TECHNICAL COMMENTS ON BILL NO. 2 OF 2022

JUNE 2022

AUTHORS

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aditus foundation
1A, Rhea Building,
Triq is-Santissima Trinitá,
Ħamrun MRS 2280,
Malta
+35620106295 | www.aditus.org.mt | info@aditus.org.mt

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BACKGROUND

Bill No. 2, the International Protection (Amendment) Bill, was presented in Parliament on 7 May 2022. At the time of writing these Technical Comments, the Bill was before Parliament, yet we received no invitation to discuss or consult. We appeal to the Ministry and to Parliament to promote a consultative approach to law-making, particularly in situations involving highly technical matters that require in-depth knowledge and experience working in the relevant fields of law, such as EU asylum law.

Our input is based on our years of experience working with asylum applicants and beneficiaries of international protection, coupled with a sound knowledge of international, EU and national law/jurisprudence. In line with the fundamental human rights to seek asylum, we advocate for procedures that are:

- **Fair** - it should be a procedure that is effectively and equally accessible to all persons wishing to exercise their fundamental right to seek asylum, irrespectively of country of oiling or other consideration. Administrative or practical hurdles that impede the exercise of this right should be removed, in particular where these affect vulnerable applicants such as children, persons with mental health issues, and persons otherwise encountering difficulties understanding their rights and obligations;

- **Effective** - asylum and humanitarian assessment procedures should be capable of distinguishing between who is and who is not in need of Malta's protection on the basis of an application of legal definitions consistent with international, EU and national definitions. Attention should also be paid to constantly evolving jurisprudence as a source of law and clarity;

- **Just** - seeking protection does not commence and stop at application stage, but is a continuous process staggered over several stages. It is imperative that all these stages guarantee procedural fairness in terms of real access to information and advice/support (including from NGOs), adequate time for preparation in

suitable conditions, sensitive interviews, impartial assessments and - importantly - real access to effective remedies.

It is with these principles in mind that our commentary on Bill No. 2 welcomes a number of its provisions. Notably, we are happy to see a clarification on the nature of the appeal procedure, in line with EU law and jurisprudence. We also welcome the simplification of the subsequent application process, acknowledging the reality faced by most applicants in these situations.

We also express serious concern at proposed articles that limit procedural guarantees for some applicants. In recent years, Malta has introduced a series of measures seeking to limit the application and procedural rights of applicants, based on their country of origin. This includes a misapplication of the notion of 'safe country of origin', permissible under EU law yet with core safeguards that Malta has failed to introduce, an over-reliance on an unfair accelerated procedure for hundreds of applications and denial of subsistence possibilities for certain categories of persons.

Whilst we appreciate Malta's interest in securing the integrity of the asylum procedure and international protection rights, we find it unacceptable that nationals of specific states are penalised from their very first day they interact with Malta's asylum procedure. In particular, our concern relates to the following proposed measures:

- a limited understanding of what Malta's 'territory' is for the purposes of receiving asylum applications;
- a continued incorrect use of accelerated procedures for applications deemed to be manifestly unfounded;
- restriction of appeal and other procedural rights;
- the Agency for the Welfare of Asylum-Seekers is not the appropriate entity to provide asylum-related assistance to children.

OUR INPUT

Article 2: territorial application of the International Protection Act

This amendment specifies that Malta's asylum regime is limited to its territory and therefore excludes the possibility of any person requesting asylum in Malta's overseas representations.

Comments

The amendment is only a partial transposition of the corresponding text in the Procedures Directive. Article 3 of the Directive does in fact support a territorial scope to asylum, yet also clarifies that its understanding of 'territorial' includes the border, territorial waters and transit zones of Member States. Malta's omission of these latter 'spaces' seems to indicate its unwillingness to extend the right to asylum to persons physically present there.

Although it is clear that any definition of a State's territory includes the areas at its and within its territorial waters, the Directive's specific reference to these spaces indicates is not a frivolous one. These spaces are of fundamental importance in assessing the quality of a person's access to asylum, since it is often at these spaces that border control operations interfere with a person's possibility of seeking safety. Furthermore, the Directive seeks to set aside the fiction that a person who is physically present on a Member State's territory is not legally present and, therefore, is not covered by national, EU or international law. This fiction is often applied to persons in airport transit zones and, in fact, embraced in the Immigration Act.

In the Maltese context, the latter scenario is particularly relevant as the Immigration Act establishes an efficient procedure for the removal of any person denied entry to Malta. Following a decision to deny entry to a person, immigration authorities are able to ensure a person's return on the same flight that brought them to Malta. This generally happens within a half hour. Where this is not possible, the person is detained until the next available flight. Unlike the forms of administrative detention, when a person denied entry at the border is detained, they do not enjoy any procedural

guarantees: no access to information, no effective remedy to challenge their detention. Within these rapid and often invisible procedure, the possibility of Malta excluding this space from its asylum scope runs the risk of Malta returning refugees to the countries they are fleeing from.

We acknowledge that, over the years, solid practices have been established whereby persons indicating a wish to seek protection at Malta's airport are promptly referred to the International Protection Agency, their return postponed. An endorsement of this approach through the inclusion of the Directive's omitted text would clear any doubts as to Malta's intentions

Furthermore, Malta has in the past actively considered the possibility of directly resettling to Malta refugees from outside the EU. These welcome discussions have also continued in the context of the EU's initiatives towards establishing an EU Resettlement Scheme, as one of the measures securing refugees a safe and legal route to protection. In the eventuality that Malta opts to resettle individual refugees (including families), or where Malta could decide to open its overseas representations in response to a specific humanitarian crisis, it is advisable that the legal basis for this be clearly enshrined in the national asylum framework with the safeguards Malta feels it requires for this possibility to be well-managed.

Recommendations

A. Include the Directive's full text.

Article 4: definition of 'manifestly unfounded'

This proposed amendment does not alter the substance of the current provision.

Comments

Whilst this amendment carries little substantive weight, it nonetheless indicates Malta's intention to maintain an accelerated procedure that is contrary to international and European law. This has been repeatedly highlighted in earlier submissions to the Ministry in the context of similar transposition exercises.

While the Procedures Directive recognises the possibility of determining an asylum application to be manifestly unfounded, it nonetheless provides that such

determination is a substantive one and not a procedural filtering system that channels applicants to an accelerated procedure. The Directive includes these decisions in the list of decision against which an effective remedy must be granted.

Malta's accelerated procedure, triggered *inter alia* by applications deemed to be manifestly unfounded, denies asylum-seekers the possibility to exercise their right to an effective remedy since they are not permitted to appeal the decision that their application was deemed to be manifestly unfounded. This is clearly contrary to the Procedures Directive.

This concern is further exacerbated by the fact that most asylum-seekers are presented with this 1st Instance decision whilst in detention. Under current procedures, where asylum-seekers are deprived of effective communication with legal advisers, they present fundamental information relating to their applications without ever having spoken to a lawyer or without having received any information whatsoever on the asylum procedure. Again, this is contrary to the spirit and wording of the EU asylum acquis.

Recommendations

B. Eliminate the procedural relationship between decisions determining applications to be manifestly unfounded and the accelerated procedure, converting these decisions to substantive rejections.

Article 5: scope of appeals to the International Protection Appeals Tribunal

The amendment clarifies the nature of the 2nd Instance, adding key terminology from the Directive stating that International Protection Appeals Tribunal is required to conduct a *"full and ex nunc examination of facts and points of law"*.

Comments

This is a welcome amendment since the current Act's formulation is contrary to the Directive and CJEU jurisprudence in not requiring a full and ex nunc examination of facts and points of law.

Recommendations

C. Adopt the amendment in full.

Article 5: no appeal from withdrawal decisions in cases of 'unequivocal renunciation'

Through amendments adopted in December 2021, for which no consultation was invited nor information provided, the Procedures Regulations authorise the IPA to withdraw international protection from protection beneficiaries who, in its IPA, have *"unequivocally renounced"* their protection. Such a decision may be reached in situations where, for example, a beneficiary confirms such renunciation in writing or a beneficiary does not renew their protection documentation within 12 months from their expiry.

Following this revocation, a beneficiaries need to apply with the IPA to have their international protection reinstated in a procedure that is unclear and, seemingly, without recourse to an effective remedy.

This amendment to the Act provides that beneficiaries stripped of their protection on this basis are not entitled to an appeal.

Comments

Primarily, the 1954 Refugee Convention does not envisage the possibility of States stripping refugees of their protection for a purely administrative consideration, being the failure to renew documentation. In fact, the Convention is extremely strict in exhaustively listing those situations wherein a refugee's protection may be revoked, focusing on the lack of need of international protection due to the refugee's acquisition of national protection rights such as nationality.

On this basis we are extremely concerned that the power granted to the IPA to strip protection in this manner is wholly unacceptable as it may deprive refugees from the protection they need and are entitled to, including protection from to *refoulement* but also from material and other forms of deprivation.

Without prejudice to these considerations, our concerns are heightened by this proposed amendment as refugees and subsidiary protection beneficiaries deprived of their international protection will not be entitled to appeal this decision. Deprivation of international protection may have devastating consequences on a refugees and is, essentially, not a mere procedural decision but a substantive one. As such, therefore, beneficiaries receiving such decisions should be entitled to file a full appeal before the IPAT.

Recommendations

D. Reject the amendment.

E. Delete the concept of *"unequivocal revocation"* from the IP Act.

Article 6: submission of new information for subsequent applications

The proposed Article 7A(2) reduces the burden currently placed on applicants by removing the requirement to present new facts/evidence within 15 days of becoming aware of such information.

Comments

This is a welcome amendment as it acknowledges the real challenges currently faced by applicants in preparing subsequent applications within the required timeframe. Furthermore, it brings the procedure in line with CJEU jurisprudence:

> *"Article 40 of the Procedures Directive does not provide for such time limits and when read in the light of Article 33 (2) prohibits Member States from subjecting the lodging of subsequent applications to full-limitation periods."* CJEU (Third Chamber) of 9 September 2021. XY v Bundesamt für Fremdenwesen und Asyl. Request for a preliminary ruling from the Verwaltungsgerichtshof. Case C-18/20

Recommendations

F. Adopt the amendment in full.

Article 8: young applicants to be assisted by AWAS

This amendment will bring the IP Act in line with recent amendments to the new Minor Protection (Alternative Care) Act, whereby unaccompanied children seeking asylum are placed under a Care Order via judicial pronouncement, which judgements also appoint AWAS' Chief Executive Officer as the child's legal guardian.

Comments

Malta's system for the care and custody of asylum-seeking children has been under review for several years. These comments are not intended to provide a general overview of the existing system or its strengths and weaknesses, but to focus on a key element subject of the present proposed amendment. As reiterated in earlier comments, we do not agree with a system whereby AWAS is entrusted with the guardianship of unaccompanied minors. We remain concerned that, *"the multiple roles and responsibilities of persons currently working as representatives for UAMs couples with limited capacity and resources may result in conflict of interest issues to the detriment of the minors."*

AWAS performs several key roles in relation to children:

- Early identification efforts at the point of disembarkation;
- Referral of details of persons claiming to be UAMs to the Director (Child Protection Services) for the purposes of the Minor Protection Act;
- Undertakes the age assessment procedure, reaching a decision on whether a persons claiming to be a UAM is a child or not;
- Care and custody of children;
- Assistance in the asylum procedure, and other formal procedures;
- Provision of accommodation and care in Dar il-Liedna and HTV;
- All other tasks relating to the welfare of children.

It is clear that it's involvement in so many aspects of the child's life do not only pose a huge strain on the Agency's capacity but, in particular, positions it in several situations of conflict of interest. We have encountered several such instances in our work with UAMs and, inevitably, the burden of these short-comings is borne by the children themselves. In relation to this particular proposed amendment, we question whether AWAS enjoys sufficient technical capacity in asylum matters to assist UAMs throughout the procedure.

Recommendations

G. Adopt the amendment, in order to reflect existing provisions in other legislation. Yet commit to exploring alternative guardianship options that will ensure a quality and independent service with the child's best interests in mind, including with the support of entities such as the European Guardianship Network.

Article 9: new ground to terminate Temporary Humanitarian Protection

In terms of this proposed amendment, IPA would be allowed to revoke, end or refuse to renew THP in situations where the beneficiary did not originally meet the original eligibility criteria.

Comments

Whilst it is acknowledged that, in such situations, it is reasonable to expect the possibility of a revocation, ending or refusal to renew, we are concerned that the equally reasonable assumption of access to an effective remedy is ignored. It is a clear principle of law and natural justice that all persons should be able to appeal a decision taken in their regard by an administrative authority.

Recommendations

H. Include this scenario as one wherein a THP beneficiary is granted access to an appeal procedure.

Article 9: down-grading of procedural guarantees for beneficiaries of Temporary Humanitarian Protection

With this amendment, the current proviso to Article 17A(3) will be removed. The proviso refers to Article 22, which article set out the procedure for IPA to revoke, end or refuse to renew subsidiary protection. Essentially, Article 22 grants SP beneficiaries faced with a potential revocation of international protection the possibility to submit reasons why the protection should not be revoked. By deleting the proviso from Article 17A(3), THP beneficiaries faced with an IPA revocation decision will be denied any appeal possibility.

Comments

The comments made above are replicated here. Whilst it is acknowledged that, in such situations, it is reasonable to expect the possibility of a revocation, ending or refusal to renew, we are concerned that the equally reasonable assumption of access to an effective remedy is ignored. It is a clear principle of law and natural justice that all persons should be able to appeal a decision taken in their regard by an administrative authority.

Recommendations

I. Grant THP beneficiaries faced with a revocation decision the right to file a full appeal.

Article 10: exclusion from subsidiary protection in situations of previous criminal activities

This proposed amendment would allow the IPA to end the international protection of SP beneficiaries in situations where they would not have been eligible for it if they reached Malta with the sole intention to avoid punishment for the commission of a crime committed prior to their arrival in Malta.

Comments

We find this proposed amendment to be superfluous since Article 17(1)(b) already reflects (albeit limitedly) the exclusion criteria adopted from Article 1F9b) of the 1951

Convention. The IP Acts already excludes from eligibility to subsidiary protection persons who "*committed a serious crime*". The proposed amendment would apply in a context having two elements: commission of a non-serious crime, and flight from prosecution.

Owing to the similarity of the the proposed amendment to the existing provision taken from the Convention, we refer to UNHCR's comments relating to the interpretation of the Convention provision:

> *"151. The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime...*
>
> *156. In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.*
>
> *157. In evaluating the nature of the crime presumed to have been committed, all the relevant factors – including any mitigating circumstances – must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates."*

We also underline that flight from prosecution could fall within the definition of 'persecution' for the purposes of assessing a need for international protection. This

would occur in situations where the applicant is could face an unfair trial due to, for example, their ethnic origin, gender, religious affiliation, or other protected ground.

Recommendation

J. Reject the amendment.

Article 11: manifestly unfounded applications only where applicants do not qualify for international protection

This proposed amendment adds a proviso to Article 23(1) of the IP Act, stating that applications may only be determined to be manifestly unfounded only where the IPA decides that the applicant does not qualify for international protection.

Comments

We feel that by adding a substantive element to decisions that applications are manifestly unfounded, the proposed amendment adds further confusion and illegality to an already muddled concept. Manifestly unfounded applications are channelled through the accelerated procedure, wherein applicants are not entitled to any appeal including on IPA's assessment that the application is manifestly unfounded.

Without this proposed amendment, the lack of access to an effective remedy is already in clear violation of international and EU law, as mentioned above. We are extremely concerned that the proposed procedure would enable the IPA to conduct a full assessment of an application, to effectively reject it on substantive grounds yet to then channel through a procedure wherein no appeal is possible. Whilst the proposed amendment seems to be incorporating current IPA practice into the IP Act, it is clearly unacceptable as a violation of a fundamental principle of EU and national law.

Recommendations

K. Reject the amendment.