[108]. Nevertheless, it extremely difficult for asylum-seekers to access this procedure as the vast majority of asylum-seekers do not have the capacity to submit an appeal in such a tight timeframe, in a context where they would be detained with no information on national procedures, availability of lawyers or legal aid, or information on organisations offering support[109].

105 Regulation 6(3) of the Reception of Asylum-seekers (Minimum Standards) Regulations, op. cit.
106 Fig. 3: Review of the lawfulness of detention.
107 Regulation 6(4) of the Reception of Asylum-seekers (Minimum Standards) Regulations, op. cit.
108 Article 25A(10) of the Immigration Act, op cit.
109 The inadequacy of appeal procedures under the Immigration Act, and the review proceedings under the Reception Regulations has been ascertained by the ECtHR in a number of judgements, as explained below.

As mentioned above, IAB appeal procedures and decisions are neither published nor publicly available.

Fig. 3: Automatic Review of the lawfulness of detention by the IAB

Application under Article 409A of the Criminal Code – Habeas Corpus

Any detained person may file a habeas corpus application to challenge the lawfulness of detention before the Court of Magistrates, under Article 409A of the Criminal Code:

"Any person who alleges he is being unlawfully detained under the authority of the Police or of any other public authority not in connection with any offence with which he is charged or accused before a court may at any time apply to the Court of Magistrates, which shall have the same powers which that court has as a court of criminal inquiry, demanding his release from custody".

This application is based on an assessment of the legality of the person's detention and is both a speedy and a judicial remedy. However, it does not allow for an examination of the lawfulness of detention nor for the granting of any remedies in terms of Article 5 ECHR, as the Courts have interpreted their mandate under Article 409A to be strictly bound to examining the legality of detention only under provisions of Maltese law[110]. Prior to the 2015 amendments to Malta's reception legislation, this stance was proved to be problematic to asylum-seekers attempting to secure their right to liberty through this avenue, since the automatic and mandatory imposition of administrative detention as a consequence of a removal order did not allow for an assessment on the legality of administrative detention, or on its conformity with the Convention's strict standards and requirements.

110 The fact that the habeas corpus is not an effective remedy for the purposes of breaches of the Constitution or the ECHR was confirmed by the Constitutional Courts in Essa Maneh v the Commissioner of Police as Principal Immigration Officer, and the Minister for Justice and Home Affairs, 53/2008/1, 29 April 2013: "il-Qorti Kriminali ddecidiet li l-kompetenza tal-Artikolu 409A ma testendix ghall-ezami tal-aspetti kostituzzjonali tal-kaz".

However, with the inclusion of the grounds of detention in the new Regulation 6 of the Reception Regulations, as explained above, the Courts are now empowered to examine alleged illegal detention against those provisions of national law.

In **Karim Barboush**[111], the applicant had filed a *habeas corpus* whilst he was in detention pending the determination of his asylum appeal. The Court of Magistrates ordered the release of Barboush and found his prolonged detention illegal. However, the Attorney General appealed to the Criminal Court and the Court overturned the first judgement, ordering Barboush's re-arrest. The Court held that its jurisdiction under Article 409A is limited to examining whether the continued detention is one which is based or founded on some provision of national law. Judge De Gaetano, presiding over the Criminal Court, held that it is not the competence of the Court of Magistrates nor of the Criminal Court to examine whether there are other circumstances that would make the detention illegal, if there are clear provisions allowing for the continuation of detention, and this also where there is an allegation that *"dik il-liġi tkun tikkozza mal-Kostituzzjoni jew mad-disposizzjonijiet dwar id-Drittijiet u Libertajiet Fondamentali mħarsa mill-istess Kostituzzjoni, jew għax tkun tikkozza mad-disposizzjonijiet tal-Konvenzjoni Ewropea; jew jekk il-fatt tad-detenżjoni fih innifsu, u cioe` indipendentement mill-liġi li tkun tawtorizza dik id-detenzjoni, ikunx b'xi mod jilledi d-drittijiet fondamentali ta' dak li jkun. Għal tali sindakar hemm proċeduri oħra quddiem qrati oħra li huma vestiti bil-liġi biex jagħmlu proprju tali stħarrig u, f'każ li jsibu li hemm ksur ta' xi dritt fondamentali jew isibu li hemm malamministrazzjoni da parti ta' l-Eżekuttiv, jaghtu rrimedju skond il-liġi."* Ultimately, the Court concluded that the fact that Barboush was an asylum-seeker did not make his detention illegal, as the Refugees Act made provision for both legal and illegal presence in Malta and made this distinction in the assessment of whether a person may be detained or not.

Similarly, in **Napoleon Merbrahtu**[112] the Court of Magistrates decided that ten months in detention was not illegal as Merbrahtu was a *"prohibited migrant"* in terms of Article 5(1)[113] of the Immigration Act and was consequently detained legally on the basis of Article 14(2) of the same Act.

However, as mentioned above, with the inclusion of provisions containing an exhaustive list of grounds for detaining asylum-seekers in the Reception Regulations[114], the habeas corpus remedy has now become relevant. More recently,

111 Karim Barboush v Kummissarju tal-Puluzija, 2/2004, 5 November 2004.

112 Napoleon Merbrahtu vs Kummissarju tal-Puluzija, 25 June 2003, as referred to in Essa Maneh and three others v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs, 16 December 2009.

113 Article 5(1) of the Immigration Act: "Any person, other than one having the right of entry, or of entry and residence, or of movement or transit ... may be refused entry, and if he lands or is in Malta without leave from the Principal Immigration Officer, he shall be a prohibited immigrant."

114 Regulation 6 of the Reception of Asylum-seekers (Minimum Standards) Regulations, op. cit.

in **Rana Ghulam Akbar**[115], the Court of Magistrates examined Regulation 6 in relation to a claim of illegal detention. Akbar was returned from Germany to Malta under the Dublin procedure[116] and on being returned to Malta he was detained on the basis of Regulation 6(1)(b) of the Reception Regulations and issued with a Detention Order. Regulation 6(1)(b) allows for the detention of asylum-seekers *"in order to determine those elements on which the application is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding on the part of the applicant".* On 14 February 2018 Akbar appealed his Detention Order before the IAB, on the grounds that under Regulation 6(1)(b) detention may not be resorted to in situations where the applicant had already provided the authorities with the required elements of the asylum claim, that the risk of absconding per se cannot be relied upon as an independent detention ground, and that the Immigration Police failed to conduct an individual assessment as to whether administrative detention was – in relation to Akbar – reasonable and necessary. In particular, the appellant highlighted that the Police failed to explore any less coercive measures to detention.

On 15 February 2018 the IAB rejected the appeal on the basis that *"the risk of absconding does exist"* and that *"detention is also legal on the basis that the reasons stated for international protection might have been incorrect."*[117] On 23 February 2018 Akbar filed a *habeas corpus* under Article 409A of the Criminal Code. The Court of Magistrates ruled that *"the guiding principles are that detention is only a measure of last resort and that less coercive measures should always be sought before going for detention".* The Court noted that the applicant had satisfied those elements, or most of those elements, that had to be determined in order to process his application for asylum. The *"risk of absconding"* had emanated principally from the fact that the applicant had originally obtained a visa to Malta for study purposes, whereas he was not intending to study and that therefore the reasons for requesting asylum might have been incorrect.

The Court held that his detention was in breach of Maltese law, as the *"declaration that the applicant's "risk of absconding" is one that is not sustainable within the strict parameters of Regulation 6(1)(b)".* The Court ordered his immediate release from detention.

In 2016 an Ivorian asylum-seeker, **Aboya Boa Jean**[118], was detained in Safi Barracks

115 Rana Ghulam Akbar vs Kummissarju tal-Pulizija, 26 February 2018.

116 Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III).

117 Appeal of Rana Ghulam Akbar – Detention Order, Immigration Appeals Board Division II, 15th February 2018.

118 Aboya Boa Jean v. Malta, Application No. 62676/16

Detention Centre when he filed an application under Article 409A for his immediate release. The Court of Magistrates upheld the legality of the applicant's detention, as it found that the applicant was raising the same issues he had raised before the IAB, and which had already been decided by it. The court agreed that the *"risk of absconding"* under Regulation 6(1)(b) of the Reception Regulations could not be seen on its own, but in the light of the entire sub-regulation, allowing the detention of asylum-seekers in order to establish the elements on which such application was based, when it would be difficult to do so in the absence of detention. Aboya filed a complaint before the ECtHR claiming a breach of Article 5(1)(f) ECHR, claiming that the deprivation of his liberty had been unlawful and arbitrary for the following reasons: (i) relying on **Suso Musa v. Malta**[119], the applicant argued that Regulation 16(2) of the Procedural Standards Regulations authorised entry of asylum-seekers into Malta, thereby rendering his Detention Order contrary to the Convention and (ii) the Detention Order had also been contrary to domestic law insofar as the applicant had provided all the relevant documentation and information regarding his asylum application upon his arrival. Furthermore, the applicant claimed, no individual assessment as to the necessity of his detention had been carried out by the immigration authorities. The applicant also complained under Article 5(4) ECHR that the remedy afforded to him to challenge his detention had not been speedy and effective, owing to the violation of the deadline provided by law in order for the Board to carry out an automatic mandatory review of his detention, as not only had the IAB reviewed the detention only one month later[120], but they had also failed to convene in order to discuss whether there were any duly justified reasons to postpone the review.

The case is currently pending a decision at the ECtHR.

CONSTITUTIONAL ACTION BEFORE THE NATIONAL COURTS AND THE ECTHR

A constitutional application filed in the Civil Courts could be another path through which a detainee may challenge the lawfulness of his or her detention in terms of the Constitution of Malta and the ECHR. A detainee may file an application claiming a breach of Article 34 of the Constitution and Article 5 ECHR (protection from arbitrary arrest or detention), and 36 of the Constitution and 3 ECHR (prohibition of inhuman and degrading treatment). However, concerns relating to the severe

119 Suso Muso v. Malta, Application No. 42337/12, ECHR 2013, 9 December 2013. This case will be discussed in further detail below.

120 "According to the applicant, during the hearing before the Board... the Board informed the applicant that it had not been able to comply with the deadline provided by the law for the review of his detention since on the date required by the Reception Regulations ... a Board member was attending a conference overseas and therefore he could not take part in the hearing. Furthermore, the Board stressed that since its members were merely part-time employees meeting once a week and lacking administrative support while being responsible for a vast array of immigration related appeals, it was simply unable to meets its legal obligation and determine the lawfulness of his detention on time", Aboya Boa Jean v. Malta, Application No. 62676/16.

delays in national Court proceedings have led the ECtHR to find that such constitutional actions fail the effective remedy test under Article 5(4) ECHR. In addition to the length of time for delivery of judgments, constitutional proceedings are also virtually inaccessible to detainees as in practice most asylum-seekers do not have access to a lawyer who could file a court case on their behalf. In fact, to date most cases have been filed by lawyers working in collaboration with NGOs assisting asylum-seekers.

The cases filed in the Maltese courts and in Strasbourg, challenging Malta's former detention system, claim a breach of the rights protected by Articles 34 and 36 of the Constitution and/or Articles 5 and 3 ECHR jointly. However, for the purposes of this publication, the breaches examined by the local Courts and the ECtHR will be tackled under separate headings. In addition, considerations relating to the right to an effective remedy under Article 5(4) ECHR will be tackled separately.

Article 34 of the Constitution and Article 5 ECHR: Protection from Arbitrary Arrest or Detention

In **Essa Maneh**[121], the applicants were being held at Safi Barracks Detention Centre and at the time of the first decision they had been in detention for over 14 months, still awaiting a decision on their application for asylum. Government policy in force at the time stated that migrants could only be held in detention for a maximum period of 12 months pending the determination of their claim for asylum, and for a maximum period of 18 months if their claim for asylum had being finally rejected. The applicants claimed that, although their initial detention was authorised by the Immigration Act, their prolonged detention was illegal and arbitrary and contrary to Article 34 of the Constitution and Article 5 ECHR. The applicants requested the Court to declare that the length and conditions of detention breached their fundamental rights, as protected by the Constitution and the ECHR.

The first Court dismissed their pleas and found that their detention as *"prohibited migrants"* was according to law. In examining the length of time prescribed by Maltese policy, Judge Tonio Mallia stated that the Court understood the need to balance the liberty of the individual with the right of the State to protect the socio-cultural aspects of society:

"F'każijiet bħal dawn il-Qorti tifhem il-ħtieġa li jinżamm bilanċ bejn il-liberta' tal-individwu, u d-dritt tal-istat li jipproteġi u jħares l-aspett soċio-kulturali ta' pajjżna. Malta tinsab fiċ-ċentru tar-rotta li persuni minn diversi stati anqas żvilluppati minna fl-Africa jieħdu biex b'mod illegali, jaqsmu għall-Ewropa bl-isperanza li jsibu livell ta' għixien aħjar.

121 Essa Maneh and three others v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs, 16 December 2009.

Fil-każ ta' Malta, it-tul ta' żmien hu, għalhekk, determinat mhux biss bin-numru kbir ta' persuni li jiżbarkaw fuq l-ixtut tagħna, iżda bil-fatt li ħafna minn dawn il-persuni, jekk mhux kollha, ma jikkoraborawx mal-awtoritajiet billi ma jfornuwhomx bid-dokumenti personali tagħhom.

L-istat għandu dritt iżomm lir-rikorrenti f'detenżjoni, u fil-fehma ta' din il-Qorti, fiċ-ċirkostanzi, iż-żmien ta' detenżjoni "does not exceed a reasonable time"."

On appeal, the Constitutional Court[122] established that their detention was legal and the actions of the authorities did not lack *bona fede* seeing that the applicants had entered Malta without the authorisation of the PIO. They were issued with a Removal Order due to their unauthorised entry, in accordance with national law. In addition, although they were given an information leaflet, the applicants did not appeal their Detention Order as allowed by Article 25A of the Immigration Act. The Constitutional Court quoted the **Louled v. Malta**[123] judgement where the ECtHR ruled that *"...the Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention pending deportation".* It however held that the situation was different in this particular case as the applicants had been released after 12 months, whereas Louled was held in detention for 18 months following the rejection of his refugee application. The Constitutional Court also considered the balance between the rights protected by the ECHR and the interests of society and national security *"in-nuqqas da parti tal-applikant li japplika ghar-rilaxx provvizorju, ikkunsidrati wkoll il-bilanc gust li ghandu jsir bejn l-interessi tas-socjeta` in generali u lhtiega li jigi protett id-dritt sancit bl-Artikolu 5, ma jistax jinghad li d-detenzjoni tieghu kienet teccedi dak li hu ragjonevoli fic-cirkostanzi."* This case was decided a few months before the ECtHR found that Malta had breached Article 5 in **Suso v. Malta**[124] and **Aden Ahmed v. Malta**[125], examined below in further detail.

Louled Massoud v. Malta[126] was the first of a string of Strasbourg judgements that consistently found breaches of Article 5 in relation to the detention of irregular migrants and asylum-seekers in Malta. Massoud was an Algerian national detained in Safi Barracks. He had arrived in Malta by boat in June 2006 and was immediately detained. He was subsequently charged and found guilty of aiding others to enter Malta. On completing his sentence of imprisonment, he was released but immediately placed in a Detention Centre for a little more than 18 months. In his application he claimed a breach of Article 5(1)(f) and (4), the latter relating to a lack of access to an effective remedy to challenge the lawfulness of his detention.

122 Essa Maneh v the Commissioner of Police as Principal Immigration Officer, and the Minister for Justice and Home Affairs, 53/2008/1, 29 April 2013.
123 Louled Massoud v. Malta, Application No. 24340/08, ECHR 2010, 27 October 2010.
124 Suso Muso v. Malta, Application No. 42337/12, ECHR 2013, 9 December 2013.
125 Aden Ahmed v. Malta, Application No. 55352/12, ECHR 2013, 9 December 2013.
126 Louled Massoud v. Malta, Application No. 24340/08, ECHR 2010, 27 October 2010.

The Court noted that the entire duration of his detention was subsequent to the rejection of his asylum claim at first instance, due to this previous imprisonment, and that the final decision on his asylum claim was delivered three weeks after the commencement of his detention in the detention centre. The Court expressed:

"grave doubts as to whether the grounds for the detention – action taken with a view to his deportation – remained valid for the whole period of his detention, namely, more than eighteen months following the rejection of his asylum claim, owing to the probable lack of a realistic prospect of his expulsion and the possible failure of the domestic authorities to conduct the proceedings with due diligence."

The Court also considered whether Maltese law offered any safeguards to protect persons from arbitrariness, noting that the Immigration Act did not contain any provisions limiting detention and that the policy in force at the time had no legal force. The absence of procedural safeguards was decisive, and the Court established that the applicant did not have access to any effective remedy under Article 25A of the Immigration Act, Article 409A of the Criminal Code, nor through constitutional proceedings. It followed, for the Court, that the Maltese legal system failed to provide a procedure intended to avoid arbitrary detention, finding a violation of the Convention.

Suso Musa v. Malta[127] and **Aden Ahmed v. Malta**[128] were both decided a few months after the Essa Maneh Constitutional judgement. In both cases the ECtHR found that the detention of the applicants breached Articles 5(1) and 5(4) of the Convention.

In **Suso Musa**, a Sierra Leone national who entered Malta by boat in an irregular manner, was placed in detention and presented with an official document containing both a Return Decision and a Removal Order. He subsequently applied for asylum. His application was rejected by the Office of the Refugee Commissioner and also on appeal by the Refugee Appeals Board. Meanwhile, pending the above asylum proceedings, he challenged the legality of his detention before the Immigration Appeals Board (IAB). The IAB challenge was rejected more than a year after its filing. The ECtHR noted that the applicant's detention up until he received a final rejection from the RAB had as a legal basis Article 5 in conjunction with Article 14 of the Immigration Act, and therefore fell under the first limb of Article 5(1)(f): *"to prevent his effecting an unauthorised entry into the country"*. However, even accepting that the applicant's detention had been closely connected to the purpose of preventing his unauthorised entry to the country, the Court noted a series of odd practices on the part of local authorities, and it also raised concerns about the appropriateness of the place and the conditions of detention endured *"for persons*

127 Suso Muso v. Malta, Application No. 42337/12, ECHR 2013, 9 December 2013.
128 Aden Ahmed v. Malta, Application No. 55352/12, ECHR 2013, 9 December 2013.

who have not committed criminal offences but who, often fearing for their lives, have fled from their own country". The Court revised its previous thinking in stating the following: *"where a State which has gone beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application... an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 (1)(f)".*

In relation to the period of detention after the final asylum decision, the Court held that this fell under the second limb of Article 5(1)(f) *"with a view to deportation or extradition"*, and that detention under the present article could be justified only for as long as deportation proceedings were in progress. The Court considered that a detention period of ten months could not be considered as serving the purposes of deportation.

It finally concluded that *"the national system failed as a whole to protect the applicant from arbitrary detention, and that his prolonged detention following the determination of his asylum claim cannot be considered to be compatible with the second limb of Article 5(1)(f) of the Convention."*

Similarly, in **Aden Ahmed**[129] the Court found that the applicant's 14 months in detention subsequent to the rejection of her asylum claim could only be justified as long as deportation proceedings were in progress. It held that *"the total failure of the domestic authorities to take any steps to pursue removal"* confirmed that no such deportation was in progress, finding a breach of Article 5(1). The applicant, who had requested release on grounds of vulnerability, also claimed a violation of Article 3 of the Convention to which the ECtHR acceded to in its judgement, explained below.

In **Abdi Mahamud v. Malta**[130], the ECtHR ruled that Malta violated Article 3 and Article 5 ECHR due to Malta's prolonged detention of Abdi Mahamud while she awaited decisions on her asylum application and her request for provisional release from immigration detention based on ill-health and her status as a vulnerable person. During her time in detention, she developed a number of physical and psychological conditions and applied for release on medical grounds.

Whilst reteirating the Court's assessment in **Suso Musa** and **Aden Ahmed** in relation to Article 5, it also examined the Government's policy in relation to its vulnerability assessment policy, observing that *"...the applicant's vulnerability assessment took eleven months to be concluded (October 2012 – September 2013). No explanation has been given as to why it took two months from the lodging of her request for the applicant to be interviewed, or why it took another eight months to indicate to the applicant that she may be released..., and yet another month to actually release her on the basis of a decision stating that her claim was acceded to...The examples referred to by the applicant... and not rebutted by the Government, go to show that this is often a lengthy procedure, which has reached deplorable delays in the present case."*

The Court also considered that the lack of relevant information and active action by the authorities, as well as the excessive delays in the vulnerability assessment procedure, defeat the point of exempting vulnerable persons from detention, and were *"even more disconcerting, given that it is one of the few applicable exceptions to the "across-the-board" detention policy"*.

The Court took into consideration the detention and age assessment procedures of two Somali asylum-seeking children in **Abdullahi Elmi & Aweys Abubakar**[131]. Whereas the Court observed that the detention had a sufficiently clear legal basis, it was nonetheless deemed arbitrary because the severe delays in the age assessment process raised serious doubts as to the Maltese authorities' good faith. This situation was further exacerbated due to the lack of procedural safeguards and the failure of the authorities to ascertain that immigration detention was a measure of last resort for which no alternative was available.

Judge Pinto De Albuquerque, in his Concurring Opinion[132], opined that in Malta the detention of undocumented migrants is the rule and not the exception, thus the application of the law is blind and is not carried out on a case-by-case basis. He stated that *"if additional evidence of the excessive nature of the Maltese legal regime were still needed, the prolonged temporal extension of the detention, with unlimited prolongation possibilities in case of non-cooperating rejected asylum-seekers, shows the Maltese regime at its worst. The time has come for the Maltese legislature to reshape the migration-related detention regime, among other things, by getting rid of the infamous Article 14 (2) of the Chapter 217 of the Laws of Malta."*

The Civil Court in its Constitutional jurisdiction found a breach of Article 34 of the Constitution and Article 5 ECHR in **Tafarra Besabe Berhe**[133], decided ten years after the original application was filed. The Court held that in order for the arrest

129 Aden Ahmed v. Malta, ibid.

130 Abdi Mahamud v Malta, Appplication No. 56796/13 ECHR 2016, 3 August 2016.

131 Abdullahi Elmi & Aweys Abubakar v Malta, Application No. 25794/13 and 28151/13, ECHR 2017, 22 February 2017. This judgement is examined in further detail in Chapter V on Age Assessment.

132 Abdullahi elmi & Aweys Abubakar v Malta, Application No. 25794/13 and 28151/13, ECHR 2017, 22 February 2017 – Concurring opinion of Judge Pinto De Albuquerque.

133 Tafarra Besabe Berhe v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs, Case No.12, 27/07JRM, 9 March 2017.

to be legal, the deprivation of liberty must be imposed in conformity with the substantive and procedural rules of national law. It explained that Article 14(2) of the Immigration Act allowed for the detention of persons who arrived in Malta in an irregular way, and that the detention of these persons may be compatible with Article 5(1)(f) of the Convention. However, it stressed, certain conditions have to be safeguarded in order for such arrest or detention not to become arbitrary or illegal. The applicant claimed that, although his initial detention may have been according to law, the prolonged detention after his application for asylum was illegal. In addition, this was coupled by the unreasonably and disproportionately long period of time waiting for the examination of his asylum application, which was not connected to the need for him to be kept in detention during this process.

The Court held that it is a fundamental principle that no detention which is arbitrary can be compatible with Article 5(1). It noted how the notion of arbitrariness in Article 5(1) extends beyond a lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and contrary to the Convention, as held in Suso Musa and Aden Ahmed: *"l-Qorti hija tal-fehma li hekk kif ir-rikorrent ressaq it-talba tiegħu mal-awtoritajiet Maltin biex jingħata kenn f'Malta, ma setax jingħad aktar li hu kien qed jinżamm f'Malta bil-ħsieb li jitreġġa' lura mnejn kien ġie... il-fatt li, minkejja li ressaq talba biex jingħata kenn f'Malta, ir-rikorrent inżamm fiċ-Ċentru ta' Detenzjoni jqajjem ukoll element ieħor li dik iż-żamma kienet arbitrarja minħabba li ż-żmien meħud mill-awtorita' kompetenti biex tqis it-talba tiegħu kienet tmur lil hinn minn dak meqjus raġonevoli."*

In addition, the Court explained, the length of time in detention can be deemed arbitrary if the time taken by the authorities to examine the request for asylum is beyond what is deemed to be reasonable and that *"għal bosta xhur wara li nbdiet il-proċedura biex jingħata kenn f'Malta, ir-rikorrent kien xorta waħda baqa' miżmum fiċ-Ċentru u kienu twaqqfu (sospiżi) l-proċeduri għat-tneħħija tiegħu minn Malta".*

The Court found for the applicant in relation to his claim of a breach of Article 5, but not of Article 3 ECHR.

Article 36 of the Constitution and Article 3 ECHR: Inhuman and Degrading Treatment

In a local case, the applicants in **Essa Maneh**[134] were being held at Safi Detention Centre and they claimed that length of their detention and the uncertainty of the period for which they would have been held constituted inhuman and degrading treatment. The Court held that being detained together with other people for a period of 12 to 18 months does not meet the intense physical and mental suffering

134 Essa Maneh and three others v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs, 16 December 2009.

threshold required by law for such treatment to fall within the definition of inhuman or degrading treatment. In addition, the object of the detention was not to humiliate and debase them but rather it was a measure needed to ensure stability of the country *"fiċ-ċirkostanzi partikolari ta' pajjiżna, bħala miżura meħtiega għall-istabbilita' ta' pajjiż biex kemm jista' jkun, jiġi evitat duluvju ta' nies "irregolari" jiġġerrew ma' Malta".* On appeal, the Constitutional Court[135] agreed with the first Court and, though it understood the anxiety migrants felt when being held in detention, it decided that their detention conditions did not amount to inhuman and degrading treatment.

Although the applicant in **Suso Musa**[136] did not lodge a complaint for a breach of Article 3 ECHR, the Strasbourg Court, in its judgement, made reference to reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[137] and the International Commission of Jurists[138]. The reports expressed concern on the conditions in detention and considered that the conditions in question could amount to inhuman and degrading treatment under Article 3 of the Convention. The Court considered that the difficult conditions in detention must have been exacerbated due to the Libyan crisis, a time when the applicant was in detention. Yet, as quoted above, the Court *"finds it difficult to consider such conditions as appropriate for persons who have not committed criminal offences but who, often fearing for their lives, have fled from their own country".*

In **Aden Ahmed**[139] the Court reiterated that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. The Court held that States must ensure that a person is detained in conditions which are compatible with respect for human dignity, and that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. The Court was not concerned that the detention centres were basic, yet it did note the overcrowded dormitories which lacked heating and proper blankets during the winter months, and lack of access to the recreation yard

135 Essa Maneh v the Commissioner of Police as Principal Immigration Officer, and the Minister for Justice and Home Affairs, 53/2008/1, 29 April 2013.

136 Suso Muso v. Malta, Application No. 42337/12, ECHR 2013, 9 December 2013.

137 Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 26 May 2008, 17 February 2011.

138 Not here to stay, Report of the International Commission of Jurists on its visit to Malta on 26-30 September 2011, May 2012.

139 Aden Ahmed v. Malta, Application No. 55352/12, ECHR 2013, 9 December 2013.

and fresh air for three months. In addition, the absence of female staff in the centre caused discomfort to the female detainees, particularly the applicant who suffered from specific medical conditions related to her miscarriage.

The Court considered that her situation was vulnerable due to a combination of her irregular migrant status, her past, her personal emotional circumstances and her fragile health. Furthermore, these conditions persisted for a continuous period of 14 and a half months. Finally, it held that:

"the cumulative effect of the conditions complained of diminished the applicant's human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance. In sum, the Court considers that the conditions of the applicant's detention in Hermes Block amounted to degrading treatment within the meaning of Article 3 of the Convention."

In contrast, **in Moxamed Ismaaciil & Abdirahman Warsame**[140], the Court was concerned with the applicants' allegations of suffering from the cold and with the lack of female staff, but noted that there had been various improvements to the Detention Centre. The Court reiterated the importance that the authorities keep a comprehensive record of the state of health of detainees, but found that the applicants had not shown that they were denied adequate medical assistance. Consideration was given to the fact that access to an outdoor yard was given to the applicants for them to exercise in the open air, as well as to the provision of indoor recreational activities. Moreover, during the seasonal temperature fluctuations some provision of blankets ensured that the applicants did not suffer any health-related concerns.

The Court concluded that the cumulative effect of the conditions of detention did not amount to degrading treatment and found no violation of Article 3.

In a case similar to **Aden Ahmed**, the Court found a violation of Article 3 due to the applicant's vulnerability as a result of her health. In **Abdi Mahamud**[141], the Court considered that the specific circumstances – *"that the applicant had no access to outdoor exercise for anything between eight and twelve weeks, the poor environment for outdoor exercise in the remaining period, the lack of specific measures to counteract the cold, the lack of female staff, the little privacy offered in the centre, and the fact these conditions persisted for over sixteen months"* – had the cumulative effect of diminishing the applicant's human dignity. It found that the

140 Moxamed Ismaaciil and Abdirahman Warsame v Malta, Application Nos. 52160/13 and 52165/13, ECHR 2016 12 April 2016.

141 Abdi Mahamud v Malta, Application No. 56796/13 ECHR 2016, 3 August 2016.

conditions of the applicant's detention in Hermes Block amounted to degrading treatment within the meaning of Article 3 of the Convention.

The local Courts were asked to examine detention in the light of Article 36 of the Constitution and 3 ECHR in the **Tafarra Besabe Berhe**[142] case. Judge Micallef noted that there is an unqualified prohibition to subject any person to inhuman and degrading treatment. This imposes a positive obligation on the State to safeguard this right and not simply to remedy any breach of such right at a later stage. The Court commented that the treatment must be of a certain level and gravity, and it must be proved to be such that is not merely an inconvenience or discomfort. Although the Court stated that the proof of such must be provided by the complainant, it added that sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact may also be taken into consideration. However, the Court did not find a breach of Article 3 due to its findings in relation to the recent improvements in the centres, the regular attendance of doctors and nurses, and that the detainees themselves vandalised the centres.

The applicant filed an appeal in the Constitutional Court[143], challenging the first Court's ruling of the non-violation of Article 3. The Court examined the elements of Article 3 and the concept of ill-treatment. It considered that in the absence of bodily injury or intense physical or mental suffering, treatment which humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance may also fall within the definition of Article 3. The Constitutional Court took into consideration the allegations of overcrowding and lack of access to fresh air. It noted that there were improvements to the centres which addressed these issues, and that detainees had access to the recreational area a few hours a day *"għalkemm qed jiġi rikonoxxut illi din il-konċessjoni hija 'l bogħod mill-istandards internazzjonali bażici għal dak li jirrigwarda aċċess ta' detenuti għall-arja, jirriżulta wkoll illi fil-perijodu ta' tliet xhur li r-rikorrent kien ġie akkomodat ġewwa t-tent compound, ma kien hemm ebda limitazzjoni tal-ħin li seta' jqatta' barra fl-arja aperta."* The Court did not find that limitations of communication, health services nor the conditions of sanitary facilities amounted to inhuman and degrading treatment. Finally, the Court made reference to the Aden Ahmed and Abdullahi Elmi judgements and held that *"ma jirriżultax illi l-fattispeċje ta' dawk il-każijiet jistgħu jsibu riskontru fiċ-ċirkostanzi tal-kaz odjern. Infatti, huwa evidenti illi l-element determinanti għas-sejba ta' ksur tal-Artikolu 3 tal-Konvenzjoni fil-kaz ta' Aden Ahmed v. Malta kienet il-pożizzjoni vulnerabbli tal-applikant minħabba l-istat*

142 Tafarra Besabe Berhe v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs, Case No.12, 27/07JRM, 9 March 2017.

143 Tafarra Besabe Berhe v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs, 27/07JRM, 24 November 2017.

ta' saħħa prekarja tagħha, kemm fiżika kif ukoll mentali, kif ukoll il-passat tagħha u ċ-ċirkostanzi emozzjonali marbutin miegħu".

As mentioned above, in **Abdullahi Elmi & Aweys Abubakar v Malta**[144] the ECtHR found a violation of Article 3 ECHR due to the cumulative effects on the applicants – who were minors detained for a period of around eight months – of the conditions in detention. These conditions included, inter alia, limited light and ventilation, deplorable sanitary facilities, lack of organised (entertainment) activities for minors, lack of proper counselling and educational assistance, a violent atmosphere and a lack of support mechanisms for the minors, as well as lack of information concerning their situation.

"...The applicants complained of limited light and ventilation – while this concern has not been specifically highlighted by international reports in connection with Warehouse 2 and Block B (where both applicants were detained for around five and three months respectively), the Court notes that such reports considered that Warehouse 2 was not intended to host people, and that it was not suitable to accommodate people for prolonged periods...Similarly, although not emphasised by the applicants, the CPT report considered that the sanitary facilities in the warehouses were in a deplorable state and that the conditions of detention there were "appalling"."

Importantly, the Court highlighted that a child's extreme vulnerability should be the decisive factor in any assessment, and should take precedence over considerations relating to the status of irregular migrant. In relation to the reception of children in an asylum setting, the Court held that *"reception conditions for children seeking asylum must be adapted to their age. However no measures were taken to ensure that the applicants as minors received proper counselling and educational assistance from qualified personnel specially mandated for that purpose...Nor were any entertainment facilities provided for persons of their age. Furthermore, the Court cannot ignore the applicants' submissions to the effect that there was a tense and violent atmosphere, as also documented by reports...The lack of any support mechanism for the applicants, as minors, as well as the lack of information concerning their situation, must have exacerbated their fears."*

The Court observed that in the applicants' case these conditions persisted for a period of around eight months, during which no specific arrangements were made for the applicants as migrants awaiting the outcome of their age-assessment procedure (their status as minors was eventually confirmed). The Court reiterated that in the present case the applicants, who were 16 and 17 years of age, were more

144 Abdullahi Elmi & Aweys Abubakar v Malta, Application No. 25794/13 and 28151/13, ECHR 2017, 22 February 2017.

vulnerable than any other adult asylum-seeker detained at the time, due to their ages.

EFFECTIVE REMEDY

As examined in detail above, the possibility of challenging or reviewing the legality of administrative detention at the national level can be a cumbersome, complex and at times ineffective process. Malta's former reception and detention regime, in particular the potential for assessing its compatibility with the Convention, came under the ECtHR scrutiny in several cases, with the Court consistently finding the regime to violate the right to an effective remedy enshrined in Article 5(4): *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"*[145].

In **Louled Massoud**[146] the Court established that detainees did not have any effective remedy by which to contest the lawfulness and length of their detention in Malta. In relation to the habeas corpus procedures, the Court held that *"the remedy under Article 409A did not provide a review of the "lawfulness" of detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 (1). In consequence, it cannot be considered as an effective remedy for the purposes of Article 5 (4). It follows that the Court cannot agree with the Government that the applicant should have tried such a remedy."* On the proceedings before the IAB, the Court held that even if it considered the IAB a judicial authority competent to grant release from detention, Article 25A of the Immigration Act (as drafted at the time of the facts of this case) was limited by the fact that a request for release from custody had no prospect of success in the event that the identity of the detainee had yet to be verified. The Court also noted that the duration of proceedings before the IAB could not be considered speedy, as required by the Convention. Finally, in relation to constitutional proceedings, the Court held that *"in Malta [they] are rather cumbersome for Article 5(4) purposes and that lodging a constitutional application could not ensure a speedy review of the lawfulness of an applicant's detention."*

Three years after the **Massoud** judgement, in **Suso Musa v Malta**[147] the Court highlighted that the circumstances had not changed, and commented that it remained of the view that the remedies present in Maltese law did not constitute an effective remedy guaranteeing the detainee's right to challenge his detention speedily, as required by Article 5(4)ECHR. In this particular case, the IAB had taken

145 Article 5(4), Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

146 Louled Massoud v. Malta, Application No. 24340/08, ECHR 2010, 27th October 2010.

147 Suso Muso v. Malta, Application No. 42337/12, ECHR 2013, 9 December 2013.

more than a year to determine Suso's challenge to his detention. In **Aden Ahmed v Malta**[148] the ECtHR used the example brought by the applicant to highlight the shortcomings inherent in national constitutional proceedings:

*"It cannot be ignored that the example submitted by the applicant (**Tefarra Besabe Berhe**[149]) concerning the lawfulness of immigrants' detention and the conditions of such detention was still pending six years after it was lodged. The Government's argument that in that case the request had been only for the case to be set down for hearing with urgency and had not been a request for hearing with urgency is out of place and cannot suffice to convince the Court that six years to hear a case about conditions of detention can in any event satisfy Convention standards under any relevant provision. Similarly, the Court notes that the second example submitted by the applicant, namely the Essa Maneh case, concerning conditions of detention, which was lodged in 2008, was not concluded until May 2013. Against this background, little comfort can be found in the subsidiary legislation cited by the Government which states that constitutional cases "shall be expeditious"."*

Similarly, in **Abdi Mahamud v Malta**[150] (2016), the Court held again that *"none of the remedies put forward by the Government, alone or in aggregate, satisfy the requirements of an effective remedy in the sense of preventing the alleged violation or its continuation in a timely manner."* In a 2017 judgement, the same reasoning was applied, and the Court relied on its previous judgments against Malta finding for **Abdullahi Elmi & Aweys Abubakar**[151] by confirming a breach of Article 5(4).

148 Aden Ahmed v. Malta, Application No. 55352/12, ECHR 2013, 9 December 2013.

149 Tafarra Besabe Berhe application was filed on the 8 May 2007 and was decided on the 9 March 2017 (Tafarra Besabe Berhe v the Commissioner of Police as Principal Immigration Officer and the Minister for Justice and Home Affairs, Case No.12, 27/07JRM, 9 March 2017.

150 Abdi Mahamud v Malta, Appplication No. 56796/13 ECHR 2016, 3 August 2016.

151 Abdullahi Elmi & Aweys Abubakar v Malta, Application No. 25794/13 and 28151/13, ECHR 2017, 22 February 2017. Also, in Moxamed Ismaaciil & Abdirahman Warsame v Malta, Application Nos. 52160/13 and 52165/13, ECHR 2016 12 April 2016.

CHAPTER IV

ACCESS TO TERRITORY AND NON-REFOULEMENT

"ON THE ONE HAND THE STATE CRIMINAL-LAW MACHINERY, INCLUDING DETENTION, PROSECUTION AND SENTENCING TO IMPRISONMENT TERMS, IS USED FOR THE PURPOSE OF IMMIGRATION ENFORCEMENT AND, ON THE OTHER HAND, EXPULSION AND DEPORTATION MEASURES AND DETENTION FOR THAT PURPOSE ARE IMPOSED AS A METHOD OF CRIME CONTROL. THIS HAS BEEN CALLED THE CRIMMIGRATION TREND.

TINGED WITH THE IGNOBLE LEGACIES OF RACISM AND XENOPHOBIA OF THE 20TH CENTURY, THIS POLICY PERCEIVES THE MIGRANT AS THE NEWEST "ENEMY", A SOCIAL OUTCAST WHOSE PRESENCE IS NO LONGER A VALUABLE CONTRIBUTION TO THE EUROPEAN MELTING POT AND ITS BOOMING ECONOMY, BUT INSTEAD ENDANGERS SOCIAL ORDER, THE SOCIAL-SECURITY BALANCE AND THE ORGANISATION OF THE LABOUR MARKET, IF NOT THE CONTINENT'S ETHNIC AND RELIGIOUS FABRIC."

Abdullahi Elmi & Aweys Abubakar v Malta, Application No. 25794/13 and 28151/13, ECHR 2017, 22 February 2017 – Concurring opinion of Judge Pinto De Albuquerque

ACCESS TO THE TERRITORY UNDER THE MALTESE LAW

The Immigration Act clearly defines persons who land in Malta without leave from the Principal Immigration Officer as *"prohibited migrants"*[152]. This is in parallel with Article 14 of the Schengen Borders Code – directly applicable in Malta – stating that *"a third-country national who does not fulfil all the entry conditions…shall be refused entry to the territories of the Member States"*[153]. The Schengen Borders Code allows for the entry of third country nationals if they satisfy the following criteria:

- Valid travel document;
- Valid visa, where required;
- Justified purpose of intended stay;
- Sufficient means of subsistence;
- Ability to return;
- No existing alert for refusing entry;
- No consideration of being a threat to public policy, internal security, public health.

Article 14(2) of the Immigration Act also allows for the detention of prohibited migrants who have been served with a return decision and a removal order. A return decision may be issued against any person who is a prohibited migrant, when this is accompanied by a removal order then Article 14(2) may be used as a ground for detention. The effects of the removal order are suspended if a person files an asylum application pending the final determination of his or her claim[154]. Although the effects of the removal order are suspended pending final determination, the detention of that person shall continue until a final decision on detention is reached[155]. However, it should be noted that a person may only be detained on the exhaustive grounds listed in Regulation 6 the recast Reception Regulations[156], as explained in Chapter III on Detention[157].

In contrast, in relation to migrants who are refused entry at the airport Article 10 of the Immigration Act states that *"Where leave to land is refused to any person arriving in Malta on an aircraft, such person may be placed temporarily on land and detained"*[158]. Individuals detained pursuant to a decision to refuse entry are afforded far less protection than those detained under the provisions regulating removal and although there is the possibility to appeal a decision to refuse entry, such appeal does not have suspensive effect on return[159]. These limitations at law are exacerbated by the fact that in many cases these persons are returned within days of their arrival[160].

One can challenge the decision of the Principal Immigration Officer to refuse entry to the territory by filing an appeal in front of the IAB on the basis of Article 25A[161]. The appeal must be filed within 3 working days from the decision to refuse entry. The IAB decisions are final and there is no possibility of further appeal to the Courts.

NON-REFOULEMENT

Although States have a sovereign right to determine who may access their territory, this sovereign right is not absolute. Malta, being a signatory to the Geneva Convention, is bound by the obligations it imposes, such as non-discrimination, non-penalization of irregular entry and *non-refoulement.* The principle of *non-refoulement*[162] provides that no one shall expel or return a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom. In practice, this would prohibit states from refusing entry to persons in a State's territorial waters or at their borders who are at risk of persecution or serious harm if returned or refused entry[163].

This legal obligation is also reflected in the European Union Charter of Fundamental Rights[164]. Article 19(2) states that *"no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."* This article prohibits Member States, including Malta when implementing actions falling within the scope of EU law[165], from returning individuals to territories where they would be at risk. This could include denial of access to the territory, interception (including maritime) and indirect *refoulement,* where these result in exposing the individual to the serious risk described in Article 19(2).

152 Article 5(1) of the Immigration Act, CAP. 217 of the Laws of Malta.
153 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).
154 Article 14(4) of the Immigration Act, op. cit.
155 Second proviso to Article 14(4) of the Immigration Act, op. cit.
156 Reception of Asylum-seekers (Minimum Standards) Regulations, Subsidiary Legislation 420.06.
157 For information on the complex relationship between Article 14(4) of the Immigration Act and Regulation 6 of the Reception Regulations see: aditus foundation and JRS Malta, Submissions to the Ministry of Home Affairs and National Security on the transposition of the Recast Reception Conditions Directive, & to Changes to Immigration Legislation, July 2015, http://aditus.org.mt/Publications/aditusjrssubmissionsonreceptiondirective_03082015.pdf.
158 Article 10 of the Immigration Act, op. cit.
159 Regulation 11 of the Common Standards and Procedures for returning Illegally Staying Third-Country Nationals Regulations, S.L. 217.12.
160 aditus foundation and JRS Malta, Submissions to the Ministry of Home Affairs and National Security on the transposition of the Recast Reception Conditions Directive, & to Changes to Immigration Legislation, July 2015, http://aditus.org.mt/Publications/aditusjrssubmissionsonreceptiondirective_03082015.pdf.
161 Article 25A of the Immigration Act, op. cit.
162 Article 33 of the Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
163 European Council for Refugees and Exiles, The application of the EU Charter of Fundamental Rights to asylum procedural law, 2014.
164 Charter of Fundamental Rights of the European Union [2010] OJ 2010 C 83/389.
165 See Article 51 of the Charter, defining its scope.

The prohibition applies regardless of whether the person explicitly requests asylum or not, implying that States are under an obligation to assess the risk of *refoulement* even in those cases where the person has not expressly indicated a wish to apply for protection[166]. This principle is also reflected in a 2014 EU Regulation that regulates the surveillance of the external sea borders by Frontex[167]. Article 4 of the Regulations provide for the protection of fundamental rights and the principle of *non-refoulement*. The Regulations state that rescued persons should not be disembarked in, forced to enter, conducted to or otherwise handed to an unsafe country[168]. Furthermore, it states that when considering the possibility of disembarkation in a third country, the responsible Member State must take into account the general situation in that third country.

It is also generally agreed that the *non-refoulement* principle also protects persons from being transferred to a country which may not itself threaten the individual, but which would not protect the person against an onward return or transfer in violation of the principle of *non-refoulement*: indirect, chain or secondary *refoulement*[169].

In **Abdul Hakim Hassan Abdulle et.**[170] the applicants claimed a breach of Article 36 of the Constitution, and Articles 3 and 13 of the ECHR. The case concerned six Somalis who, together with a group of people, had entered Malta by boat irregularly. The six applicants were taken to the depot in Floriana and kept there for 20 days. The rest of the group were moved to a detention centre and from there they applied for asylum. After the 20 days, the applicants were forcibly placed on an aircraft and returned to Tripoli. On arriving in Tripoli, they were arrested, blindfolded and taken to an unidentified location to be interrogated. For a week they were beaten and tortured, whilst some of them were also electrocuted. After three months they were taken to a Libyan court and were sentenced to a year imprisonment. In November 2005 the applicants, together with the other Somalis, were taken out of the prison and driven out for three days into the desert and left there. They spent 14 days in the desert without water or food. After a week, two

166 See Hirsi Jamaa and Others v. Italy, Appl. No. 27765/09, 23 February 2012.

167 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

168 A country where there is "a serious risk that he or she would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where his or her life or freedom would be threatened on account of his or her race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another country in contravention of the principle of non-refoulement", Article 4(1) of Regulation (EU) No 656/2014, op. cit.

169 International Commission of Jurists, Migration and International Human Rights Law, Practitioners Guide No. 6, 2011.

170 Abdul Hakim Hassan Abdulle and Kasin Ibrahim Nur v the Minister for Justice and Home Affairs, the Commissioner of Police in his capacity as Principal Immigration Officer, 56/2007, 29 November 2011.

of their compatriots died and the other two didn't have the strength to continue walking. The applicants walked until they met some Berbers who helped them. They managed to get back to Tripoli and in June 2006 they returned to Malta.

On returning to Malta, the applicants filed an application in court claiming a breach of Article 36 of the Constitution and Article 3 ECHR, Article 13 (effective remedy) and Article 4 of the 4th Protocol of the European Convention (collective expulsion of aliens). The Court did not find a breach of Article 4 of the Protocol; however, it did find a breach of Article 36 and 3 ECHR and Article 13.

The Court heard that, when in Malta, the applicants only had contact with one police officer who issued them with the Removal Order and an asylum application form, which was not exhibited in court. This police officer took their details and did not do have any subsequent contact with them during their 20-day stay in the depot. They were not told of their right to apply for protection, and they were not detained in a detention centre with other migrants and asylum-seekers but kept isolated in the police depot in Floriana. It also transpired that a number of Somali women who had arrived on the same boat were allowed to apply for asylum almost immediately, whilst the other men were allowed to apply in November. The six applicants were treated differently, and without any plausible explanation.

The Court held that Article 3 of the Convention would be breached in those situations where a state deports a person to another state where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. It reiterated that this interpretation is also applied in asylum cases. In these circumstances, Article 3 implies the obligation not to expel the person to that state.

In this particular case *"ma hemm l-ebda dubju f'għajnejn din il-Qorti li mir-rakkont tagħhom l-istess rikorrenti ġew assoġġettati għal tortura, swat, detenżjoni prolungata f'kundizzjonijiet degradanti u inumani li setgħet faċilment waslet għall-mewt, u kien b'miraklu biss li dan ma seħħx".*

The Court felt that it was well-established that Sub-Saharan African migrants were not protected in Libya and were severely mistreated, and that the defendant authorities could not claim to not have known about this:

"huwa ħafna diffiċli għal din il-Qorti, li taċċetta l-posizzjoni mpoġġija l-quddiem għall-konsiderazzjoni tagħha, mid-difensuri tal-intimati fin-nota responsiva tagħhom, li tali riskju ta' tortura u trattament inuman u degradenti għal persuni bħar-rikorrenti fil-Libja ma kienx għadu magħruf presumibilment mill-intimati f'Ottubru 2004...

... ma hemm l-ebda dubju u rrapporti ma jħallu l-ebda dubju dwar it-trattament ta' persuni li jkunu qed ifittxu l-ażil fil-Libja, fejn dan l-istatus lanqas biss kien rikonnoxxut, u la darba rimpatrijati, l-istess persuni, b'mod sistematiku, kienu jiġu soġġetti għal kull tip ta' trattament inuman, tortura, u degradazzjoni umana fl-għar livell possibbli u immaginabbli, li twassal għal uġieh kbir, jekk mhux mewt, u wkoll għal deportazzjoni, fejn il-bniedem jibqa' ħaj, proprju lejn il-pajjiz fejn dawn l-imsejkna persuni jkunu ħarbu sabiex jevitaw persekuzzjoni kontra tagħhom".

Judge Pace found a breach of Article 3 as he was satisfied that Libya could not be considered a safe country and that, even if migrants had survived violent treatment in Libya, they would have then been repatriated to their country of origin in violation of the principle of non-refoulement: *"lanqas biss kien hemm sistema biex wieħed jagħmel talba għal ażil u ġie wkoll pruvat li f'numru konsiderevoli ta' każi ta' persuni li kienu qed ifittxu kenn gew maltrattati, torturati, degradati, suġġettti għat-trattament vjolenti u inumani, impoġġija f'kundizzjonijiet patetiċi, u dižumani għall-aħħar u fl-estrem, u fl-aħħar mill-ahhar, jekk jirnexxielhom jibqgħu jgħixu wara din l-esperjenza, jiġu deportati lejn pajjiżhom, jew abbandunati f'nofs dežert, kollox in vjolazzjoni tal-prinċipju ta' non refoulement, u dan kollu jikkostitwixxi ksur tal-artikolu 3 tal-Konvenzjoni".*

In relation to the alleged breach of Article 13 ECHR, the Court felt that there was no doubt that the applicants had what is called "an arguable case" and that the State had the obligation to offer a remedy in the event of breach of rights under the Convention. As a consequence of the actions of the State, the applicants had not had any access to a remedy in national courts before they were deported in 2004. The applicants were not allowed to apply for asylum in Malta and they were not granted any effective remedy before a national authority in order for them to claim that their rights and freedoms under the Convention have been violated. The Court awarded each applicant €10,000 by way of damages.

An appeal was filed by the Minister for Justice and Home Affairs and the Principal Immigration Officer in 2011[171]. The Constitutional Court referred to the **Dilek Sahan**[172] judgement, where it had already ruled that the removal of a person that would result in inhuman and degrading treatment would breach Article 3. The Court noted that, in order to decide whether or not there was a breach under this Article, the Court has to examine what the foreseeable consequences would be if the person in question was returned by taking into account the specific situation of the country at the time and the specific personal circumstances of that person. It also

171 Abdul Hakim Hassan Abdulle and Kasin Ibrahim Nur v the Minister for Justice and Home Affairs, the Commissioner of Police as Principal Immigration Officer, 56/2007/1, 28 June 2013.

172 Dilek Sahan, Serif Ali Sahan, Serdar Sahan v the Minister for Justice and Home Affairs, the Principal Immigration Officer, 6/2008/1, 22 February 2013.

observed that, in principle, it is the applicant who has to provide evidence of a risk of maltreatment and that when such evidence is presented the burden of removing all doubts falls on the State.

"Fil-prinċipju spetta lir-rikorrent li jipproduċi provi tar-riskju ta' maltrattament jekk jiġi ritornat iżda meta jiġu prodotti tali provi l-piż li jiġi eliminat kull dubbju dwarhom jaqa' fuq l-iStat6. F'każijiet fejn jiġi allegat li l-persuna tappartjeni għal xi grupp li sistematikament jiġi espost għal maltrattament, tiskatta lprotezzjoni tal-Artikolu 3 tal-Konvenzjoni meta r-rikorrent jirnexxilu juri li hemm raġunijiet serji biex wieħed jemmen fil-prattika inkwistjoni u li hu jappartjeni għall-grupp konċernat".

The Court examined in detail the documentary evidence relating to the situation in Libya during the relevant period, and on the evidence presented it found that Malta should have known of the situation in Libya.

"Għalhekk il-Qorti ssib li jirriżulta li r-rikorrenti forzatament intbagħatu minn Malta għal-Libja meta l- Gvern Malti messu kien jaf li hemm dawn kienu jirrinfaċċjaw ir-riskju li jiġi torturati jew trattati inumanament jew b'mod degradanti. Irriżulta wkoll li, għalkemm ma jirriżultax li kieku jiġu rimpatrijat mil-Libja lejn is-Somalja huma kienu jirrinfaċċjaw xi riskju ta' tortura jew ta' trattament inuman jew degradanti, il-Gvern Malti messu kien jaf li fil-Libja r-rikorrenti kienu jirrinfaċċjaw ir-riskju li jiġu arbitrarjament mibgħuta fil-pajjiż ta' oriġini tagħhom tenut kont tal-fatt li l-Libja ma kinitx irratifikat il- Konvenzjoni ta' Ġinevra fuq l-istatus ta' Refuġjat, innuqqas ta' rikonoxximent fil-Libja tal-istatus ta' refuġjat, innuqqas ta' kull forma ta' proċeduri għall-ħarsien ta' persuni li jkunu jfittxu l-asil, in-nuqqas ta' rikonoxximent uffiċjali mill-awtoritajiet Libjani tal-uffiċju tal-UNHCR, l-informazzjoni disponibbli dak iż-żmien dwar it-theddida li numru ta' Eritrejani jiġu arbitrarjament ritornati f'pajjiżhom fejn kien hemm ir-riskju li jiġu torturati, detenuti incomunicado u saħansitra jirriskjaw eżekuzzjoni extra ġudizzjarja".

The Constitutional Court confirmed a breach of Article 3 for both applicants, yet it found that there was not sufficient evidence that Abdul Hakim Hassan was in fact tortured in Libya. In relation to Article 13, the Court found that the applicants did not apply for asylum, they did not appeal their Removal Order and that many of the other migrants on the same boat had applied for asylum. It noted, however, that one of the applicants showed his objection to his return whilst he was being transferred from the bus onto the aircraft, yet he was not provided with any legal assistance nor with the opportunity to contest the Removal Order. The Court noted that applicant Abdul Hakim Hassan Abdulle did not sufficiently prove the allegations presented in his affidavit, as he left Malta pending the outcome of the Constitutional Case. In this regard, therefore, the Court accepted the appellants' pleas. The Court confirmed the awarding of €10,000 damages to Kasin Ibrahim Nur

and, due to the lack of evidence, lowered the damages awarded to Abdul Hakim Hassan Abdulle to €6,000.

Just a couple of weeks after this judgement, on the 9 July 2013, a group of migrants who had been rescued at sea were brought to Malta. Following their disembarkation, the applicants were received by the police and given a tag with an immigration registration number. At 6.30 a.m. they were placed on buses and driven to the police headquarters in Floriana. According to the applicants, they were asked to alight from the buses so that they could be searched. The single men were then told to get back on the buses and were left there for several hours without any explanation of what was happening. In the early afternoon of the same day, the Times of Malta website carried an article stating that Malta was considering returning the migrants to Libya. A number of news sources confirmed that the Government had booked an Air Malta plane to fly the migrants back to Libya on two flights, planned for that same night[173].

A group of local NGOs filed a Rule 39 application with the ECtHR, requesting it to issue an interim measure ordering Malta to refrain from returning the group of men to Libya. A couple of hours later, the Court acceded to the request and instructed the Government that the migrants should not be expelled to Libya for the duration of the proceedings before the Court[174]. Following the Court's interim measure, the migrants were transferred to detention centres to be detained in accordance with the provisions of the Immigration Act. That evening, UNHCR was granted access to the applicants. It was only then that the applicants learnt about the Government's original plans.

On the basis of the interim measure, an application was later filed before the Strasbourg Court, **Abaker Abdi Ahmed and others**[175]. The Court found the application inadmissible as it held that, since the interim measure had been issued, there was no risk of deportation and the applicants could have made use of available national remedies. In addition, since a number of applicants had been granted international protection, a risk of deportation no longer subsisted. In relation to those applicants whose applications were still pending, the Court assessed that claims of a breach of Article 3 were premature.

173 Abaker Abdi Ahmed and others v. Malta, Appl. No. 43985/13, 16 September 2014.
174 X and others v. Malta, Application No. 43985/13, ECHR 2013, 9 July 2013.
175 Abaker Abdi Ahmed and others v. Malta, op cit.

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Ms Katrine CAMILLERI
JRS Malta
Triq ix-Xorrox
Birkirkara
MALTA

SECOND SECTION

ECHR-LE2.2R
RMT/jsa

9 July 2013

BY MAIL AND FAX (00356 21 44 27 52)
Total no. of pages: 2

Application no. 43985/13
X and others v. Malta

Dear Madam,

I acknowledge receipt on 9 July 2013 of your fax of 9 July 2013 requesting the European Court of Human Rights under Rule 39 of the Rules of Court to stop the removal to Libya of your clients.

Your file has been given the above number. You must refer to it in any further correspondence relating to this case.

On 9 July 2013 the Acting President of the Section to which the case has been allocated decided, in the interests of the parties and the proper conduct of the proceedings before the Court, to indicate to the Government of Malta, under Rule 39 of the Rules of Court, that the applicants should not be expelled to Libya for the duration of the proceedings before the Court.

The parties' attention is drawn to the fact that failure of a Contracting State to comply with a measure indicated under Rule 39 may entail a breach of Article 34 of the Convention. In this connection, reference is made to paragraphs 128 and 129 of the Grand Chamber judgment of 4 February 2005 in the case of *Mamatkulov and Askarov v. Turkey* (applications nos. 46827/99 and 46951/99) as well as point 5 of the operative part.

The Acting President also decided to request the Government, under Rule 54 § 2 (a) of the Rules of Court, to submit the following information:

1. Before deciding on their deportation, did the authorities consider the applicants' claim that they are exposed to the risk of being subjected to inhuman treatment in Libya?

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2. Which measures will be taken by the Government in order to ensure each applicant's assessment and access to the Court's proceedings?

The Government have been asked to submit this information by 30 July 2013. Their reply will be communicated to you for information or, if appropriate, for comments in reply on behalf of the applicants.

The Acting President decided to give priority to the application under Rule 41.

You will find enclosed a document containing a copy of the Convention and its Protocols and the official application form with an explanatory note for prospective applicants. In order to complete the file, you should fill in these forms fully and accurately and return them to me by **30 July 2013**, together with copies of all relevant documents, including all relevant domestic decisions and judgments (unstapled and numbered pages). **Please note that if you send original documents, they will not be returned to you by the Court.**

For safety reasons, any object sent to the Court without having being expressly requested by the Registry will be destroyed immediately together with the cover letter. If you consider sending documents other than on paper, you should first get in touch with the Registry.

The file opened in respect of your communication will be destroyed without being submitted for judicial decision, six months from the date of the present letter, unless the duly completed application form has been received in the meantime.

In order to process your application more efficiently, please find enclosed a set of 10 barcode labels for your use exclusively in this case. If you send the Registry a letter or any other correspondence, please stick one of the barcode labels on the top right-hand corner of the **first** page of the correspondence.

Please inform me of any change in your address or that of your clients.

Yours faithfully,

K. Reid
Deputy Section Registrar

Enc: Application package
(Please note that enclosure to this letter will be posted to your address.)

DUBLIN PROCEDURES

The Dublin III Regulation[176] provides EU Member States with criteria to determine which EU Member State is responsible to examine an application for international protection, based on the rule that any application for asylum filed within the EU may only be the responsibility of one Member State. Criteria include first point of entry in the EU, possession of Schengen visa, family unity and place of legal residence.

In terms of the Regulation, if the Member State where the application for asylum is lodged considers another Member State to be responsible, and this other Member State accepts responsibility, the applicant will be transferred to the responsible Member State in order for the asylum application to be processed[177]. The Regulation provides timelines for this procedure, stating that when the second Member State accepts responsibility for the application, the applicant's transfer must happen within six months of acceptance of responsibility[178]. During this process, applicants may only be detained if they present a significant risk of absconding, and even in such cases detention should be for the shortest time possible, proportional to the risk, and only relied upon as a last resort when less coercive measures cannot be relied upon[179].

In **Havval Gamshid vs Il-Kummissarju tal-Pulizija**[180] decided in 2016, the appellant arrived in Malta and applied for international protection in October 2011. It resulted that the applicant had already applied for asylum in Cyprus in 2004, and therefore a transfer request was made to Cyprus. On 16 April 2012 the appellant was informed that he had to leave Malta and be transferred to Cyprus since Cyprus had accepted responsibility for his asylum claim on 27 March. The Court held that the Dublin Regulation required the applicant to be transferred within six months from 27 March 2012, and that this had not happened. It ruled that the asylum application should be determined and decided by Malta[181].

PENALISATION OF THE USE OF FALSE DOCUMENTATION FOR ENTRY TO MALTA

Article 31 of the Geneva Convention states that *"the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in the territory without authorisation, provided*

176 Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III).
177 Article 18(1) of Regulation (EU) No 604/2013, op. cit.
178 Article 29(1) Regulation (EU) No 604/2013, op. cit.
179 Article 28 Regulation (EU) No. 604/2013, op. cit.
180 Havval Gamshid v the Commissioner of Police and the Attorney General, 15/2013, 27 January 2016.
181 See also Abou Zidan Bassem v the Commissioner of Police and the Attorney General, 16/2013AE, 27 January 2016.

they present themselves without delay to the authorities and show good cause for their illegal entry or presence." The Geneva Convention thus acknowledges the difficulty, and at times the impossibility, of refugees (and, therefore, of asylum-seekers[182]) to flee persecution in a legal manner, recognising that seeking asylum may require refugees to breach immigration rules[183].

Article 31 applies to refugees entering Malta, and although national law has moved away from the automatic and mandatory detention of asylum-seekers who enter Malta in an irregular manner, it nonetheless continues to criminalise refugees who use false documentation to enter. The possession and use of such false documentation is prohibited under the Criminal Code[184], the Immigration Act[185] and the Passports Ordinance[186]. Persons found guilty by the Criminal Court of Magistrates may be handed a prison sentence of six months to two years. In most cases examined, the Court of Magistrates handed down a suspended sentence. However, in some cases the Courts sentenced refugees to prison sentences[187] or lengthy suspended sentences.

In 2016, an asylum-seeker used false documents to enter Malta at the end of 2016 and she was apprehended at the airport, where she immediately explained her need for protection. After being detained for three days, she was brought before the Courts and charged with forging, altering or tampering with official documents or being in possession with the same documents which she knew to have been forged, altered or tampered with. She was convicted and given a two-year imprisonment suspended for four years[188]. She was subsequently given international protection by RefCom.

182 For more on this point, see the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979, reissued January 1992 and December 2011), available at http://www.unhcr.org/3d58e13b4.pdf.

183 For more information on the meaning and application of Article 31 of the Geneva Convention, see Costello Dr. C., Article 31 of the 1951 Convention Relating to the Status of Refugees, July 2017, available at http://www.unhcr.org/protection/globalconsult/59afed607/34-article-31-1951-convention-relating-status-refugees-dr-cathryn-costello.html.

184 Article 188 of the Criminal Code, op. cit.

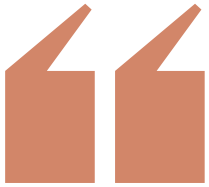
185 Article 32(1)(c) of the Immigration Act, op. cit.

186 Articles 3 – 5 of the Passport Ordinance, CAP. 61 of the Laws of Malta.

187 The accused was sentenced to an effective eight-month prison sentence in the Principal Immigration Officer v Essam A. Hamad Elkershine, 7/2016, 29 May 2016.

188 The Principal Immigration Officer v Magdoleen R.W. Besaiso, 25 October 2016.

CHAPTER V
AGE ASSESSMENT



WEAK, INADEQUATE OR FAULTY ASSESSMENTS PUT CHILDREN AT RISK. CHILDREN WHO ARE FALSELY ASSESSED AS ADULTS MAY EXPERIENCE VIOLATIONS OF THEIR HUMAN RIGHTS, ARE AT RISK OF BEING DETAINED IN UNSUITABLE DETENTION FACILITIES AND CONSEQUENTLY EXPOSED TO GREATER RISKS OF ABUSE AND VIOLENCE. THEY MAY FURTHER LOSE OUT ON ESSENTIAL SUPPORT AND ASSISTANCE TO GUARANTEE THEIR SAFETY, HEALTH, WELL-BEING AND DEVELOPMENT."

Council of Europe, Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration, September 2017

In order to secure effective access to the rights set out in the Convention of the Rights of the Child[189] and of the 1951 Refugee Convention, States are under an obligation to ensure that children are properly identified as such, and also to assess whether they are separated or unaccompanied, as soon as their presence in the country is known[190].

Migrants and asylum-seekers claiming to be unaccompanied minors or separated children ('UAMs' or 'SC') are referred to AWAS in order for their age to be verified. This age assessment process is not regulated by law, and the only reference to age determination procedures is found in Regulation 17 of the Procedural Regulations[191], which states that a *"medical examination to determine the age of unaccompanied minors within the framework of any possible application for international protection may be carried out".* The new Child Protection (Alternative Care) Act[192] briefly mentions the duty of the director for welfare to refer the UAM to the competent authorities to *"make such investigations and assessments as they may consider necessary to determine whether the claimant is, or is not, in effect an unaccompanied child".*

Although age assessment procedures are touched upon in the Procedural Regulations[193], the right to appeal age assessment decisions before the Immigrations Appeals Board emerges from the Reception Regulations[194]. The 2015 amendments to the Reception Regulations specifically included the right to appeal age assessment decisions, as also the right to free legal assistance and representation for any such appeals.

As mentioned in the introduction, decisions of the IAB are neither published nor publicly available. However, in 2016 and 2017 the IAB did not receive any appeals relating to age assessment decisions[195].

It should be noted that the UNHCR recommends that age assessments are only conducted when a child's age is in doubt and need to also take into account the

189 Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577.

190 UN High Commissioner for Refugees (UNHCR), UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum, 1 June 2015.

191 Procedural Standards for Granting and Withdrawing International Protection Regulations, op. cit.

192 Article 20(4) of the Child Protection (Alternative Care) Act, CAP 569 of the Laws of Malta, not yet in force at the time of writing. The Child Protection Act will replace the Children and Young Persons (Care Orders) Act, the Foster Care Act and the Placing of Minors Regulations, which also did not contain any age assessment procedures.

193 Regulation 17 of the Standards for Granting and Withdrawing International Protection Regulations, op. cit.

194 Regulation 16(1) of the Reception of Asylum-seekers (Minimum Standards) Regulations, op. cit.

195 aditus foundation & Jesuit Refugee Service Malta, edited by the European Council for Refugees and Exiles, AIDA (Asylum Information Database) Country Report: Malta, op. cit.

physical appearance and the psychological maturity of the child[196]. This is because medical examinations based on dental or wrist bone x-rays can only estimate age and carry with them a margin of error[197]. The recast Asylum Procedures Directive[198] provides for a number of safeguards, including that the least invasive option should be chosen, that the child and his/her representative should be informed in a language and manner they understand of the medical assessment and its consequences, that consent is required and that refusal to consent cannot be the sole basis to reject an application.

The 2015 ***Strategy for the Reception of Asylum-seekers and Irregular Migrants*** states that age assessment procedures shall not be carried out on those who are *"undoubtedly children"*[199]. The Strategy also stipulates that age will be assessed through psycho-social procedures approved by AWAS management, and that medical procedures will only be used as a last resort.

Yitagesu Legesse Weldemariam et v AWAS et al[200] was filed by in 2012 by four migrants who had arrived in Malta in 2011. They were all detained at the Ħal Safi Detention Centre. One of the applicants was released from detention in 2012 due to his mental state, after spending up to 12 months in detention, whilst the other three were still in detention in September 2012. This amounted to approximately 18 months in detention. When they had entered Malta, all the applicants declared that they were born in 1994, effectively claiming to be minors. In 2011, the AWAS evaluation team declared that, following an interview, the applicants were over the age of eighteen and should not be treated as minors. The applicants subsequently all managed to present birth certificates from their countries of origin showing that they were all born in 1994. On the basis of this information, the applicants submitted an application for reconsideration to AWAS in 2012, and they were informed that AWAS rejected their request for reconsideration.

The applicants claimed that, as an administrative entity, AWAS is duty-bound to observe the rules of proper administration and that the decisions of AWAS are administrative acts within the parameters of Article 469A of the COCP.[201] They

196 UN High Commissioner for Refugees, UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum, op.cit.

197 Separated Children in Europe Programme, Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012.

198 Article 25(5) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast).

199 Strategy for the Reception of Asylum Seekers and Irregular Migrants, Minister for Home Affairs and National Security, 2015.

200 Yitagesu Legesse Weldemariam (11C-187) et al v the Chief Executive Officer of the Agency for the Welfare of Asylum Seekers (AWAS), the Minister for the Interior and Parliamentary Affairs as Minister responsible for Immigration and the Attorney General, 885/2012, 3 March 2015. The appeal was filed on the 23 March 2015 and currently pending in the Court of Appeal.

201 Article 469A of the Code of Organization and Civil Procedure, CAP 16 of the Laws of Malta.

requested the Court to rule that AWAS' actions breached Article 469A and principles of natural justice, since it was duty-bound:

- To give its reasons for its refusal;
- To clearly point out the procedure that the applicants had to adopt in order to challenge decision or request re-consideration of decisions;
- To inform the applicants of their right of appeal before the Immigration Appeals Board, notwithstanding the fact that applicants held that this right of appeal did not result anywhere in the law[202].

The Court dismissed all claims by the applicants. It felt that the procedures adopted by the Office of the Refugee Commissioner and by the AWAS Age Assessment Team were in accordance with the above-mentioned standards of national and international law. The Court also found that the Age Assessment Team was composed of qualified social-workers and its function was *"not a mere one-sided entity engaged solely in the interest of those seeking asylum locally but is also an entity that is duty-bound to act justly also in the interest of society".*

In relation to the claim that the applicants were not given reasons for the negative decisions, the Court held that that such proceedings are not to be equated with rigid court procedures. The Court held that age assessment proceedings *"do not qualify as judicial proceedings and, as such, although they still attract certain principles deemed necessary for the proper exercise of discretion like the principle of natural justice, yet, they do not attract all the guarantees established under Article 6 of the European Convention of Human Rights".*

The Court also held that since the applicants had *"free access to a local non-government organisation with long well-proven experience in the field",* it was untenable for them to state that they did not know how to secure their rights, including by exercising their right to appeal from the decision of the age assessment team itself.

In **Abdullahi Elmi & Aweys Abubakar v Malta**[203], the Strasbourg Court found a violation of ECHR Articles 3, 5(1) and 5(4). This case relates to two Somali asylum-seeking children who applied for asylum shortly after their arrival in Malta. They were detained in Warehouse 2 and Block B at Safi Detention Centre while awaiting their Age Assessment Procedure. Despite the fact that the procedure found the applicants to be children, they were only released from detention several months later.

202 The right to appeal was included in the 2015 amendments to the Reception Regulations, as mentioned above.

203 Abdullahi Elmi and Aweys Abubakar v. Malta, Applications nos. 25794/13 and 28151/13, ECHR 2016, 22 November 2016.

The applicants claimed that their eight-month detention pending the outcome of their Age Assessment Procedures exceeded the length of time reasonably required for its purpose, and could therefore not be said to be closely connected to the purpose of preventing unauthorised entry. This was even more so given the relatively straightforward assessment procedure consisting of a couple of interviews and a wrist X-ray. In addition, the applicants submitted that, despite the fact that the AWAS procedure had a determining impact on the continued detention of individuals detained in terms of the Immigration Act, the procedure not adequately regulated by law or by publicly available rules. The only reference to the procedure was in a government policy document[204] and in the Procedural Regulations[205].

The applicants submitted that the age assessment procedure *"is plagued by delays and by a lack of adequate procedural guarantees, including lack of information about the procedure followed and the possibility of appeal. No reasons are ever given for decisions and there is no real possibility to challenge the decision taken by the AAT*[206]*. In addition, migrants undergoing Age-Assessment Procedures are detained throughout the procedures, usually in centres with adults without any special consideration for the fact that they are minors".* Malta responded that in the case of teenagers close to 18 years of age, the procedure required more steps and took longer to finalise. The assessment procedure involved interviews with AWAS officials and if these were inconclusive a Further Age Verification Test (hand and wrist X-ray) would be conducted. Malta claimed that the Further Age Verification Test gave accurate results, whilst also admitting a margin of error of around two years.

In its judgement, the Court noted that it was positive that once a migrant was found to be a minor liberty would be guaranteed. However, it also observed that issues may arise in respect of a state's good faith if the age determination process took an unreasonably long time. The Court considered that, despite the fact that borderline cases may require further assessment, the numbers of alleged minors per year put forward by Malta could not justify an Age Assessment Procedure duration of more than seven months. This situation was rendered *"even more serious by the fact that the applicants lacked any procedural safeguard ...as well as the fact that at no stage did the authorities ascertain whether the placement in immigration detention of the applicants was a measure of last resort for which no alternative was available".*

204 Irregular Immigrants, Refugees and Integration Policy Document, issued by the Ministry for Justice and Home Affairs and the Ministry for the Family and Social Solidarity, in 2005, now superseded by the more recent Ministry for Home Affairs and National Security, Strategy for the Reception of Asylum Seekers and Irregular Immigrants, Ministry for Home Affairs and National Security, 2015.

205 Procedural Standards for Granting and Withdrawing International Protection Regulations, op. cit. (prior to the amendments in 2015).

206 Age Assessment Team.

In **Mahamed Jama**[207], a Somali national entered Malta irregularly by boat in May 2012. She was detained and declared to be 16 years old. She received an age assessment decision in 2013, wherein she was found to be an adult. The applicant claimed that the conditions and length of her detention violated Article 3 ECHR.

The Court considered that the length of her overall detention was not unreasonable due to the pending Age Assessment Procedure and the processing of her asylum claim. In relation to the Age Assessment Procedure, the Court held that, whilst it understands that borderline cases could take longer to be determined *"the numbers of alleged minors per year put forward by the Government cannot justify a duration of around seven months to determine the applicant's claim. Indeed, the Government have not explained why it was necessary for the applicant in the present case to wait for two months for her first age assessment interview...and a further two months to perform an X-ray on her wrist...following a second interview, and more than three months to have a decision following a standard medical test".*

The Court continued by stating that *"however, in the circumstances of the present case the Court cannot ignore that the applicant turned out to be an adult...and whether willingly or unwillingly, such false claims burden the system".* Whilst it expressed reservations about the duration of the Age Assessment Procedure, it did not find a breach of Article 5(1).

207 Mahamed Jama v. Malta, Application No. 10290/13, ECHR 2015, 26 November 2015.

CHAPTER IV

RIGHTS OF BENEFICIARIES OF INTERNATIONAL PROTECTION

"[LOCAL INTEGRATION] IS A LEGAL PROCESS, WHEREBY REFUGEES ARE GRANTED A PROGRESSIVELY WIDER RANGE OF RIGHTS AND ENTITLEMENTS BY THE HOST STATE THAT ARE BROADLY COMMENSURATE WITH THOSE ENJOYED BY ITS CITIZENS. THESE INCLUDE FREEDOM OF MOVEMENT, ACCESS TO EDUCATION AND THE LABOUR MARKET, ACCESS TO PUBLIC RELIEF AND ASSISTANCE, INCLUDING HEALTH FACILITIES, THE POSSIBILITY OF ACQUIRING AND DISPOSING OF PROPERTY, AND THE CAPACITY TO TRAVEL WITH VALID TRAVEL AND IDENTITY DOCUMENTS. REALIZATION OF FAMILY UNITY IS ANOTHER IMPORTANT ASPECT OF LOCAL INTEGRATION. OVER TIME THE PROCESS SHOULD LEAD TO PERMANENT RESIDENCE RIGHTS AND IN SOME CASES THE ACQUISITION, IN DUE COURSE, OF CITIZENSHIP IN THE COUNTRY OF ASYLUM."

UNHCR, Local Integration, Global Consultations on International Protection, EC/GC/02/6, 25 April 2002

Under the Geneva Convention, EU and national law, international protection beneficiaries are entitled to a series of rights, including residence, documentation, healthcare, education and employment. These are mainly prescribed in the Procedural Standards Regulations[208], yet other legal instruments regulate specific rights and also their manner of implementation[209].

To date, there has not been significant litigation before national courts in relation to the enjoyment of rights afforded to beneficiaries of international protection. There was no finding of any court decisions relating to issues such as the granting of or access to social benefits (such as unemployment benefits or social assistance), access to education or medical care[210].

This is possibly due to the fact that appeals for most such decisions lie with specialised administrative tribunals or bodies. For instance, appeals relating to decisions on social benefits are decided by the Social Security Umpire[211], and these decisions are not publicly available. Appeals from the decision of the Umpire are permitted, and are heard by the Court of Appeal (Inferior Jurisdiction) at the instance of any person, including the Director of Social Security[212]. Appeals against decisions of the Housing Authority[213], such as those relating to the Rent Subsidisation On Privately Owned Dwellings Scheme[214], Scheme for Persons With a Disability[215] and the Adaptation Works in Dwellings Occupied by Tenants and Owners Scheme[216], are heard by the Appeals Board of the Housing Authority appointed by the Housing Authority Board. The decisions of the Appeals Board are *"final and shall bind both the Authority and the applicants/beneficiaries. The applicants/beneficiaries effected by this provision have the right to make written objections to the Appeals Board."*[217] These decisions are also not publicly available.

208 Procedural Standards for Granting and Withdrawing International Protection Regulations, Subsidiary Legislation 420.07. For more information on the actual content of each right see aditus foundation & Jesuit Refugee Service Malta, edited by the European Council for Refugees and Exiles, AIDA (Asylum Information Database) Country Report: Malta, 2017.

209 For more information see aditus foundation, Rights attached to Beneficiaries of International Protection, available at http://aditus.org.mt/Publications/factsheet14_rightsinternationprotection.pdf.

210 At the time of writing, desk research carried out did not result in any published judgements relating to these rights for beneficiaries of international protection in the Maltese courts.

211 Article 108 of the Social Security Act, CAP 318 of the Laws of Malta.

212 Article 109 of the Social Security Act, ibid.

213 Housing Authority Act, CAP 261 of the Laws of Malta.

214 For more information see: https://housingauthority.gov.mt/en/Documents/Schemes/Sussidju%20fuq%20il-Kera%20-%20conditions%20EN%20-%202018.pdf

215 Scheme for Persons With a Disability: https://housingauthority.gov.mt/en/Documents/Schemes/Skema%20ghal%20persuni%20b%27dizabilita%27%20-%20conditions%20EN%20-%202018.pdf

216 Adaptation Works in Dwellings Occupied by Tenants and Owners: https://housingauthority.gov.mt/en/Documents/Schemes/Ghotja%20ghall-Irrangar%20ta%27%20postijiet%20EN%202014.pdf

217 See: Rent Subsidisation On Privately Owned Dwellings, Scheme for Persons With a Disability and Adaptation Works in Dwellings Occupied by Tenants and Owners, op. cit. footnotes 214 - 216.

FAMILY REUNIFICATION

Recognised refugee are entitled to family reunification in order to bring their families to Malta[218], yet the Family Reunification Regulations specify that subsidiary protection beneficiaries are excluded from this right[219]. 'Family members' are defined as the refugee's spouse, over the age of 21, and their unmarried minor children. Once in Malta, family members of a refugee sponsor are entitled to the same rights and benefits of the sponsor[220]. Although persons with subsidiary protection are not entitled to family reunification, the Procedural Standards Regulations state that *"family members of a person granted subsidiary protection, if they are in Malta at the time of decision, enjoy the same rights and benefits as the person enjoying subsidiary protection status so that family unity may be maintained."*[221] Regulation 22 of the Family Reunification Regulations states that decisions relating to family reunification may be appealed in front of the IAB, however as previously mentioned IAB decisions are not made public.

There have been no cases brought to the Maltese courts by international protection beneficiaries on the right to family reunification. However, two such complaints were filed with the Office of the Ombudsman. In 2010, a Somali national filed a complaint as his request for family reunification was turned down[222]. The complainant was granted subsidiary protection and asked the Maltese authorities for permission to bring his family from his country of origin to Malta. The Ombudsman did not find any maladministration as defined in the Ombudsman Act[223] as, in accordance with EU law, the limitation of the right to family reunification to refugees is permitted under the Family Reunification Directive[224]. Nevertheless, the Ombudsman recommended that the *"Government should monitor the situation to determine, at the proper moment, when limitations in the EU Directive that exclude persons enjoying subsidiary protection from the right to be reunited with their immediate family, become no longer reasonable in a democratic society. This decision would achieve a balance between the needs of society and the inhuman effects that persons suffer from this restriction."*

In 2015 another complaint relating to family reunification was filed with the Office of the Ombudsman[225]. This complaint related to undue delays in issuing

218 Family Reunification Regulations, Subsidiary Legislation 217.06.

219 Regulation 3, Family Reunification Regulations, ibid.

220 Regulation 20(2)(a) of the Procedural Standards for Granting and Withdrawing International Protection Regulations, Subsidiary Legislation 420.07.

221 Regulation 20(2)(b) of the Procedural Standards for Granting and Withdrawing International Protection Regulations, op. cit.

222 The Somali national who tried to reunite his family in Malta, June 2010, Case Notes Number 30, October 2010

223 Ombudsman Act, CAP 385 of the Laws of Malta.

224 Article 3(2)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

225 Case No. P0096, Migrant's Family Reunited, Case Notes Number 35, January - December 2015.

the required permits. The complainant was recognised as a refugee in January 2014, and soon after he applied for family reunification so that his wife could join him in Malta. For almost a year, no progress was made in the processing of the application. The Ombudsman investigated the complaint and drew the attention of the Permanent Secretary in the Ministry for Home Affairs and National Security to the unwarranted delay and requested a formal decision on the complainant's application. The Ombudsman noted that, as a refugee, the complainant had the right to be reunited with his family, also on the strength of the Family Reunification Directive[226]. Eventually, the Permanent Secretary informed the Ombudsman that complainant's request had been acceded to, and that he would soon be issued with confirmation in writing to this effect[227].

MARRIAGE

There is nothing at law preventing an international protection beneficiary from getting married in Malta, if he or she satisfies the conditions under the Marriage Act.[228] However, in order to publish the marriage banns preceding the marriage, the persons wishing to get married are required to submit to the Marriage Registrar a number of documents, including birth certificates of the spouses, declarations on oath that no impediment exists and *"all other relevant information"* (e.g. residence cards)[229]. Compliance with this documentation requirement often presents a problem for persons who have been displaced or who have fled conflict zones.

Beneficiaries of international 80applying to marry but who are unable to produce the required documents are allowed to present a copy of the PQ[230], confirmed on oath. ***Ombudsman Case No I 466, Immigrants Right to Marry***, related to a complaint on the refusal by the Marriage Registrar to publish marriage banns relating to a marriage application lodged by persons whose status for international protection had been rejected. Although the complaint itself related to failed asylum-seekers, and technically outside the scope of this publication, the Ombudsman also examined the procedure adopted in relation to applications to marry filed by refugees and beneficiaries of subsidiary protection when they are unable to present the required documentation. Interestingly, the Ombudsman disagreed with the Public Registry's submission that *"civil marriages can only be celebrated between persons who are identified or identifiable in the sense that such identification has to be absolutely ascertained."* In fact, the Ombudsman noted that the Registrar relies on the refugee's own declaration of identity and status as declared in the PQ as a practical way of satisfying the requirement of identification. In conclusion, the Ombudsman found that the Marriage Registrar's policy in relation to the publication of the banns for irregular migrants constitutes a breach or threat to their right to marry as it is a restriction, limitation or prohibition that is not in pursuit of a legitimate aim and is not proportionate[231].

226 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.
227 Case No. P0096, Migrant's Family Reunited, Case Notes Number 35, January - December 2015.
228 Marriage Act, CAP. 255 of the Laws of Malta.
229 Article 7(5) of the Marriage Act, CAP. 255 of the Laws of Malta.
230 The PQ, completed by RefCom once an asylum application is filed, contains the applicant's personal details, including name, surname, parents' names and surnames, etc.
231 Case No I 466, Immigrants Right to Marry, August 2009, Case Notes Number 28, October 2009.

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232 Not in force at the time of writing

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