

JRS RECOMMENDATIONS FOR IMPROVED
PROTECTION OF ASYLUM SEEKERS IN MALTA

November 9, 2002

JESUIT REFUGEE SERVICE - MALTA

56, Lion Street
Floriana

Fax: 21 22 75 19

Tel: 21 22 75 21
99 21 44 45

info@jrsmalta.org

Introduction

The structures for the examination and determination of applications for refugee status, set up by the Refugees Act 2000, started functioning in October 2001. During its first nine months of operation the Office of the Refugee Commissioner received 194 applications and granted protection in 44 cases. In 10 cases the applicant was recognised as a refugee, while in the other 35 cases the applicants were granted humanitarian protection. Most of the asylum seekers whose application was rejected appealed to the Refugee Appeals Board, however none of these appeals were accepted.

Throughout this period, the Office of the Refugee Commissioner functioned efficiently, particularly in view of the very limited resources at its disposal and the enormous case-load, at least by Maltese standards, that it was compelled to deal with in its first few months of office. Asylum applications were examined individually, and the recommendation of the Refugee Commissioner regarding each application was delivered in writing to the applicant concerned together with the reasons for the acceptance or rejection of such application. Each applicant was interviewed personally and, to our knowledge, the Refugee Commissioner conducted a thorough investigation into the circumstances and merits of each case.

There are, however, a number of issues, particularly regarding the appeal stage of the procedures, which are of concern to the **Jesuit Refugee Service - Malta**. We believe that these have to be dealt with as soon as possible in order to ensure that the rights of asylum seekers are adequately safeguarded and that all those people who need protection are effectively recognised and granted asylum.

We understand that the creation of truly fair and efficient asylum procedures is an end that cannot realistically be achieved in a matter of months, by simply setting up the basic structures. It is an ongoing process, which requires a firm commitment towards constant evaluation of existing structures and procedures, both by the decision-making bodies themselves as well as by concerned individuals and organisations. There must also be a readiness on the part of the authorities concerned to accept constructive criticism and to effect all the changes that may be necessary to ensure that the rights of asylum seekers are effectively safeguarded at all stages of the procedure.

This document examines the issues that, in the view of JRS, raise concerns regarding the adequacy of the protection provided to asylum seekers throughout the procedures for the examination of their application for protection. It also contains recommendations intended to enhance the protection provided at present by the new legal regime, set up by the Refugees Act, 2000.

JRS Recommendations for the improved protection of asylum seekers in Malta

As a party to the 1951 Convention on the Status of Refugees and the 1967 Protocol and various other international human rights instruments, Malta is obliged to offer effective protection to all who need it.

This implies first and foremost that those people who need protection are identified, and it is for this purpose that asylum procedures are created. It implies also that these procedures must be administered fairly, in a manner that ensures that each asylum seeker is given the opportunity to present his case fully and receives a fair hearing at every stage of the proceedings. This is the only way of guaranteeing that all in need of protection are effectively identified.

This document examines the procedures for the examination and determination of applications for refugee status in Malta, set up by the Refugees Act 2000. It is not intended to be exhaustive, but rather to outline the improvements that JRS believes are urgently required in order to enhance the protection presently provided to asylum seekers in Malta, within the context of the status determination procedures.

JRS makes these recommendations in the hope that steps will be taken by the authorities concerned to make the improvements that are necessary to ensure that the rights of asylum seekers are adequately safeguarded at every stage of the proceedings.

The most effective procedures are utterly useless if asylum seekers are denied access to them. JRS re-affirms the fundamental importance of allowing every person, who is within the effective jurisdiction of the Maltese government and who claims to need protection, to apply for asylum. To fail to do so would be a breach of Malta's international obligations, and could have fatal consequences for the person concerned.

Asylum seekers' access to asylum procedures could be barred by refusing admission to asylum seekers and returning them to their country of origin or a third country without allowing them to apply for protection. It could also be restricted by the imposition of time limits beyond which asylum seekers are no longer allowed to apply for protection, even if they show good reason for having failed to apply within a reasonable time.

JRS believes that there should be no restriction or limitation on an asylum seeker's right to apply for protection, as this could result in an asylum seeker being returned to his country of origin in violation of Malta's international and national legal obligations.

This document is divided into four sections, the first dealing with information that should be provided to the asylum seekers so that they are able to effectively exercise their rights and fulfil the procedural obligations imposed on them by law. The second section underlines the importance of providing training to those persons who, though not involved directly in the decision making process, could have a significant impact on the protection that asylum seekers ultimately receive. The third deals with the mechanisms that need to be put in place in order to ensure that asylum seekers are able to exercise their legal rights. The final section deals with the concerns of JRS regarding the appeal stage of the proceedings.

Information provided to asylum seekers

The Refugees Act 2000 (Act XX of 2000) places an obligation upon the immigration officer to inform each person who intends to apply for asylum of his right to apply to the Office of the Refugee Commissioner and to contact the representative of the United Nations High Commissioner for Refugees.

Moreover, at the initial interview with the Refugee Commissioner, the asylum seeker is briefly informed of his rights and obligations throughout the procedures. He is provided with a written list of such rights and obligations, which is available in both English and Arabic. Where the applicant speaks another language, the interpreter explains the content of the document to him in a language he understands.

From this point on the applicant is not provided with any further information, whether regarding the procedure that will be followed to determine his claim or regarding the progress of his application for protection, until after his initial application has been determined. When an application is rejected, the asylum seeker is then provided with some information regarding the manner in which he can file appeal if he wishes to do so.

JRS believes that asylum seekers should be provided with more information regarding their rights and obligations, as well as regards the asylum procedures, both in the initial stages of the process and throughout the proceedings, particularly regarding the following matters.

General and specific information regarding the procedures

Many asylum seekers are not familiar with our relatively sophisticated methods of examining applications for status. Moreover, a number of them come from countries where they have very good reason to mistrust people in authority and governmental institutions.

It is therefore important to explain to asylum seekers, not only that they have a right to apply for refugee status, but also what such application implies in practice: the procedures to be followed, the legal framework within which such application will be examined, and other relevant information. They also need to be assured of the absolute confidentiality with which all the information they submit to the adjudicating authorities will be treated.

Asylum seekers should also be able to obtain information about the progress of their applications throughout the procedures. At present, it is practically impossible for them to obtain such information, particularly if they are detained.

Once their application is determined, they need to be informed of their legal position whatever the decision of the Refugee Commissioner. Persons recognised as refugees or granted humanitarian protection should be informed of their position at law, and of the rights, if any, which the status confers upon them. Those persons whose application is rejected too should be informed of their legal position, given the opportunity to evaluate the options available to them in the circumstances and take decisions about their future, if it is possible for them to do so. Rejected asylum seekers may not be refugees, but they are people nonetheless. As such they should be treated with dignity and allowed to assume some form of control over their lives and their future, to the extent that this is possible.

JRS recommends that:

- **Steps are taken to ensure that, at the outset, asylum seekers receive information about their rights and obligations, about the procedure that will be followed to examine and determine their application for refugee status, and the manner in which any information that they submit will be treated.**
- **Asylum seekers are provided with information about the progress of their applications throughout the procedures.**

- **The authorities assign trained professionals, preferably social workers, to handle the cases of these persons on an individual basis. These professionals would be charged with providing the necessary information to asylum seekers from the moment of their asylum application to the moment their application is determined, whatever the outcome. They would also be in a position to assist the asylum seeker to exercise his legal rights effectively.**

Legal assistance and access to High Commissioner

In terms of the Refugees Act (Act XX of 2000) and the Asylum Procedures (Application for a Declaration) Regulations, 2001 (LN 253 of 2001) the applicant is informed of his right to legal assistance throughout the procedures at the initial interview with the Refugee Commissioner. Moreover, in terms of the said Act, the immigration officer who receives the application for refugee status informs the asylum seeker of his right to contact the High Commissioner.

To our knowledge the interviewing officer does not explain to the applicant that the assistance of a lawyer and/or the High Commissioner could be very valuable in ensuring proper protection of his rights.

Moreover the applicant is not given the means to avail himself effectively of this right. He is not provided with a list of organisations that provide free legal assistance, nor with instructions regarding the steps he must take to be provided with a lawyer through the state legal aid system. Without a list of names, addresses and telephone numbers, or, very often, access to a telephone or a phone-card, it is difficult for the applicant to be able to call the lawyer of his choice or to contact the High Commissioner.

As a matter of fact, few if any asylum seekers are assisted by a lawyer at first instance. Some seek legal advice at appeal stage, and the vast majority of applicants for refugee status consult a lawyer only after their appeal has already been filed, or even decided.

JRS recommends that:

- **The importance of being assisted by a legal advisor at all stages of the procedure is explained to each applicant for refugee status as early as possible in the proceedings, preferably as soon as he expresses his intention to apply for asylum.**
- **As soon as he expresses his intention to apply for asylum, each asylum seeker is given sufficient information, in a language he understands, to be able to effectively exercise his right to legal assistance and/or to contact the High Commissioner at all stages of the asylum procedures. This should include practical information such as contact phone numbers, names, and all other instructions that may be necessary for him to obtain the required legal assistance, whether from a private lawyer or through the state legal aid system, or to contact the High Commissioner as the case may be.**
- **Where necessary the asylum seeker should be provided with access to a telephone and provided with the means to make the call to the legal advisor of his choice or to the local representative of the High Commissioner.**

- **When an asylum seeker requests legal assistance, he is given sufficient time to contact the lawyer of his choice and discuss his case with him/her before the proceedings for the determination of his application start or resume, as the case may be.**
- **Detained asylum seekers are allowed to contact their lawyer whenever they need to do so, and to speak with him/her in private.**

Procedural rules for filing appeals

After the asylum seeker's initial application has been examined and determined by the Commissioner, the asylum seeker is notified with two documents, an Eligibility Recommendation and a Confidential Memo. The former states whether or not the application has been accepted, and in cases of rejected applications, the procedure to be followed when filing an appeal, while the latter explains the reasons for the decision of the Commissioner.

The eligibility recommendation of the Refugee Commissioner is usually written in English, however, in case of applicants who speak Arabic, it is accompanied by an Arabic translation. It is not clear whether this service is provided even to asylum seekers who speak other languages. The Confidential Memo is always written in English.

Asylum seekers who are not familiar with the English, particularly those who are detained and are unable to go personally to the Refugee Commissioner's Office to ask for clarification, often fail to understand the content of these documents fully. Therefore they are often uncertain of the reasons for the rejection of their initial application, and at times they fail to realise that they have a limited time within which to file an appeal.

It is extremely important that all asylum seekers are able to understand fully the procedural rules they are expected to follow in submitting applications and appeals under the Refugees Act, as delay in filing an appeal could have a determining effect on the outcome of such appeal.

Moreover in order to be able to appeal from a decision they must be able to understand the motives for the Refugee Commissioner's rejection of their application first.

JRS recommends that:

- **Where an applicant does not understand English, the contents of the Eligibility Recommendation and the attached Confidential Memo, particularly the procedural rules for the filing of appeals and the reasons for the rejection of his application, are explained to him clearly in a language he understands.**

Training of immigration police, armed forces personnel and interpreters

There are a number of officials who, though not directly involved in the decision-making process, have a considerable impact on the quality of treatment and protection which asylum seekers receive.

We have identified two groups of officials who come in contact with asylum seekers at different points in the asylum procedures. The first are immigration officials and army personnel and the second are interpreters. The manner in which these people fulfil their role could have a significant effect on the eventual outcome of the determination process.

It is therefore important that they are given proper preparation in order to ensure that asylum seekers receive the best possible protection of their rights at all times.

Immigration officers/police and army personnel

Immigration officers are often the first persons who come in contact with asylum seekers. In terms of the Refugees Act 2000 (Act XX of 2000) these officers are charged with the responsibility of informing each asylum seeker of his right to apply to the Office of the Refugee Commissioner and to contact the representative of the United Nations High Commissioner for Refugees.

A number of immigration police are also responsible for detaining asylum seekers and immigration detainees. In view of the recent increase in the number of asylum seekers and undocumented migrants arriving in Malta by boat, the Armed Forces of Malta are also heavily involved in the reception of these persons.

It is important that these officials are made aware of Malta's obligations towards refugees and other persons in need of protection, and, particularly in the case of border officials, of their obligations in terms of the Refugees Act 2000. It is also indispensable that they receive the necessary training to enable them to identify an asylum claim and to refer it to the competent authorities.

Those officials who are working at detention centres should receive training regarding the special situation of the persons in their care.

It should be said that, by and large, detainees speak highly of many police officers and soldiers who work at the detention centres. They appreciate the sympathy, kindness and concern that many show towards them. On occasion however, certain incidents occur which cause offence or unnecessary suffering to the detainee. As a rule, such incidents demonstrate not malice or racist motivation on the part of the guard, but a lack of sensitivity towards people of other cultures and faiths, and a lack of awareness of the plight of the detainees in their care.

The training of detention centre staff too, should include information on the right of asylum and the causes of refugee movements. It should also focus on appropriate ways of dealing with persons from different cultures and faiths, recognizing the symptoms of psychological disturbances that detainees may exhibit, and the manner in which they should treat persons in detention.

JRS recommends that:

- **Immigration officers are made fully aware of their legal obligation to allow all persons in need of protection to apply for refugee status, and to inform them of their basic rights as asylum seekers.**
- **Border guards and immigration officers receive training to enable them to recognise an asylum claim and deal with it in a manner consistent with Malta's international obligations.**
- **The staff at detention centres, be they police officers or soldiers forming part of the Armed Forces of Malta, receive training that includes information on the right of asylum and the causes of refugee movements. It should also focus on appropriate ways of dealing with persons from different cultures and faiths,**

recognizing the symptoms of psychological disturbances that detainees may exhibit, and the manner in which they should treat persons in detention.

Interpreters

The Refugees Act, 2000 stipulates that where necessary an interpreter shall be provided for the applicant.

Where possible, such interpreter should have received at least basic training in providing interpretation, and should be made aware of his responsibilities, not least that of observing the most absolute confidentiality and impartiality. This is fundamental if the applicant is to be expected to trust the interpreter appointed to assist him during his interview with the Refugee Commissioner.

To date the choice of interpreters has been conditioned by the very real limitations of local resources and, to our knowledge, none have actually been trained to provide this service. We are aware that, in a country the size of Malta, the authorities concerned could encounter serious difficulties, particularly when it comes to finding trained interpreters for applicants who speak less-known languages or dialects. It should however be possible to ensure that there are trained interpreters at least for the languages most commonly used.

The assistance of a competent interpreter is vital for an applicant, who speaks neither English nor Maltese fluently, to receive a fair hearing and make his case for refugee status, which in most cases hinges almost completely on the interview conducted by the Office of the Refugee Commissioner. Every effort must therefore be made to ensure that, whenever necessary, a competent and qualified interpreter is present during the interview.

JRS has come across cases where the applicant alleged that he did not feel that he could trust the interpreter appointed or where the applicant was concerned that the interpreter was not conveying all of what he was saying correctly to the interviewing official. These applicants therefore felt that the choice of interpreter had a negative impact on their ability to give a complete statement of the facts of their case and the reasons why they could not return to their country.

JRS therefore recommends that:

- **Every effort is made to ensure that where necessary the applicant is provided with the services of a qualified interpreter during his interview.**
- **An interpreter should always be considered necessary, except in those cases where the asylum seeker concerned can express himself fluently and confidently in either English or Maltese.**
- **The authorities concerned take steps to create pool of trained interpreters, by identifying persons who are able to speak particular languages, and providing them with formal training to enable them to provide a professional service.**
- **When appointing the person to act as interpreter in a particular case, every precaution is taken to ensure that, as far as possible, the interpreter is a person the applicant will trust.**

- **When the interpreter has to be a person whom he is already familiar with, the applicant should be asked, in private, whether he has any objection to that person's presence during the interview, unless he has chosen such person himself.**

Mechanisms that need to be put in place in order to ensure that procedures are fair

With the passage of time, the need to set up mechanisms necessary to ensure that the procedural rights of asylum seekers are adequately safeguarded, has become ever more urgent.

The following is an outline of mechanisms considered absolutely essential if we are indeed committed to ensuring asylum procedures are administered justly and every asylum seeker receives a proper hearing. In our view, without these structures it is not possible to guarantee that asylum seekers are able to exercise their legal rights effectively, in spite of the fact that the legal framework for such protection may exist.

a. Legal Aid

The Refugees Act 2000 states that, at appeal stage, asylum seekers are entitled to legal aid. This basically means that they are entitled to obtain legal assistance free of charge, through the government Legal Aid system.

Under the present system any person who wishes to avail himself of the option of applying for legal aid must make a request to the Advocate for Legal Aid, usually by going to his office at the Law Courts in person. The said Advocate will then assign the asylum seeker a lawyer from the list of Curators, Advocates and Legal Procurators 'Ex-Officio', established by the Code of Organization and Civil Procedure.

Besides the fact that an asylum seeker only has two weeks to file an appeal, which could not be sufficient to obtain the services of a 'legal aid' lawyer and prepare an appeal request, asylum seekers face other significant problems when they come to access the legal aid system.

The main problem is that the manner in which the system operates makes it very difficult for detained asylum seekers to access the system. They are unable to go to court to speak to the lawyer for legal aid personally, and the manner in which they should establish contact with the Advocate for Legal Aid in order to make the necessary request is not clearly established.

JRS recommends that:

- **A mechanism is established in order to allow asylum seekers, particularly those who are detained, to access the legal aid system, so that they can effectively avail themselves of their legal right to legal aid within the short time period available to them.**
- **Asylum seekers are informed of the procedure, preferably in writing, in a language they understand, and of the practical steps they must take to establish contact with the Advocate for Legal Aid to obtain legal assistance.**

b. Mechanism that would allow detained asylum seekers to ensure their appeal is filed on time

Asylum seekers whose initial application is rejected are informed in writing that they must submit an appeal from the recommendation of the Commissioner in writing, within two weeks from the notification of the negative decision, preferably by means of a registered letter.

Detained asylum seekers are not able to deliver their appeal personally or to post it themselves. Appeals are usually handed to the officer on duty who then delivers them. The appellant has no guarantee that the appeal will be delivered on time. On one occasion, an asylum seeker insisted that he had handed his written submissions to the officer on duty well before the time limit established by law for the filing of such appeal had expired. However, there was no record of his appeal being delivered to office of the Appeals Board.

It is clear that failure to hand in an appeal on time could have extremely negative consequences for the asylum seeker concerned. It is not quite clear whether or not late appeals are rejected outright, or if the Refugee Appeals Board will accept them of good reason is shown for such a delay. However, in view of the gravity of the possible consequences for the appellant, it is fundamental that asylum seekers are in a position to ensure that their appeals are handed in on time.

JRS recommends that:

- **Specific provision is made for the filing of appeals by persons in detention, as the existing procedures do not provide adequate safeguards.**
- **If possible officers at the detention centres are authorised to receive appeals on behalf of the Refugee Appeals Board, so that the moment an appellant hands his appeal to the official on duty at the centre it is deemed to have been received by the Board. This would allow the applicant to ensure that his appeal is indeed filed and filed on time.**

c. Procedure followed to hear and determine appeals

The Refugees Appeals Board (Procedures) Regulations, 2001 (LN 252 of 2001) states that, where appropriate the board will hold an oral hearing.

In actual fact, since it started functioning in October 2001, the board has not held any oral hearings. To our knowledge, not a single negative recommendation reached by the Refugee Commissioner has been overturned and no reasons are given for the rejection of these appeals. Appellants are simply informed by means of a brief letter signed by the secretary of the board, that their appeal has been rejected.

This does not mean the appeal procedures are necessarily flawed, however the fact that they are shrouded in secrecy does little to inspire asylum seekers' confidence in them. Moreover, this method of examining asylum claims, coupled with the fact that no reasons were given for the rejection of every single appeal that has been filed to date, raises serious questions about the adequacy of the appeal procedure and whether or not each

case is indeed being thoroughly reviewed.

Since the decision of the Refugee Appeals Board is final and binding and no appeal may be made from such decision to any court of law, greater transparency is necessary, in order to ensure that the appellant's rights are safeguarded.

JRS recommends that:

- **A greater degree of transparency is introduced in the procedures for hearing and determining appeals, so that not only is justice done but it is also be seen to be done, and asylum seekers may have confidence in the procedures for the determination of their applications for protection.**
- **The appellant and his legal advisor must always be allowed to attend the Board sitting where the appellant's case is discussed.**
- **In those cases where there is new evidence or where it is otherwise deemed necessary, the appellant must be allowed to present evidence to the Refugee Appeals Board during the sitting.**
- **Where the appellant is not allowed to give further evidence, he should at least be allowed to make submissions regarding the points raised during the sitting, whether they are related to the facts of his case or to points of law.**
- **The decision of the Board must state in some detail the reasons for the acceptance or rejection of the appeal, and indicate the sources of information, particularly regarding the country of origin, upon which such decision is based.**