

Malta Refugee Council

Input to the EASO Annual Report 2021

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MALTA REFUGEE COUNCIL



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The Malta Refugee Council

The Malta Refugee Council is a network of Maltese non-governmental organisations working for the promotion of the fundamental human rights of persons in forced migration. The Council's mission is to advocate for legislation, policies and practices that are in accordance with Malta's international obligations and best practice in the sector. Furthermore, the Council seeks to foster an environment that is welcoming and inclusive of refugees.

In order to fulfil its mission, the Council engages in Policy Papers on key themes, Press Statements and other public interventions, and Advocacy Meetings with Stakeholders.

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Detention of Asylum-Seekers (Mid-2018 – today)

At the time of writing, Malta's detention regime is a combination of various elements. Centrally, the 1970 Immigration Act, amended several times over the years, is the main national instrument regulating border control, detention, expulsion, and residence in Malta. A series of transpositions of relevant EU norms resulted in a legal framework that is not entirely harmonised in relation to administrative detention, removal and relevant procedures.

The current regime is therefore composed of elements of Malta's pre-transposition combined with provisions from relevant EU Directives. Some situations, particularly in relation to administrative detention, are characterised by conflicting legal norms.

Malta's detention regime today is therefore composed of the following regimes:

1. The Reception Regulations, reflecting the provisions of the Reception Conditions Directive. This detention regime is not discussed in this submission;
2. Public health legislation, introducing a new dimension to Malta's treatment of asylum-seekers. This is presented below;
3. No legal basis, as explained below.

It is to be noted that at the time of writing this submission, all asylum-seekers intercepted or rescued at sea are automatically detained.

Detention of asylum-seekers on public health grounds

Legal Basis

In response to the dramatic rise in numbers of arrivals of asylum-seekers by sea in mid-2018, until the end of 2020 Malta automatically detained all asylum-seekers reaching Malta by boat. To this end, the authorities relied on the 1982 Prevention of Disease Ordinance containing a provision which enables the Superintendent of Public Health to restrict personal movements. Article 13(1) states:

“Where the Superintendent has reason to suspect that a person may spread disease he may, by order, restrict the movements of such person or suspend him from attending to his work for a period not exceeding four weeks, which period may be extended up to ten weeks for the purpose of finalising such microbiological tests as may be necessary.”

Upon arrival, asylum-seekers to be detained under this legal regime were handed a template document signed by the Superintendent of Public Health stating that in order to prevent spread of a contagious disease and on the basis of the Ordinance, his/her free movement is being restricted. The document did not explicitly inform individuals that they were about to be detained on the basis of public health legislation.

The document was available in a number of languages, yet we have seen documents in Arabic being given to nationals of Bangladesh and Pakistan. We also noted how on many documents, individuals are not identified by their names and surnames but merely by their Police Immigration Number.

The document does not contain information as to whether the decision to restrict movement may be questioned or challenged.

It is also noteworthy that, in the context of immigration detention, this Article has only been relied upon to detain asylum-seekers and not other groups of migrants.

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Following the presentation of this document, usually during the first encounter between the asylum-seekers and the authorities just after disembarkation from a rescue at sea operation, no further information was provided and no further procedures were conducted. Asylum-seekers were channelled through the standard procedure for health screening, being chest X-rays for the purpose of identifying cases of tuberculosis. Additionally, regular testing for COVID-19 was also initiated during 2020. These medical procedures were usually triggered a few days or weeks following arrival and results generally available within days – at most a couple of weeks – of the tests.

We are unable to ascertain the exact number of asylum-seekers detained under this health regime, as queries we sent to the Superintendent of Public Health remained unanswered at the time of writing this report. Attempts to gather the information via Freedom of Information Requests were equally unsuccessful.

Human Rights Concerns

Malta's detention of asylum-seekers on the basis of national health legislation presents a series of concerns in relation to its compatibility with international and European standards.

At the outset, it must be underlined that the detention of asylum-seekers on health grounds is not envisaged in the recast Reception Directive or in the national Reception Regulations. Whilst a discussion may be had over which law ought to take precedence in a case of conflict – the Reception Regulations or the Prevention of Disease Ordinance – this discussion would ultimately be an entirely abstract and futile exercise since, as explained below, the Ordinance may not be relied upon to detain asylum-seekers.

The health legislation and its implementation in this context presents a series of concerns, discussed below:

1. It is not a permitted ground for detaining asylum-seekers under international, EU and national law;

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2. In terms of the Ordinance itself, in case of such a reasonable suspicion that a person may spread a contagious disease, the Superintendent of Public Health is only permitted to restrict a person's free movement and not entirely deprive of his/her liberty;
3. A maximum period of four weeks is permitted, only extendable to 10 weeks in exceptional cases;
4. The reasonableness of the suspicion that asylum-seekers arriving by boat may spread contagious diseases is dubious, not based on a case-base scientific assessment and tantamount to discrimination;
5. It is applied even in the case of vulnerable applicants and children, despite national law and policy underlining that vulnerable persons and children will not be detained
6. No effective remedy is provided against such form of detention. There are no procedural guarantees in relation to this form of detention, saving the habeas corpus process under the Criminal Code, Article 409A.

Detention on health grounds is not envisaged under rules pertaining to detention of asylum-seekers

The detention of asylum-seekers is strictly regulated by EU and national law through the recast Reception Conditions Directive, establishing the exhaustive list of grounds on which such detention may be imposed and also the necessary procedural guarantees that must be provided. Protection of public health is not included in this list of permitted grounds.

It may be argued, of course, that asylum-seekers are subject to the State's entire spectrum of legal regimes, together with asylum norms. Under such other regimes, including public health legislation, their detention could certainly be envisaged. Yet observation of practice revealed a number of features indicating that the Ordinance was consistently and exclusively applied to asylum-seekers reaching Malta by sea. Persons travelling to Malta from the asylum-seekers' countries of origin, or via the same countries

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through which they would have transited before reaching Malta, were not subject to the same deprivation of liberty on public health grounds.

These observations indicate the probability that the Ordinance was relied upon as a tool of migration management, rather than an instrument to protect public health. In doing so, it may be said that the Superintendent of Public Health as implemented the detention of asylum-seekers under the Ordinance in bad faith and not in genuine observance of the aims and objectives of the public health legal regime. By shifting away from public health considerations and towards a migration management approach, the authorities ought to have applied the specific legal norms that actually apply to this approach, i.e. immigration and asylum norms.

Reference is also made to Article 5(1)(e) of the European Convention of Human Rights:

“Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants...”

Whilst it may be argued that this provision allows Malta to detain persons on public health grounds, it must be also underlined that this possibility carries with it a series of procedural and substantive guarantees in order to ensure persons are not deprived of their liberty in a manner which is arbitrary or disproportionate.

The jurisprudence of the European Court of Human Rights (ECtHR) on Article 5 has repeatedly underlined those elements that must be observed by States when implementing measures resulting in the deprivation of a person’s liberty. These guarantees emerge from Article 5 itself, from general principles laid down by the Court in its interpretation of the Article and from specific considerations to paragraph (1)(e). In principle, the ECtHR requires: the list of detention grounds must be interpreted strictly in

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view of their exceptional nature; scrupulous adherence to the rule of law must be observed procedurally and substantively in order to ensure the lawfulness of the detention; a prompt or speedy judicial review of the State's decision to detain is fundamental.

The Convention requires detention to be in accordance with national law and with relevant standards contained in international law. In order to avoid arbitrary detention, the Court requires good faith in the use of detention, that the actual detention conforms to the purpose of the permitted grounds, and that the place of detention is related to its purpose. Detained persons should be informed of the reasons for their detention in fact and in law and Article 5(4) requires States to ensure the right to an effective remedy whereby the lawfulness of the detention may be speedily reviewed by a body of "judicial character".

With specific reference to the possible use of detention to prevent the spread of a contagious disease, as per Article 5(1)(e) of the Convention, the ECtHR has stated:

"It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1(e) of Article 5 to be deprived of their liberty is not only that they are a danger to public safety but also that their own interests may necessitate their detention.

Taking the above principles into account, the Court finds that the essential criteria when assessing the "lawfulness" of the detention of a person "for the prevention of the spreading of infectious diseases" are whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist."

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We are of the opinion that Malta's use of the public health regime in order to detain asylum-seekers entering Malta by sea failed to observe most of the above criteria. As underlined above, there is no national law basis for this detention regime. Furthermore, its application was indicative of arbitrariness and bad faith on the part of the health authorities: it was applied in a discriminate manner only to asylum-seekers rescued at sea and to no other person entering Malta; instead of being relied upon for public health purposes it was used as a tool of migration management; the place of detention no way conformed to the intended purpose of a public health regime. We have no evidence of the health authorities exploring any less severe alternatives in order to protect public health from an infectious disease in relation to which they have not provided any evidence as to its very existence.

Ultra vires: the relevant provision does not authorise deprivation of liberty

The Superintendent of Public Health informs detained asylum-seekers that they are being detained under Article 13(1) of the Ordinance:

“Where the Superintendent has reason to suspect that a person may spread disease he may, by order, restrict the movements of such person or suspend him from attending to his work for a period not exceeding four weeks, which period may be extended up to ten weeks for the purpose of finalising such microbiological tests as may be necessary.”

The wording of the law is clear and unambiguous: the Superintendent, being a public officer, is not authorised to detain a person but merely to restrict his/her movements. It is clear that the Ordinance is not granting the State the authority to deprive persons of their liberty on public health grounds. This reading is confirmed by other Ordinance Articles that authorise the detention of persons in order to protect public health, namely Articles 25 (Removal to hospital of infected person in certain cases by order of magistrate) and 26 (Detention of infected person without proper lodging in hospital by order of magistrate).

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Both articles contain specific rules, in acknowledgement of the exceptional nature of any measure depriving a person of his/her liberty:

1. an order from a magistrate is required, and not merely a decision of the Superintendent;
2. the person is to be detained in a hospital and not in a detention centre; and
3. the person is suffering from a disease, meaning a suspicion – however reasonable – does not warrant a person's detention.

It is amply clear that Malta's reliance on the Ordinance to detain migrants, as implemented, was contrary to the Ordinance itself.

Length of detention exceeds Ordinance time-limits

In addition to the above-mentioned observations, we note that the Ordinance allows the Superintendent to restrict movement “for a period not exceeding four weeks, which period may be extended up to ten weeks for the purpose of finalising such microbiological tests as may be necessary.”

Throughout 2020 hundreds of asylum-seekers were detained for over 5 months and some for up to ten months. At no stage did we come across persons who were formally notified that their deprivation of liberty was being extended due to the need to finalise microbiological tests.

No reasonable suspicion of spread of a contagious disease

The basis of the Superintendent's suspicion that asylum-seekers arriving by sea may spread a contagious disease was unclear. As mentioned above, persons travelling to Malta from the asylum-seekers' countries of origin, or via the same countries through which they would have transited before reaching Malta, were not subject to the same

deprivation of liberty on public health grounds. No explanation was given as to what elements gave rise to this suspicion, and why at that particular time.

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Detention with No Legal Basis

Throughout 2020 Malta detained asylum-seekers with no attempt to justify this on any legal basis. Whereas reliance on the public health regime in order to contextualise the detention of hundreds of asylum-seekers, mid-way through 2020 asylum-seekers rescued or intercepted at sea were systematically and automatically detained with no such context.

No documents explaining the detention were given to the asylum-seekers and when, in Court (see below) the Immigration Police were asked to explain the legal basis for the applicants' 'accommodation' in a detention centre, the authorities explained that the applicants were not under any form of detention. Our observation noted that applicants were placed in detention due to a lack of space in any of the open reception centres, resulting in a de facto detention of hundreds of applicants. We further noticed that applicants were being released from detention as space was being made available in the open reception centres.

Habeas Corpus Applications

Immigration detention under the above-described health provisions and also that under no apparent legal basis was pronounced to be illegal by Maltese Courts in a series of six cases brought by detained asylum-seekers at the end of 2019 and in 2020.

The cases were habeas corpus applications brought under Article 409A of the Criminal Code, whereby:

“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. Any such application shall be appointed for hearing with urgency and the application together with the date of the hearing shall be served on the same day of the application on the applicant and on the Commissioner of Police or on the public authority under whose authority the applicant is allegedly being unlawfully detained. The Commissioner of Police or public authority, as the case may be, may file a reply by not later than the day of the hearing.”

The men were detained in either Safi or Lyster Barracks (both detention centres), some for over 100 days. All men had been medically tested and cleared a few days or weeks after their arrival in Malta, yet their detention based on health grounds subsisted. Other applicants were detained under the latter detention regime, with no document or information provided as to the legal basis for their detention

The men detained under the public health regime were given a document informing them that their free movement was being restricted due to a suspicion that they could spread a contagious disease, yet this information was not always in a language understood by the applicants and the applicants were merely identified by their Immigration Number.

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All applications were successful in their applications, with the Court ordering their immediate release from detention. In one particular application, the Magistrate described the situation as “*abusive and farcical*”.

In relation to the applicants detained under the health regime, the Office of the Attorney General and the Superintendent of Public Health did not object to any of the applicants’ claims, confirming that they had no reason to detain the applicants at the time of their Court applications.

The case documents of most of the applications, some also informally translated to English, may be found at the below links:

1. [Court of Magistrates \(Malta\) as a Court of Criminal Inquiry, Application of Zeeshan Saleem, 9 October 2019;](#)
2. [Court of Magistrates \(Malta\) as a Court of Criminal Inquiry, Application of Mohammed Abdallah Mohammed, 8 October 2019;](#)
3. [Court of Magistrates \(Malta\), Application of Frank Kouadioane, 29 October 2020, also \[here\]\(#\);](#)
4. [Court of Magistrates \(Malta\) as a Court of Criminal Judicature, Application of Koumari Salif et, 26 November 2020.](#)

Holding Asylum-Seekers Aboard Private Vessels for Over 1 month

Between May and June 2020 Malta detained over 400 asylum-seekers on board four private vessels just outside Malta's territorial waters. The four 'Captain Morgan' vessels used for this enterprise are shops generally used in the tourism sector for the organisation of tours and parties, and not for accommodating large groups of people over such long periods of time.

During their detention aboard the four ships, the men, women and children were denied access to the outside world. They had no means of communicating with anyone, also due to their location, and attempts to reach them were not acknowledged by the Maltese authorities. At no point were they provided with information or documentation relating to their situation or their future. Whilst Malta did provide supplies, it is clear from testimonies gathered that living conditions aboard the ships were extremely challenging for all persons aboard. Complaints on this incident were filed before the UN Special Rapporteur on the human rights of migrants, the UN Working Group on Arbitrary Detention, the CoE Committee for the Prevention of Torture and the EU Commission.

On 3 June the EU Commission urged Malta to disembark the asylum-seekers as soon as possible.

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The Accelerated Procedure

Article 23 of the International Protection Act establishes the accelerated procedure, whereby applicants fulfilling the enumerated criteria (applications deemed inadmissible or manifestly unfounded) are channelled through a fast-track process instead of the regular one.

Whilst we appreciate the possibility of relying on accelerated procedures, we are nonetheless concerned that Malta's accelerated procedure fails to meet the basic procedural guarantees to which all applicants are entitled. Once an application is processed in the accelerated manner, the applicant has no opportunity to appeal the decision defining the application as inadmissible or as manifestly unfounded.

The Act states that the review conducted by the International Protection Appeals Tribunal, within the Act's three-day limit, is to be considered an appeal - in Article 7(1A)(a)(ii) - yet no hearing or held and the appellant is unable to present written submissions in this review process. In most of the cases we are familiar with, the appellant was only informed of the decision to declare the application as inadmissible or manifestly unfounded quite some time after the decision and in the vast majority of cases after the confirmation by the Tribunal of such a decision.

In view of Malta's increased efforts at returning failed asylum-seekers to their countries of origin, and the addition of further countries to the list of safe countries of origin, this flagrant violation of EU law is extremely worrying.

An EU Commission complaint is also pending over this issue, together with a case brought before Malta's courts.

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