



**UNHCR's Observations on Malta's
Revised Legislative and Policy Framework
for the Reception of Asylum-Seekers**

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Executive Summary

Malta's reception framework, in particular that affecting asylum-seekers arriving in an irregular manner, has been assessed and addressed by UNHCR and other stakeholders in the past. The revised legislative and policy framework introduces a number of important changes which, once implemented in practice, should lead to improved reception standards and treatment for many asylum applicants who arrive in Malta in an irregular manner. In particular, the revised legislation no longer supports the automatic and mandatory detention of asylum seekers, who have entered in Malta in an irregular manner, but provides for legal grounds for detention, free legal assistance, the possibility to challenge detention orders, and establishes the automatic review of detention orders.

In recent years, various Maltese authorities undertook efforts to address the challenges posed by the reception system. In 2015, UNHCR welcomed the opportunity to provide detailed comments to the Ministry for Home Affairs and National Security on relevant provisions of draft legislation and policy. In fact, a number of UNHCR's comments have been taken into account in the revised reception framework. UNHCR appreciates these changes, as they potentially address shortcomings which the agency outlined in its *Position on the Detention of Asylum-Seekers in Malta*,¹ published in September 2013, namely that although founded on immigration regulations, the practice of detaining, for the purposes of removal, all asylum-seekers, who arrived on the territory in an irregular manner, is arbitrary and unlawful in terms of well-established international law standards.² At that point, UNHCR was particularly concerned that Malta's practice violated Article 31 of the 1951 *Convention Relating to the Status of Refugees*³ and the fundamental right to liberty and security of person, as enshrined in international and European human rights instruments.⁴

The comments and observations put forth in this document relate to the provisions found in the revised legal and policy framework published in December 2015. It is UNHCR's understanding that the amendments to the asylum reception framework introduced by the Maltese authorities are intended to transpose the recast European Union Directive 2013/33/EU ("the EU Reception Conditions Directive") and the points addressed in judgements given by the European Court of Human Rights.⁵

It remains, however, to be seen how the Maltese authorities will implement in practice the revised legislative and policy framework. At this point, UNHCR's main concerns relate to the interpretation of the legal grounds for detention, the lack of clarity on the applicability of alternatives to detention (less coercive measures other than detention), and the absence of provisions regarding individual assessment based on the necessity to detain and its proportionality to a legitimate purpose.

As always, UNHCR stands ready to continue to provide support to the Maltese authorities in exploring potential adjustments and further improving reception arrangements.

¹ UN High Commissioner for Refugees (UNHCR), *UNHCR's Position on the Detention of Asylum-seekers in Malta*, 18 September 2013, available at: <http://www.refworld.org/docid/52498c424.html>

² See UNHCR Detention Guidelines 2012, op. cit. Guideline 4.

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

⁴ Article 10 of the 1948 Universal Declaration of Human Rights, Article 9 and 12 of the 1966 International Covenant on Civil and Political Rights, Article 5 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁵ *Louled Massoud v. Malta*, App. No. 24340/08, 27 July 2010; *Suso Musa v. Malta*, App. No. 42337/12, 23 July 2013; *Aden Ahmed v. Malta*, App. No. 55352/12, 23 July 2013.

UNHCR's Mandate and Role in Malta

1. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.⁶ As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”⁷ UNHCR’s supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 *Convention relating to the Status of Refugees* (“the 1951 Convention”)⁸ according to which State parties undertake to “co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.” The same commitment is included in Article II of the 1967 *Protocol relating to the Status of Refugees* (“the 1967 Protocol”).⁹
2. UNHCR’s supervisory responsibility is also reflected in European Union (EU) law, including by way of a general reference to the 1951 Convention in Article 78(1) of the *Treaty on the Functioning of the European Union*, as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees [...] on matters relating to asylum policy”.¹⁰ Secondary EU legislation also emphasizes the role of UNHCR. UNHCR’s supervisory responsibility is specifically articulated in Article 29 of the EU Asylum Procedures Directive¹¹ and Recital 22 of the EU Qualification Directive.¹² In relation to the reception of asylum-seekers, UNHCR’s role is also explicitly recognized in the EU Reception Conditions Directive.¹³
3. UNHCR has access to all detention and open reception centres in Malta, as do civil society organizations offering services and support to asylum-seekers and migrants. UNHCR, in line with its supervisory role conducts regular visits to detention and open centres in pursuance of its protection-related and advocacy activities in Malta. During these visits UNHCR observes day-to-day operations within detention centres, interviews and counsels persons of concern, and also engages with Detention Service staff and management on various issues relating to the operation of detention centres and treatment of persons of concern. UNHCR also engages in continuous dialogue with the relevant authorities on specific issues relating to detention. Such authorities include the relevant ministries, in particular the Ministry for Home Affairs and National Security, senior management of Detention Service, the Monitoring Board for Detained Persons, and the Agency for the Welfare of Asylum Seekers (AWAS).

⁶ See UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html>

⁷ *Ibid.*, para. 8(a).

⁸ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>. See also Article 3 of the *Refugees Act* (Chapter 420) of the Laws of Malta, stating that “[t]his Act incorporates the obligations assumed by Malta under the [1951] Convention and its obligations under the [EU] Directives.” Malta acceded to the 1951 Convention on 17 June 1971, and the 1967 *Protocol Relating to the Status of Refugees* on 15 September 1971, subject to declarations and reservations.

⁹ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>

¹⁰ European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, available at: <http://www.refworld.org/docid/51c009ec4.html>

¹¹ European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, L 180/60, available at: <http://www.refworld.org/docid/51d29b224.html>. Article 29(1)(c) in particular obliges Member States to allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure.”

¹² European Union: Council of the European Union, *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 (recast)*, 20 December 2011, OJ L 337; December 2011, pp 9-26, available at: <http://www.refworld.org/docid/4f197df02.html>

¹³ European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, L 180/96, Articles 10(3) and 18(2)(b) and (c), available at: <http://www.refworld.org/docid/51d29db54.html>

Background and Overview

4. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes and supports the efforts made by the Government of Malta in recent years to improve its reception framework for asylum seekers and beneficiaries of international protection. Over the years, UNHCR's dialogue with the Maltese authorities has included discussions about law and policy issues relating to the detention of asylum seekers and reception modalities, as well as practical recommendations to alleviate the major concerns relating to conditions in detention and open centres in Malta.
5. In September 2013, UNHCR published its *Position on the Detention of Asylum-Seekers in Malta*¹⁴ ("Malta Position Paper") which states that although founded on immigration regulations, the Maltese practice of detaining, for the purposes of removal, all asylum-seekers, who arrived on the territory in an irregular manner, is arbitrary and unlawful in terms of well-established international law standards.¹⁵ At that point, UNHCR was particularly concerned that this practice violated Article 31 of the 1951 *Convention Relating to the Status of Refugees*¹⁶ and the fundamental right to liberty and security of person, as enshrined in international and European human rights instruments.¹⁷
6. The following comments relate to provisions found in the revised legal and policy framework introduced in December 2015, namely: Act No. XXXVI of 2015, the Immigration Act (Amendment) Act, 2015¹⁸ (hereinafter referred to as "the Amendment Act") amending the Immigration Act;¹⁹ Legal Notice 417 of 2015, the Reception of Asylum Seekers (Minimum Standards) (Amendment) Regulations, 2015²⁰ (hereinafter referred to as "Legal Notice 417"), amending the Reception of Asylum Seekers (Minimum Standards) Regulations²¹ (hereinafter referred to as "the Reception Regulations");²² as well as the procedures found in the new policy document entitled *Strategy for the Reception of Asylum Seekers and Irregular Migrants*²³ (hereinafter referred to as "the new policy document") published by the Ministry for Home Affairs and National Security on 30 December 2015.²⁴
7. UNHCR welcomes and supports the efforts made by the Ministry for Home Affairs and National Security to revise the reception system. UNHCR also welcomes the Prime Minister's affirmed commitment to address the detention of children,²⁵ the President's efforts to facilitate discussion on the improvements which are required to ensure the protection of asylum-seeking and migrant children,²⁶ and the Agency for the Welfare of Asylum Seekers' (AWAS) initiative to review and improve the age assessment procedures as well as the initial reception conditions for unaccompanied children and families with children. In addition, the Office of the Refugee Commissioner is working to establish a strengthened unit for processing cases under the Dublin

¹⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR's Position on the Detention of Asylum-seekers in Malta*, 18 September 2013, available at: <http://www.refworld.org/docid/52498c424.html>

¹⁵ See UNHCR Detention Guidelines 2012, op. cit. Guideline 4.

¹⁶ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

¹⁷ Article 10 of the 1948 Universal Declaration of Human Rights, Article 9 and 12 of the 1966 International Covenant on Civil and Political Rights, Article 5 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁸ Published on 4 December 2015, available here: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=27179&l=1>, (accessed on 19 January, 2016).

¹⁹ Chapter 217 of the Laws of Malta.

²⁰ Published on 11 December, 2015, available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=27220&l=1>, (accessed on 16 January, 2016).

²¹ Subsidiary Legislation 420.06, Reception of Asylum Seekers (Minimum Standards) Regulations, Legal Notice 320 of 2005, 22 November 2005.

²² Reference to "the Revised Reception Regulations" will be made when referring to the final published version of Subsidiary Legislation 420.06, *Reception of Asylum Seekers Regulations*, as amended by Legal Notice 417 of 2015.

²³ Available here: <https://homeaffairs.gov.mt/en/MHAS-Information/Documents/Migration%20Policy%20181215.docx>, (accessed on 21 January, 2016).

²⁴ Press release issued by the Ministry for Home Affairs and National Security: New migration strategy draws a balance between human rights and security, PR152933eng, 30 December 2015, available here: <http://www.gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx>, (accessed 16 January, 2016).

²⁵ *UNHCR welcomes Prime Minister's statement on detention of children*, 31 March 2014, available at: <http://www.unhcr.org/mt/news-and-views/press-releases/733-unhcr-welcomes-prime-ministers-statement-on-detention-of-children>, accessed on 1 February 2016.

²⁶ *Joint IOM – UNHCR report on reception of unaccompanied and separated children launched in Malta*, 13 October 2014, available at: <http://www.unhcr.org/mt/news-and-views/north-africa-situation/768-joint-iom-unhcr-report-on-reception-of-unaccompanied-and-separated-children-launched-in-malta>, accessed on 1 February 2016.

Regulation framework. These, and other recent initiatives, are particularly appreciated and address to an extent, the various comments and proposals put forward by UNHCR and other stakeholders in recent years.

8. Indeed, in 2015, UNHCR was given the opportunity to provide detailed comments to the Ministry for Home Affairs and National Security on relevant provisions of the revised law and policy. And whilst UNHCR has welcomed this opportunity, the agency would like to encourage the relevant authorities to also engage in further strengthening dialogue with relevant civil society organizations on matters relating to Malta's asylum system generally and, in particular, on the functioning of the revised reception system according to their mandate and expertise. A number of local civil society organizations have been active in the field of asylum and migration for several years, providing services to asylum-seekers, refugees²⁷ and other migrants. They have also been active in advocating for the rights of persons in need of international protection, and have developed capacities and expertise in their respective fields. UNHCR considers that their contributions to dialogue on the topic of reception are important, valid, and can be useful to the authorities in strengthening current systems.
9. It is UNHCR's understanding that the amendments to the asylum reception framework introduced by the Maltese authorities are intended to transpose the recast European Union Directive 2013/33/EU ("the EU Reception Conditions Directive") and the points addressed in judgements given by the European Court of Human Rights in Strasbourg,²⁸ including the obligation to take "the necessary general measures to ensure an improvement"²⁹ in the detention system.
10. This document provides observations on Malta's revised legal and policy framework relating to the reception of asylum-seekers, and the conclusions herein supersede those in the Malta Position Paper published in 2013. The comments in the forthcoming analysis are grounded in the international and European human rights framework, UNHCR's *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention*³⁰ ("the UNHCR Detention Guidelines"), on UNHCR's view as put forward in the Malta Position Paper, as well as relevant international and European human rights standards, and UNHCR positions and doctrine.³¹

²⁷ Including beneficiaries of complimentary forms of protection.

²⁸ *Louled Massoud v. Malta*, App. No. 24340/08, 27 July 2010; *Suso Musa v. Malta*, App. No. 42337/12, 23 July 2013; *Aden Ahmed v. Malta*, App. No. 55352/12, 23 July 2013.

²⁹ *Suso Musa v. Malta*, App. No. 42337/12, 23 July 2013, at para. 123.

³⁰ 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, available at: <http://www.refworld.org/docid/503489533b8.html>

³¹ See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016.

Specific Comments on the new *Strategy for the Reception of Asylum Seekers and Irregular Migrants*

11. UNHCR welcomes the new policy document entitled *Strategy for the Reception of Asylum Seekers and Irregular Migrants*³² and notes that the document contains a comprehensive description of procedures employed by the Maltese authorities in the context of reception for asylum-seekers who arrive in an irregular manner. While some policies and procedures described therein have been in effect for a number of years, the document also includes new elements, including: an initial reception facility foreseeing admission of and delivery of services by NGOs; legal grounds for detention; alternatives to detention; and vulnerability assessment. However, **UNHCR notes that the new policy document's primary focus is on asylum-seekers who arrive in Malta in an irregular manner.** UNHCR notes that during 2015, the number of asylum applications received by the Office of the Refugee Commissioner was significant when compared to the decreasing number of persons who arrived by boat in an irregular manner.³³
12. Of particular note are Annex A, providing guidelines for police officers drawing up recommendations for the Principal Immigration Officer with regard to the detention of asylum applicants; and Annex B, providing guidelines for police officers drawing up recommendations for the Principal Immigration Officer with regard to the detention of irregularly present third-country nationals with a view to return.³⁴ **In relation to Annex A, UNHCR is concerned about the discretion given to immigration authorities in the application of the legal grounds for detention and alternatives to detention. UNHCR notes that some of the guidelines in Annex A are not fully in line with the wording of well-established European and international human rights and refugee law standards, and could potentially lead to situations of arbitrary and unlawful detention.** Since the guidelines in Annex A are to be interpreted in the context of specific legal provisions, UNHCR's observations on Annex A are discussed in the forthcoming paragraphs.

³² Press release issued by the Ministry for Home Affairs and National Security: New migration strategy draws a balance between human rights and security, PR152933eng, 30 December 2015, available here: <http://www.gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx>, (accessed 16 January, 2016).

³³ In 2015, the Office of the Refugee Commissioner received a total of 1693 applications for international protection and around 1584 of these were from persons who did not arrive by boat in an irregular manner. In 2015, around 109 persons arrived by boat in an irregular manner, most of whom were rescued at sea and disembarked in Malta. For more statistics see www.unhcr.org/mt/charts/.

³⁴ UNHCR has not articulated any specific comments on Annex B since the guidelines therein are applicable to the detention of third-country national with a view to return in the context of Subsidiary Legislation 217.12, *Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations*, as amended by Legal Notice 15 of 2014 [transposing European Union: Council of the European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, <http://www.refworld.org/docid/496c641098.html>].

Specific comments on relevant provisions of the Amendment Act 2015

Definitions

13. UNHCR notes that the Amendment Act substitutes the definition in the Immigration Act of “removal order”³⁵ which now states the following: “*[R]emoval order’ means an order enforcing the return decision or an order made in relation to the restriction of the movement of a Union citizen and his family members as provided for in the Free Movement of European Union Nationals and their Family Members Order.*”
14. UNHCR notes that the Amendment Act inserts the definition of “return decision” in the Immigration Act, which states the following: “*[R]eturn decision’ means a decision issued by the Principal Immigration Officer, stating or declaring the stay of a third country national to be illegal and imposing or stating an obligation to return.*” UNHCR notes that this definition corresponds to the definition of “return decision” found in the Returns Regulations³⁶ transposing the EU Returns Directive.³⁷
15. UNHCR notes that the Amendment Act inserts the definition of “third-country national” in the Immigration Act, which states the following: “*[T]hird-country national’ means any person who is not a national of the European Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).*” UNHCR notes that this definition corresponds to the relevant definition of “third-country national” found in the Schengen Borders Code.³⁸
16. UNHCR notes that the Amendment Act substituted the word “removal” with the word “return”, the words “removal order” with the words “return decision”, and the word “order” with the word “decision” in the revised Article 14(1)³⁹ of the Immigration Act. UNHCR understands this to mean that the new Article 14(1) shall state the following: “*If any person is considered by the Principal Immigration Officer to be liable to return as a prohibited immigrant under any of the provisions of article 5, the said Officer may issue a return decision against such person who shall have a right to appeal against such decision in accordance with the provisions of article 25A.*” **UNHCR understands this substitution to mean that the immigration authorities may issue return decisions, instead of removal orders, to prohibited migrants in terms of the Immigration**

³⁵ “[R]emoval order” means an order issued by the Principal Immigration Officer or the Immigration Appeals Board in accordance with Article 14, or the Court of Appeal under article 25A as the case may be...” (Article 2 of the Immigration Act).

³⁶ Subsidiary Legislation 217.12, *Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations*, as amended by Legal Notice 15 of 2014, available at:

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11637&l=1>.

³⁷ European Union: Council of the European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L 348/98-348/107; 16.12.2008, 2008/115/EC, available at: <http://www.refworld.org/docid/496c641098.html>

³⁸ Consolidated version of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105 13.4.2006, p.1), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02006R0562-20131126>, accessed on 1 February 2016.

³⁹ “If any person is considered by the Principal Immigration Officer to be liable to removal as a prohibited immigrant under any of the provisions of article 5, the said Officer may issue a removal order against such person who shall have a right to appeal against such order in accordance with the provisions of article 25A:

Provided that in relation to any such person as may be prescribed by regulations made under article 4A and who entered Malta or is in Malta, a removal order shall only be issued following an application to that effect by the Principal Immigration Officer to the Board which shall make such order upon being satisfied that such person is liable to expulsion under this Act. The provisions of article 25A shall mutatis mutandis apply to any order issued by the said Board under this proviso.”

Act.⁴⁰ UNHCR has observed that in the past immigration authorities did not conduct an individual assessment but issued removal orders and return decisions together, in an automatic manner.⁴¹

Effects of the removal order

17. UNHCR notes that Article 14(2)⁴² has been deleted and substituted by the following: “If such a return decision is accompanied by a removal order, such person against whom such order is made, **may** [emphasis added] be detained in custody until he is removed from Malta:

Provided that if the person in respect of whom a return decision and a removal order has been made is subject to criminal proceedings for a crime punishable with imprisonment or is serving a sentence of imprisonment, the Minister may give such directions as to whether the whole or part of the sentence is to be served before the return of such person from Malta, and in default of such directions, such person shall be removed after completion of the sentence, without prejudice to the provisions of any other law.”

18. UNHCR understands that the revised Article 14(2) no longer makes it mandatory for a person to be detained upon the issuance of a removal order. However, this article still allows the immigration authorities to issue a removal order together with a return decision, and such removal order may serve as grounds to detain for the purpose of removal.

19. UNHCR notes that Article 14(4)⁴³ shall include three new provisos, and the sub-article shall state the following:

“Removal of a person shall be to that person’s country of origin or to any other State to which he may be permitted entry, in particular under the relevant provisions of any applicable re-admission agreement concluded by Malta and in accordance with international obligations to which Malta may be a party:

Provided that, following the issue of a removal order by the Principal Immigration Officer in accordance with the provisions of this article, to any person considered as a prohibited immigrant under any of the provisions of article 5, if such person files an application for asylum in terms of the Refugees Act, all the

⁴⁰ Any reference to the term “prohibited migrant” in this document refers to the provisions in Article 5 of the Immigration Act:

“5. (1) Any person, other than one having the right of entry, or of entry and residence, or of movement or transit under the preceding Parts, 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.

(2) Notwithstanding that he has landed or is in Malta with the leave of the Principal Immigration Officer or that he was granted a residence permit, a person shall, unless he is exempted under this Act from any of the following conditions or special rules applicable to him under the foregoing provisions of this Act, be a prohibited immigrant also –

(a) if he is unable to show that he has the means of supporting himself and his dependants (if any) or if he or any of his dependants is likely to become a charge on the public funds; or

(b) if he is suffering from mental disorder or is a mental defective; or

(c) if, having landed in Malta pursuant to or under any regulation made under articles 44 and/or 50 of the [Prevention of Disease Ordinance](#), he is still in Malta after the lapse of the period of fifteen days from the day on which the Superintendent of Public Health certifies in writing that the stay of such person in Malta is no longer required under and for the purpose of such regulation; or

(d) if he is found guilty by a court of criminal jurisdiction in Malta of an offence against any of the provisions of the [White Slave Traffic \(Suppression\) Ordinance](#) or of the [Dangerous Drugs Ordinance](#) or of a crime, other than involuntary homicide or involuntary bodily harm, which, in the case of a first crime committed by such person, is punishable with imprisonment for a term of not less than one year or, in the case of a second or subsequent crime committed by such person, is punishable with imprisonment for a term of not less than three months; or

(e) if he contravenes any of the provisions of this Act or of any regulations made thereunder; or

(f) if he does not comply or ceases to comply with any of the conditions, including an implied condition, under which he was granted leave to land or to land and remain in Malta or was granted a residence permit; or

(g) if any circumstance which determined the granting of leave to land or to land and remain in Malta or the extension of such leave or the granting of a residence permit ceases to exist; or

(h) if such person is a prostitute; or

(i) if he is a dependant of a person who is a prohibited immigrant under any of the provisions of this subarticle.”

⁴¹ See paragraph 23 of the Malta Position Paper.

⁴² Article 14(2) of the Immigration Act previously stated the following:

“Upon such order being made, such person against whom such order is made, **shall** [emphasis added] be detained in custody until he is removed from Malta:

Provided that if the person in respect of whom an expulsion order has been made is subject to criminal proceedings for a crime punishable with imprisonment or is serving a sentence of imprisonment, the Minister may give such directions as to whether the whole or part of the sentence is to be served before the expulsion of such person from Malta, and, in default of such directions, such person shall be removed after completion of the sentence.”

⁴³ Previously, Article 14(4) stated: “Removal of a person shall be to that person’s country of origin or to any other State to which he may be permitted entry, in particular under the relevant provisions of any applicable re-admission agreement concluded by Malta and in accordance with international obligations to which Malta may be a party.”

effects of the removal order shall be suspended pending the final determination of the asylum application. Following the final rejection of the asylum application, the removal order along with its effects shall again come into force:

Provided that, notwithstanding that the effects of the removal order are suspended pending the final determination of the asylum application, the detention of such person shall continue until a final decision on detention is reached in terms of the regulations⁴⁴ issued under the Refugees Act:

Provided further that, whenever a prohibited immigrant has filled an application for asylum, the Principal Immigration Officer shall not be required to issue a return decision or a removal order.”

20. **UNHCR welcomes the introduction of the new provisions in Article 14(4), in particular the proviso stating that whenever a “prohibited immigrant” (in terms of the Immigration Act) has filled an application for asylum, the Principal Immigration Officer shall not be required to issue a return decision or a removal order.⁴⁵ UNHCR understands this to be a significant departure from the automatic and mandatory detention regime which characterized the Maltese reception system for asylum seekers arriving in an irregular manner, in previous years. UNHCR notes that the third proviso grants discretion to the Principal Immigration Officer when deciding whether to issue a return decision and/or a removal order against an asylum applicant. However, UNHCR considers that, in principle, this provision alone does not provide for sufficient guarantees against the detention of asylum-seekers for the purposes of removal. UNHCR is concerned that, wrongly interpreted or applied, this provision could create the risk of widespread detention in the context of return or removal procedures and result, contrary to Article 31(1) of the 1951 Convention,⁴⁶ in the penalization of asylum-seekers who enter Malta in an irregular manner.**

Safeguards against refoulement

21. UNHCR welcomes the insertion of Article 14(8), which states: *“The Principal Immigration Officer shall not execute any return decision or removal order if appeals proceedings before the Immigration Appeals Board are pending.”* **UNHCR notes that this new provision introduces safeguards against possible return or refoulement for persons who have instituted proceedings before the Immigration Appeals Board.**
22. UNHCR notes the substitution of the words “removal order” and “order” in Article 17 of the Immigration Act with the words “return decision or removal order”. UNHCR welcomes the insertion of the new proviso: *“Provided that Article 17 shall not apply to orders issued by the Constitutional Court.”* **UNHCR notes that this is another safeguard against possible return or refoulement of persons who have instituted proceedings before the Constitutional Court.**

Jurisdiction of the Immigration Appeals Board

23. UNHCR notes that in Article 25A(9) of the Immigration Act the word “deportation” has been substituted by the words “deportation order” and the words “removal order” were substituted by the words “return decision and removal order”. The amended provision now states the following: *“The Board shall also have jurisdiction to hear and determine applications made by persons in custody in virtue only of a deportation order or return decision and removal order to be released from custody pending the determination of any application under the Refugees Act or otherwise pending their deportation order in accordance with the following subarticles of this article.”* **UNHCR understands this provision to mean that applications on the basis of deportation orders, return decisions and/or removal orders issued against prohibited migrants have been included within the jurisdiction of the Immigration Appeals Board.**
24. UNHCR notes that Article 25A(10)⁴⁷ of the Immigration Act was deleted and substituted by the following new sub-article: *“The Board shall grant release from custody where the detention of a person is, taking into*

⁴⁴ It is assumed that this is referring to Regulation 6 of the Revised Reception Regulations which provides, *inter alia*, for the reasons for which the Principal Immigration Officer may order detention, the possibility of review by the Immigration Appeals Board at specified intervals, and that asylum applicants may not be detained for more than nine months.

⁴⁵ Article 3(d) of Amendment Act 2015, new Article 14(4) (third proviso) of the Immigration Act.

⁴⁶ Article 31(1) provides 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 their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”*

⁴⁷ Previously, Article 25A(10) stated: *“The Board shall only grant release from custody under subarticle (9) wherein its opinion the continued detention of such person is taking into account all the circumstances of the case, unreasonable as regards duration or because there is no reasonable prospect of deportation within a reasonable time:*

account all the circumstances of the case, not required or no longer required for the reasons set out in this Act or subsidiary legislation under this 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 timeframe." UNHCR notes that the insertion of this new article expands the Immigration Appeals Board's jurisdiction to assess whether detention is "required". Prior to the introduction of this provision, the Board could only authorise release on grounds of "unreasonableness as regards duration."⁴⁸ **UNHCR notes that the new sub-article does not specifically grant the Board the authority to assess the legality of one's detention. In addition, this provision does not make specific reference to the necessity and proportionality of detention in each individual case, two tests which are required by international and European human rights standards. UNHCR considers that, to guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose. Further, failure to consider less coercive or intrusive means could also render detention arbitrary.**⁴⁹

25. UNHCR notes that Article 25A(11)(a)⁵⁰ has been deleted, and interprets this to mean that, in terms of the Immigration Act, the Immigration Appeals Board is no longer prohibited from granting release in cases where identity and nationality still has to be verified. UNHCR however notes that it is still possible for an asylum-seeker to be detained on grounds of identity verification in terms of the Revised Reception Regulations (see paragraph 34 below).

Fingerprinting

26. UNHCR notes that the Amendment Act included a new sub-article to Article 28 which states that: *"The Principal Immigration Officer or any Authority responsible for the function related to the issue of visas or residence permits may require that personal data including fingerprints be provided."* UNHCR notes that third-country nationals, including asylum applicants, may be required to provide their fingerprints for the purposes of immigration procedures.

Providing humanitarian assistance

27. UNHCR notes the introduction of a new proviso in Article 32(1) stating: *"Provided that the Principal Immigration Police may decide not to institute proceedings on any person who aids or assists any other person in any immediate situation of danger to land or attempt to land or transit through Malta, when such acts have been committed with a view to providing humanitarian assistance."* **UNHCR considers that this new provision has positive implications for those persons who engage in efforts which are relevant to the preservation of safety of life at sea.**

Provided that where a person, whose application for protection under the Refugees Act has been refused by a final decision, does not co-operate with the Principal Immigration Officer with respect to his repatriation to his country of origin or to any other country which has accepted to receive him, the Board may refuse to order that person's release."

⁴⁸ See para. 47 and 48 of the Malta Position Paper.

⁴⁹ See UNHCR's Detention Guidelines, Guidelines 4, paras. 18 – 42.

⁵⁰ Article 25A(11)(a) previously stated: *"The Board shall not grant release in the following cases:*

(a) when the identity of the applicant including his nationality has yet to be verified, in particular where the applicant has destroyed his travel or identification documents or used fraudulent documents in order to mislead the authorities."

Specific comments on relevant provisions of the Reception of Asylum Seekers Regulations, as amended by Legal Notice 417 of 2015

Transposition of the EU Reception Conditions Directive 2013

28. UNHCR notes that while Regulation 1(2) of Legal Notice 417 states that “[t]hese regulations transpose the provisions of the Council Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast),” the Revised Reception Regulations still refer to provisions of the European Union Directive 2003/9/EC which establishes minimum standards for the reception of asylum seekers in Member States.⁵¹ UNHCR notes that the 2003 Directive has been superseded by Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). **While UNHCR appreciates that this could be an inadvertent drafting error, it recommends a correction for the purposes of legal clarity and certainty.**

Definitions

29. UNHCR notes that the definition of “**family members**” in Regulation 2 of the Revised Reception Regulations has been amended to state as follows:

“[F]amily members’ means, only in so far as the family already existed in the country of origin, the following members of the applicant’s family who are present in Malta, in relation to the application for asylum made in Malta:

- (a) the spouse of the asylum seeker or his unmarried partner in a stable relationship;
- (b) the minor children of the applicant and his spouse referred to in paragraph (a) or of the applicant, on condition that the children are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted in a manner recognized under Maltese law;
- (c) the father, mother or legal-guardian, where the applicant is a minor”.

30. UNHCR notes that this definition is broadly in line with the definition in Article 2 of the EU Reception Conditions Directive, which is still limited to “in so far as the family already existed in the country of origin.” This fails to accommodate family ties which may have been formed during or after flight, or in refugee camps, thus excluding children born from those relationships from the guarantees laid down in the Directive, for example with regard to the maintenance of family unity. **UNHCR urges the Maltese authorities to recognize relationships that were formed during or after flight in line with the principle of family unity of Article 8 of the European Convention on Human Rights.**⁵² UNHCR is concerned that married minor children are not considered as family members even where they are not accompanied by their spouse and where it is in their best interests to consider them as family members. This is equally true for minor siblings of an applicant (including where the applicant or sibling is married, if it is in the best interests of one of them to consider these persons as family members). **UNHCR notes that these provisions may in certain circumstances run counter to the Convention on the Rights of the Child (CRC),⁵³ and in particular Article 9⁵⁴ of the EU Reception Conditions Directive, as the child may be dependent on his or her adult family members and encourages the Maltese authorities to apply the notion of family generously in line with recital 22 of the EU Reception Conditions Directive.**⁵⁵

31. UNHCR notes that Legal Notice 417 has not amended the definition of “**unaccompanied minors**” in the Reception Regulations to bring it in line with the definition⁵⁶ in the EU Reception Conditions Directive. The relevant definition in the Reception Regulations continues to define unaccompanied minors as persons “below the age of eighteen who arrive in Malta unaccompanied by an adult responsible for them whether

⁵¹ In Regulation 1(2).

⁵² UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, p. 7.

⁵³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>

⁵⁴ Article 9 CRC contains the right to family unity.

⁵⁵ UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, p. 8.

⁵⁶ “[U]naccompanied minor’: means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member States concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States...”

by law or by custom, and for as long as they are not effectively taken into the care of such person; it includes minors who are left unaccompanied after they have entered Malta.” UNHCR notes that this definition is problematic for several reasons. Firstly, it is not in line with the definition of “unaccompanied minors” in the *Procedural Standards for Granting and Withdrawing International Protection Regulations*⁵⁷ which states that: “‘unaccompanied minor’ means a minor who arrives on the territory of Malta unaccompanied by an adult responsible for him or her in accordance with national law and for as long as such minor is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Malta...” Secondly, UNHCR is concerned that this definition does not cover those children who are separated from their parents but are accompanied by an adult (who may or may not be their relative). In recent months, UNHCR has observed that a number of separated children have arrived in Malta without their parents and are residing with, or being taken care of, by adults who are not necessarily their relatives. While in many of these cases there does not seem to be an apparent risk, one cannot exclude that some children could be exposed to unnecessary harm. **UNHCR considers that children who find themselves without parental protection are dependent on States to uphold their rights. Malta is encouraged to uphold children’s rights by assessing what would be in the best interests of the individual child.**⁵⁸ In this context, UNHCR recognises the full applicability of the principle of the best interests of the child in terms of the Convention of the Rights of the Child.

Grounds for detention

32. UNHCR notes that Regulation 6⁵⁹ of the Reception Regulations has been deleted and was substituted by a new regulation containing 8 sub-regulations. The new Regulation 6(1) states the following:

“6. (1) The Principal Immigration Officer may, without prejudice to any other law, order the detention of an applicant for one or more of these reasons, pursuant to an assessment of the case:

- (a) in order to determine or verify his identity or nationality;
- (b) 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;
- (c) 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;
- (d) when the applicant is subject to a return procedure under the Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, in order to prepare the return or carry out the removal process, and the Principal Immigration Officer can substantiate, on the basis of objective criteria, including that the applicant already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

⁵⁷ Subsidiary Legislation 420.07, *Procedural Standards for Granting and Withdrawing International Protection Regulations*, as amended by Legal Notice 416 of 2015, available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10663&l=1>

⁵⁸ For more on this point see UN High Commissioner for Refugees (UNHCR), *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: <http://www.refworld.org/docid/5423da264.html>, at p. 9.

⁵⁹ “6. (1) The Principal Immigration Officer may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.

(2) The Principal Immigration Officer may, for legal reasons or reasons of public order, order that an applicant be confined to a particular place in accordance with Maltese law.

(3) The provision of the material reception conditions shall be subject to actual residence by the particular applicant in a specific place, to be determined by the Principal Immigration Officer.

(4) The Principal Immigration Officer shall have the possibility to grant applicants temporary permission to leave the place of residence mentioned in subregulations (1) and (3) or the assigned area mentioned in subregulation (2). The Principal Immigration Officer shall take the decisions individually, objectively and impartially and shall give reasons if the decisions are negative:

Provided that the applicant shall be given the facility to keep appointments with authorities and courts if his appearance thereat is necessary.

(5) Where applicable, applicants are required to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible.”

(e) when protection of national security or public order so require; or,

(f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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.

33. UNHCR notes that the new Regulation 6(1) is intended to transpose Article 8(3)⁶⁰ of the EU Reception Conditions Directive. While the Directive states that “[a]n applicant may be detained only...” on specific grounds, and thus is exhaustive, Regulation 6(1) refers to the Principal Immigration Officer’s discretion who “may, without prejudice to any other law, order the detention of an applicant”. **UNHCR notes that this provision only partially transposes Article 8(3) of the EU Reception Conditions Directive and considers the application of this provision to be potentially problematic as it may give rise to a conflicting interpretation of the law.** UNHCR notes that the provision listing the six grounds for detention, in Article 8(3), taken in conjunction with other guarantees, such as the necessity and proportionality test to be applied in each individual case, should discourage the systematic detention of asylum-seekers while ensuring that it is used as a measure of last resort. However, UNHCR has some concerns in relation to the grounds themselves (see forthcoming paragraphs).⁶¹

Verification of identity and nationality

34. Regulation 6(1)(a) stipulates that the Principal Immigration Officer may order the detention of an applicant in order to determine or verify his/her identity or nationality. UNHCR notes that according to the guidelines in Annex A of the new policy document, this ground does not apply where the asylum applicant is in possession of genuine travel and/or identification documents. It applies, however, whenever asylum applicants are undocumented, meaning that no proof of identity or nationality exists.⁶² **UNHCR acknowledges that minimal periods in detention may be permissible to carry out initial identity checks and security checks in cases where identity is undetermined or in dispute.**⁶³ However, the examination of nationality can be a complex and lengthy process, especially for stateless applicants, and thus special safeguards will need to be put in place to safeguard against arbitrary detention.⁶⁴ In using the ground of verifying identity or nationality under Regulation 6(1)(a), special procedures may need to be introduced with respect to stateless persons who apply for international protection to avoid their possible lengthy detention.⁶⁵

⁶⁰ “3. An applicant may be detained only:

(a) in order to determine or verify his or her identity or nationality;

(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

(c) in order to decide, in the context of a procedure, on the applicant’s right to enter the territory;

(d) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

(e) when protection of national security or public order so requires;

(f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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.

The grounds for detention shall be laid down in national law.”

⁶¹ UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, p. 16.

⁶² <https://homeaffairs.gov.mt/en/MHAS-Information/Documents/Migration%20Policy%20181215.docx>, at page 23.

⁶³ See UNHCR Detention Guidelines, Guideline 4.1.1. paras. 24 and 25.

⁶⁴ UNHCR detention Guidelines, Guideline 4.1.1. para. 26.

⁶⁵ UNHCR detention Guidelines, Guideline 4.1.1. para. 27.

See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 16-17.

Determining the elements upon which an application is based

35. As regards the ground in Regulation 6(1)(b), which allows detention 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, **UNHCR stresses that strict maximum time limits are to be observed in line with Article 9 of the EU Reception Conditions Directive, to ensure that detention on the basis of this ground is not used for purposes of administrative convenience for the whole duration of the asylum procedure.**⁶⁶ **Clear criteria need to be developed in order to assess the risk of absconding to avoid any arbitrary application of this ground.**⁶⁷ Factors to balance in an overall assessment of the necessity of detention could include, but are not limited to: family or community links or other support networks in the country of asylum, willingness or refusal to provide information about the basic elements of their claim, or whether the claim is considered manifestly unfounded or abusive.⁶⁸ Of note is that Article 3(7) of the Returns Directive describes the “risk of absconding” as meaning the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national, who is the subject of return procedures may abscond.⁶⁹ Likewise, Article 2(n) of the Dublin III Regulation contains a similar definition.⁷⁰ In developing objective criteria to assess a risk of absconding in the case of applicants for international protection the same approach should be adopted.⁷¹
36. UNHCR notes that Annex A⁷² of the new policy document instructs the immigration authorities to apply Regulation 6(1)(b)⁷³ and consider that there is a risk of absconding whenever an asylum seeker is documented, but entered Malta irregularly. **While it remains to be seen how the new legislative and policy framework will be implemented, UNHCR is concerned that this particular interpretation of the mentioned legal provision could lead to a situation where the vast majority of asylum applicants who are documented, but entered Malta in an irregular manner are detained.**⁷⁴

In order to decide, in the context of a procedure, on the applicant’s right to enter the territory

37. Regulation 6(1)(c) allows the Principal Immigration Officer to detain an applicant 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. UNHCR further notes that Annex A⁷⁵ of the new policy document instructs the immigration authorities to apply Regulation 6(1)(c) to asylum seekers in possession of required travel documentation, who have entered Malta via a regular crossing, but whose entry has been irregular (e.g. stowaways). It further states that access to the territory shall be granted in the event that the asylum application is admitted into the asylum procedure, and in the event that the asylum application does not fall under the responsibility of another Member States. **UNHCR notes that this provision may serve as a ground for detention of asylum seekers who are at risk of their application not being admitted into the asylum procedure, and asylum applicants who are awaiting the acceptance by another Member State of a Take Charge request sent by Malta in terms of the Dublin III Regulation framework.**⁷⁶

⁶⁶ UNHCR Detention Guidelines, Guideline 4.1.1, para. 28 and UNHCR Detention Guidelines, Guideline 6.

⁶⁷ In *A v Australia*, the UN Human Rights Committee clarified that assertions about a general risk of absconding cannot legitimize detention: “[T]he burden of proof for the justification of detention lies with the State authority in the particular circumstances of each case; the burden of proof is not met on the basis of generalized claims that the individual may abscond if released.” *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, <http://www.refworld.org/docid/3ae6b71a0.html>

⁶⁸ UNHCR Detention Guidelines, Guideline 4.1.1, para. 22.

⁶⁹ European Union: Council of the European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L 348/98-348/107; 16.12.2008, 2008/115/EC, <http://www.refworld.org/docid/496c641098.html>

⁷⁰ European Union: Council of the European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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), 29 June 2013, OJ L 180/31-180/59; 29.6.2013, (EU)No 604/2013, <http://www.refworld.org/docid/51d298f04.html>

⁷¹ See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 17.

⁷² <https://homeaffairs.gov.mt/en/MHAS-Information/Documents/Migration%20Policy%20181215.docx>, at page 24.

⁷³ “(b) 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...”

⁷⁴ In 2015, UNHCR observed that 5 Syrians, 9 Libyans and 2 Iranian asylum seekers were detained. One of the Syrians, all the 9 Libyans and the 2 Iranians had identification documents but had entered Malta irregularly.

⁷⁵ <https://homeaffairs.gov.mt/en/MHAS-Information/Documents/Migration%20Policy%20181215.docx>, at page 24 – 25.

⁷⁶ In 2015, UNHCR observed at least 3 persons in detention who were awaiting the outcome of a Take Charge request sent by Malta to another Member State.

38. UNHCR is concerned that, wrongly interpreted or applied, this provision could create the risk of widespread detention in the context of border procedures and result, contrary to Article 31 (1) of the 1951 Convention⁷⁷ in the penalization of asylum-seekers who enter the EU in an irregular manner. In UNHCR's view, it is important for national legislation and administrative practice to recognize the specific legal situation of asylum-seekers, who are claiming the fundamental human right to asylum, which entitles them to safeguards additional to those of other prohibited migrants, who enter or are otherwise present in Malta in an irregular manner. Detention under this ground should be as short as possible and only for as long as the ground applies. Sub-regulation (c) should be read in conjunction with Article 43 (1) (a) or (b) and paragraph 2 of the recast Asylum Procedures Directive in order to establish in which instances an applicant may be detained at the border or transit zone, in order to decide, in the context of a procedure, on his or her right to enter the territory.⁷⁸ Of note in this regard is that the decision on access to the territory under Article 43(2) should be taken within 4 weeks.⁷⁹

In the context of returns procedures in terms of the EU Returns Directive

39. Regulation 6(1)(d) allows for detention of an applicant who is subject to a return procedure in order to prepare the return and/or carry out the removal process and who makes an application for international protection whilst in detention. UNHCR further notes that Annex A⁸⁰ of the new policy document instructs the immigration authorities to apply Regulation 6(1)(d) to asylum seekers who have submitted an asylum application upon or after being served with a return decision, or upon being informed that he or she would be returned.
40. Situations described in Article 8(3)(d) may arise where a person has a *sur place* claim or where the person files a subsequent application. **UNHCR acknowledges that detention may be justified in individual cases where it can be shown that the person applies for international protection solely to frustrate an ongoing removal process and in addition where it can be established that the person had an effective possibility to apply for international protection previously in Malta.**⁸¹ In all such cases, however, the removal must be reasonably likely to take place. UNHCR emphasizes the vital role of the Immigration Appeals Board and the national courts in overseeing the proper implementation of this provision and related safeguards.⁸²

National security or public order

41. As regards Regulation 6(1)(e) which allows the Principal Immigration Officer to detain an applicant to protect national security or public order, Annex A⁸³ of the new policy document states that:
"This ground for detention may be applied whenever there is reasonable suspicion or certainty that the asylum applicant has committed an offence which would constitute a criminal offence in Malta, particularly

⁷⁷ Article 31(1) provides 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 their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

⁷⁸ Paragraph (a) refers to Article 33 APD, which defines as inadmissible applications when an applicant comes from a safe country of origin, where another country has granted international protection, is considered as a safe third country or where a subsequent application does not contain new elements. Paragraph (b) refers to Article 31 (8) APD, which sets out nine different reasons for accelerating procedures or deciding on applications at the border including in the event of manifestly unfounded or abusive applications including those which aim to frustrate the removal process, where the applicant refuses to be fingerprinted or where s/he is considered to be danger to the national security or public order.

⁷⁹ See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 18.

⁸⁰ <https://homeaffairs.gov.mt/en/MHAS-Information/Documents/Migration%20Policy%20181215.docx>, at page 25.

⁸¹ UNHCR Detention Guidelines, Guideline 4.1.4, para. 33.

⁸² The corresponding wording in the EU Reception Directive [Article 8(3)(d)] follows the ruling in *Arsalan (Czech Republic) (C-534/11)*, Judgment of the Court of 30 May 2013, where the CJEU stated that, a third-country national who has applied for international protection from pre-removal detention, may be kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardize the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return, available at: <http://www.refworld.org/pdfid/51a88fc04.pdf>, at para. 63.

See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016 at p. 18-19.

⁸³ <https://homeaffairs.gov.mt/en/MHAS-Information/Documents/Migration%20Policy%20181215.docx>, at page 25.

a serious criminal offence, and that there is a risk of another offence being committed in Malta. This ground may also be applied in any case where an applicant is considered to pose a serious threat to fundamental State interests. An asylum seeker may also be detained whenever he or she would have entered Malta irregularly as part of an influx of such proportions and/or suddenness that it is deemed to have an adverse effect on public order.”

42. **UNHCR considers the guidelines in the above-mentioned paragraph to be incompatible with well-established principles of international human rights and refugee law. The fact the Malta has the potential to receive relatively high numbers of asylum-seekers does not absolve the fundamental state responsibilities in this regard.⁸⁴ According to UNHCR’s Detention Guidelines, public order is the broad heading to cover detention for the purposes of preventing absconding, if there is a likelihood that the applicant will not cooperate, in connection with accelerated procedures for manifestly unfounded or clearly abusive claims or for initial identity and/or security verification.⁸⁵ This needs to be an individual and reasoned assessment in line with Article 8(2) of the EU Reception Conditions Directive.** Minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks. At the same time, the detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and within strict time limits established in law. Appropriate screening and assessment methods need to be in place in order to ensure that persons who are *bona fide* asylum-seekers are not wrongly detained. This ground may overlap with the grounds listed under Regulation 6(1)(a), (b) and (c). Careful judicial scrutiny would be required where several grounds for detention are applied in succession, as this is likely to become arbitrary.⁸⁶
43. Governments may need to detain a particular individual who presents a threat to national security. Even though determining what constitutes a national security threat lies primarily within the domain of the Government of Malta, detention has to be necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight.⁸⁷ Inability to produce documentation should not automatically lead to an adverse security assessment.⁸⁸

In the context of a Dublin Regulation transfer

44. Regulation 6(1)(f) should be read in conjunction with Article 28 of the Dublin III Regulation. UNHCR welcomes the safeguards in Article 28(1) Dublin III Regulation that an applicant cannot be solely detained based on the fact that s/he is in the Dublin procedure and only to secure a transfer under Dublin when there is a “significant risk of absconding”. Article 2(n) of the Dublin III Regulation defines a significant risk of absconding as *“the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond”*. This definition is almost identical to that contained in the EU Returns Directive.⁸⁹ Article 28(2) Dublin III Regulation restates the safeguards in Article 8(2) of the EU Reception Conditions Directive, namely the requirement of an individual assessment, proportionality, and the need to explore less coercive and alternative measures first. **In UNHCR’s view it is necessary to establish clear and objective criteria in law of what a “significant risk of absconding” means, a threshold which seems higher than under Article 8(3)(b) [and Regulation 6(1)(b) of the Revised Reception Regulations].⁹⁰**

⁸⁴ See also UNHCR Position Paper, para. 65 – 66, 89.

⁸⁵ UNHCR Detention Guidelines, Guideline 4.1.1 paras. 22-25.

⁸⁶ See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 19.

⁸⁷ UNHCR Detention Guidelines, Guidelines 7.

⁸⁸ UNHCR Detention Guidelines, Guideline 4.1.3.

⁸⁹ European Union: Council of the European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, available at: <http://www.refworld.org/docid/496c641098.html>

⁹⁰ See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 20.

Individual assessment, and the necessity and proportionality test

45. **UNHCR notes that key provisions from Article 8 of the EU Reception Conditions Directive have not been adequately transposed into the new Regulation 6 of the Revised Reception Regulations. Regulation 6 does not include any provision transposing Article 8(2) of the Directive** which states: “[w]hen it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.” UNHCR considers that the introduction of the necessity test brings the EU Reception Conditions Directive in line with international human rights and refugee law as well as regional case law.⁹¹
46. **UNHCR considers that it is essential that the Maltese authorities engage in an individual assessment as regards the necessity and proportionality of detaining each person, before making a decision to detain on any of the grounds listed in Regulation 6(1) of the Revised Reception Regulations. Should a decision to detain be taken, the applicability of less coercive measure (or alternatives to detention) should then be considered before confining an individual to a detention centre.**

Detention orders

47. UNHCR notes that the new Regulation 6(2) states:
*“A detention order issued by the Principal Immigration Officer in writing, in a language which the applicant is reasonably supposed to understand, shall state the reason or reasons on which it is based:
Provided that wherever the Principal Immigration Officer issues such a detention order he shall also inform the applicant of procedures to challenge detention and obtain free legal assistance and representation.”*
48. UNHCR notes that the provision in Regulation 6(2) seeks to transpose Article 9(2)⁹² and (4)⁹³ of the EU Reception Conditions Directive. UNHCR welcomes the requirement in Regulation 6(2) that the detention order be in writing, in a language which the applicant is reasonably supposed to understand, and that the order states the reason or reasons on which it based. UNHCR considers that the reason or reasons stated in the order should state the reasons in fact and in law, in terms of the mentioned Article 9(2). UNHCR also welcomes the requirement that the applicant is informed of procedures to challenge detention and to obtain free legal assistance and representation. **UNHCR observes, however, that the requirement to inform detained asylum-seekers immediately of “the reasons for detention (...) in a language they understand or are reasonable supposed to understand” is only partially in line with Article 5(2) of the European Convention on Human Rights (ECHR), which states that “everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”** This provision has been interpreted by the European Court of Human Rights in several cases.⁹⁴ It would not be sufficient to only provide the reasons for detention in a language that the applicant is “reasonably supposed to understand.”⁹⁵

⁹¹ Article 8(2) makes it explicit that a necessity assessment is required, going beyond Saadi v. UK and UNHCR particularly welcomes this change. *Saadi v. United Kingdom*, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008, <http://www.refworld.org/docid/47a074302.html>

See also 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, Guideline 4.2, <http://www.refworld.org/docid/503489533b8.html>
See, also, *Rusu v. Austria*, Application no. 34082/02, Council of Europe: European Court of Human Rights, para. 582 October 2008, <http://www.refworld.org/docid/496361e02.html>

⁹² “2. Detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based.”

⁹³ “4. Detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.”

⁹⁴ *Fox, Campbell and Hartley v. The United Kingdom*, Application nos. 12244/86; 12245/86; 12383/86, Council of Europe: European Court of Human Rights, 30 August 1990, <http://www.unhcr.org/refworld/docid/3ae6b6f90.html>
See also, *Saadi v. United Kingdom*, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008.

⁹⁵ See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016.

Review of detention orders

49. UNHCR notes that a new Regulation 6(3) and (4) states:

“(3) The Immigration Appeals Board shall, with due regard to article 25A(10)⁹⁶ of the Immigration Act, review the lawfulness of detention after a period of seven (7) working days, which may be extended by another seven (7) working days by the Board for duly justified reasons.

(4) If the applicant is still detained, a review of the lawfulness of detention shall be held after periods of two months thereafter. Wherever the Immigration Appeals Board rules that detention is unlawful, the applicant shall be released immediately.”

50. UNHCR notes that the provisions in Regulation 6(3) and (4) seek to transpose Article 9(3)⁹⁷ and (5)⁹⁸ of the EU Reception Conditions Directive. UNHCR notes that Article 25A(10) of the Immigration Act, mentioned in Regulation 6(3), states that the Board shall grant release where detention “is not required or no longer required” for the reasons set out in the Immigration Act (and subsidiary legislation thereunder) or the Refugees Act (including the Revised Reception Regulations). The entitlement for asylum-seekers to request judicial review of detention whenever relevant circumstances arise or information becomes available, under Article 9(5), provides a further safeguard to ensure its ongoing lawfulness. **UNHCR welcomes the initial review of detention after a period of seven working (7) days, however, notes that the stipulation as regards working days may effectively prolong one’s detention more than is strictly required due to the Immigration Appeals Board not conducting reviews during weekends and public holidays.** Reviews of detention orders should ideally take place in the first instance within 24-48 hours of the initial decision to hold the asylum seeker.⁹⁹ In addition, **UNHCR notes that there are no provisions in the law stipulating that the Immigration Appeals Board shall conduct the periodic reviews by specifically undertaking an assessment on the necessity and proportionality of the continuation of detention in view of the legitimate purpose serving as a ground for detention.** Good practice furthermore indicates that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month (and not two months) mark and thereafter every month until the maximum period set by law is reached.¹⁰⁰ In larger detention facilities, good practice could be that the detention reviews are held at the detention facility, allowing for easy access of applicants to the hearings.¹⁰¹

Free legal assistance

51. UNHCR notes that a new Regulation 6(5) states:

“(5) An applicant shall be provided with free legal assistance and representation during the review of the lawfulness of his detention in accordance with sub-regulation (3). Free legal assistance and representation entails preparation of procedural documents and participation in any hearing before the Immigration Appeals Board.”

52. **UNHCR notes that free legal assistance does not extend to proceedings before the First Hall Civil Court (in its constitutional jurisdiction), the Constitutional Court, the European Court of Human Rights (ECtHR) and**

⁹⁶ Article 25A(10) of the Immigration Act:

“The Board shall grant release from custody where the detention of a person is, taking into account all the circumstances of the case, not required or no longer required for the reasons set out in this Act or subsidiary legislation under this 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.”

⁹⁷ “3. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* and/or at the request of the applicant. When conducted *ex officio*, such review shall be decided on as speedily as possible from the beginning of detention. When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review *ex officio* and/or the judicial review at the request of the applicant shall be conducted.

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.”

⁹⁸ “5. Detention shall be reviewed by a judicial authority at reasonable intervals of time, *ex officio* and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.”

⁹⁹ UNHCR Detention Guidelines, Guideline 7, para. 47 (iii).

¹⁰⁰ UNHCR Detention Guidelines, Guideline 7, para. 47 (iv).

¹⁰¹ See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 25.

the Court of Justice of the European Union (CJEU). Nevertheless, UNHCR welcomes the introduction of free legal assistance, an element which was absent prior to December 2015.

53. UNHCR notes that the provision in Regulation 6(5) seeks to transpose Article 9(6)¹⁰² of the EU Reception Conditions Directive. UNHCR welcomes this provision which foresees legal assistance and representation. UNHCR notes that the new policy document states that “[i]n view of the introduction of the right to free legal aid for the first review of the lawfulness of detention, asylum seekers whose detention is being reviewed shall have access to the existing legal aid pool that assists those clients contesting the Refugee Commissioner’s decision at appeals stage. Reviews of the lawfulness of detention shall be heard by the Immigration Appeals Board.”¹⁰³ **UNHCR notes, however, that over the years it has observed several issues with the existing legal aid pool that assists applicants during their asylum appeal, including the availability of interpretation services to facilitate lawyer and client meetings, as well as the inconsistent, and at times inadequate, quality of submissions presented to the Refugee Appeals Board.**¹⁰⁴ UNHCR is concerned that if these issues are not immediately addressed by the authorities, they will inevitably have an influence on the effectiveness of legal assistance. UNHCR considers that independent free legal assistance and representation is necessary in order to ensure effective access to justice.¹⁰⁵

Temporary permission to leave detention

54. UNHCR notes that a new Regulation 6(6) states:
“The Principal Immigration Officer shall have the possibility to grant applicants temporary permission to leave detention. The Principal Immigration Officer shall take the decisions individually, objectively and impartially and shall give reasons if the decisions are negative:
Provided that the applicant shall be given the facility to keep appointments with authorities and courts if his appearance thereat is necessary.”

55. UNHCR notes that the above provision is similar to Regulation 6(4)¹⁰⁶ of the Reception Regulations before the amendments of Legal Notice 417 of December 2015.

Time limit on the detention of applicants for asylum

56. UNHCR notes that a new Regulation 6(7) states:
“Any person detained in accordance with these regulations shall, on the lapse of nine months, be released from detention if he is still an applicant.”
57. **UNHCR notes that Regulation 6(7) is not in line with Article 9(1) of the EU Reception Conditions Directive**, which states that “[a]n applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable. Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.” UNHCR notes that the practice of using the time limit established by the EU Reception Conditions Directive for access to the labour market¹⁰⁷ seems to have been retained, and even codified in

¹⁰² “6. In cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

Free legal assistance and representation shall be provided by suitably qualified persons as admitted or permitted under national law whose interests do not conflict or could not potentially conflict with those of the applicant.”

¹⁰³ Press release issued by the Ministry for Home Affairs and National Security: New migration strategy draws a balance between human rights and security, PR152933eng, 30 December 2015, available here: <http://www.gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx>, (accessed 16 January, 2016), at p.11.

¹⁰⁴ UNHCR has observed that some lawyers within the existing legal aid pool are not well versed in matters of refugee law, including for example, an insufficient knowledge on the refugee definition and the grounds for granting subsidiary protection.

¹⁰⁵ See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 25.

¹⁰⁶ “(4) The Principal Immigration Officer shall have the possibility to grant applicants temporary permission to leave the place of residence mentioned in sub regulations (1) and (3) or the assigned area mentioned in sub regulation (2). The Principal Immigration Officer shall take the decisions individually, objectively and impartially and shall give reasons if the decisions are negative:

Provided that the applicant shall be given the facility to keep appointments with authorities and courts if his appearance thereat is necessary.” [Subsidiary Legislation 420.06, Reception of Asylum Seekers (Minimum Standards) Regulations, as enacted by Legal Notice 320 of 2005].

¹⁰⁷ Article 15(1) of the EU Reception Conditions Directive states: “Member States shall ensure that applicants have access to the labour

law. UNHCR considers that it is not appropriate to use laws and policies regulating access to the labour market as a means to regulate detention practices. The grounds for detention are provided for in European and international law, and are also set out in UNHCR's Detention Guidelines. These rules amply clarify the circumstances in which asylum-seekers may or may not be detained. More importantly, the nature of the grounds set out in Article 8(3) EU Reception Conditions Directive all relate to short term procedures, e.g. verifying identity and/or establishing the basic elements of the claim, and would not cover the entire asylum procedure.¹⁰⁸ In this context, it is important to note that Article 43(1) of the recast Asylum Procedures Directive (APD) allows Member States to provide for procedures to decide at the border or in transit zones on (a) the admissibility of an application, pursuant to Article 33 of the same Directive, or (b) the substance of an application in a procedure pursuant to Article 31(8) of the APD. Article 43(2) of the APD states that in case a decision cannot be made within 4 weeks the applicant should be granted access to the territory for further processing. Whereas Article 43 of the APD does not regulate detention, given that in practice such decisions are awaited in transit zones or at borders where the issue of deprivation of liberty may arise, UNHCR urges Member States to apply the safeguards of Article 9 of the EU Reception Conditions Directive requiring a speedy judicial review where an applicant is detained based on Article 8(3)(a), (b), (c) or (e) of the EU Reception Conditions Directive, and that decisions be taken within the four week mark in accordance with the principle of due diligence.¹⁰⁹

Alternatives to detention

58. UNHCR notes that a new Regulation 6(8) states:

(8) Where the Principal Immigration Officer does not order the detention of an applicant¹¹⁰ in accordance with sub-regulation (1), he may require the applicant:

- (a) to report at a police station within specified timeframes;*
- (b) to reside at an assigned place.*

For the purposes of this paragraph, the Principal Immigration Officer shall have the possibility to grant temporary permission to leave. The Principal Immigration Officer shall take the decisions individually, objectively and impartially and shall give reasons if the decisions are negative:

Provided that the applicant shall in no case require permission to keep appointments with authorities and courts if his appearance thereat is necessary:

Provided further that wherever the applicant is not required to reside at an assigned place, he shall be required to notify any change of address to the Principal Immigration Officer within not more than twenty-four hours;

- (c) to deposit or surrender documents; or*
- (d) to place a one-time guarantee or surety, with the Principal Immigration Officer.*

Such measures shall have a maximum duration of nine months:

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

59. UNHCR further notes that the new policy document¹¹¹ states the following as regards alternatives to detention:

"The Reception of Asylum Seekers Regulations, SL 420.06 shall specify that asylum seekers who entered the country irregularly, who are not vulnerable, and who are not subjected to a detention decision,¹¹² may be

market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant."

¹⁰⁸ See UNHCR Detention Guidelines, Guideline 4, para. 18 to 42.

See also UN High Commissioner for Refugees (UNHCR), *UNHCR's Position on the Detention of Asylum-seekers in Malta*, 18 September 2013, available at: <http://www.refworld.org/docid/52498c424.html>, at para. 30-32.

¹⁰⁹ See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 23.

¹¹⁰ Emphasis added.

¹¹¹ Press release issued by the Ministry for Home Affairs and National Security: *New migration strategy draws a balance between human rights and security*, PR152933eng, 30 December 2015, available here:

<http://www.gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx>, (accessed 16 January, 2016), at p.11.

¹¹² Emphasis added.

required to abide by one or more of the following conditions for a period not exceeding 9 months, namely:

- to report at an assigned place within specified timeframes;
- to reside at an assigned place;
- to deposit or surrender documents; or
- to place a one-time guarantee or surety.

These conditions shall be applied whenever no detention decision is issued¹¹³ in respect of the person concerned, but where it is still considered that there may be a risk of absconding.

Whenever such conditions are imposed due consideration shall be given to the person's circumstances, so that it is possible for the person concerned to abide by relevant conditions, e.g. undocumented persons shall not be required to deposit or surrender documents; persons having no financial resources shall not be required to place a guarantee or surety etc...

Any person who fails to comply with alternative to detention conditions may be issued with a warning or be detained. Any person so detained would be detained under the same terms and conditions as for any other detainee in terms of the Reception of Asylum Seekers Regulations, SL 420.06.

Alternatives to detention cannot be imposed on any person in respect of whom grounds to detain asylum seekers do not apply.¹¹⁴

In addition, Annex A¹¹⁵ of the new policy document states that “[w]henever a recommendation is made to the Principal Immigration officer not to detain an asylum applicant¹¹⁶ given that none of the above grounds apply or the risk of absconding is not deemed sufficiently high, the Officer making the recommendation shall also indicate whether alternatives to detention should be applied¹¹⁷ in the specific case and, if so, which.”

60. **UNHCR notes that Regulation 6(8) together with the above-cited paragraph from Annex A of the new policy document are not in line with Article 8(2) of the EU Reception Conditions Directive and therefore constitute an incorrect transposition of the said article.** UNHCR understands the above-cited provisions to mean that where a detention order is not issued by the Principal Immigration Officer, alternatives to detention may be applied. UNHCR considers that alternatives to detention are only applicable when there is an individualised assessment of the necessity, reasonableness and proportionality of detention and where a ground for detention applies. The risk of absconding may be a valid reason to impose a detention measure, albeit under the appropriate circumstances and taking into account the individual's situation, as a component of the legitimate purpose to impose such a restriction on freedom of movement to protect public order.¹¹⁸ **UNHCR also considers that the imposition of “conditions” in terms of the new policy document cited in paragraph 55 above, would be equivalent to applying alternatives to detention, but cannot be qualified as such because no decision to detain has been taken in the individual case.** Furthermore, in such a case these restrictions of liberty and freedom of movement would need to be compatible to those imposed to all individuals in similar circumstances and not limited to asylum applicants.¹¹⁹ **UNHCR recognizes that the “conditions” mentioned in the new policy document are relevant in the context of Article 7 of the EU Reception Conditions Directive, however they cannot be considered to be alternatives to detention, in the sense of less coercive measures other than detention,**

¹¹³ Emphasis added.

¹¹⁴ Emphasis added.

¹¹⁵ <http://www.gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx>, at p.26.

¹¹⁶ Emphasis added.

¹¹⁷ Emphasis added.

¹¹⁸ See UNHCR Detention Guidelines, Guideline 4.1.1

¹¹⁹ See Article 12 of ICCPR:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.”

if they are being used in a context where a decision to detain has not been taken. UNHCR considers that there is a lack of clarity on alternatives to detention in national legislation and policy and the provisions in the new policy document constitute an incorrect interpretation of the right to liberty and security of person. If not implemented correctly, the measures mentioned in paragraphs 58 and 59 may become alternative forms of detention.

61. Article 8(2) of the Directive states: “[w]hen it proves necessary and on the basis of an individual assessment of each case, Member States *may*¹²⁰ detain an applicant, *if*¹²¹ other less coercive alternative measures cannot be applied effectively.”¹²² UNHCR considers that it is essential that the Maltese authorities engage in an individual assessment as regards the necessity and proportionality of detaining each person, before actually resorting to detention. Should a decision to detain be taken on the basis of one of the grounds that apply, the applicability of less coercive measure (or alternatives to detention) should be considered before confining an individual to a detention centre. When considering the implementation of a detention decision, less coercive and intrusive measures (alternatives to detention), including no detention or release with or without conditions, need to be available and given preference, in particular for vulnerable individuals or persons in special circumstances.¹²³ Any decisions to detain need to conform to minimum procedural safeguards. The right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.¹²⁴

Detention facilities

62. UNHCR notes the introduction of Regulation 6A in the Revised Reception Regulations which provides for detention facilities. Regulation 6A(1) and (2) state the following:

“(1) Whenever an applicant is detained in accordance with regulation 6, he shall be detained in a specialised facility, which facility shall not be utilised as a place of detention for sentenced persons. In the eventuality that an applicant has to be detained in a facility for the detention of sentenced persons he shall be kept separate from inmates who are not detained pursuant to regulation 6:

Provided that minors shall never be detained in a facility utilised as a place of detention for sentenced persons.

(2) Applicants detained in a specialised detention facility in accordance with sub-regulation (1) shall, insofar as possible, be kept separate from third-country nationals who have not filed an application for international protection.”

63. UNHCR notes that Regulations 6A(1) and (2) seek to transpose Article 10(1)¹²⁵ of the EU Reception Conditions Directive. UNHCR welcomes the general rule in Regulations 6A(1) and (2) that immigration authorities are to use separate detention facilities for asylum-seekers apart from convicted criminals or prisoners on remand.¹²⁶ Even where separate facilities are not possible, UNHCR notes the requirement to

¹²⁰ Emphasis added.

¹²¹ Emphasis added.

¹²² Article 8(2) makes it explicit that a necessity assessment is required, going beyond Saadi v. UK and UNHCR particularly welcomes this change. Saadi v. United Kingdom, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008, <http://www.refworld.org/docid/47a074302.html>

See also 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, Guideline 4.2, <http://www.refworld.org/docid/503489533b8.html>

See, also, Rusu v. Austria, Application no. 34082/02, Council of Europe: European Court of Human Rights, para. 582 October 2008, <http://www.refworld.org/docid/496361e02.html>

¹²³ These include victims of trauma or torture, children, women, victims or potential victims of trafficking, asylum-seekers with mental or physical disabilities, older asylum-seekers, lesbian, gay, bisexual, transgender or intersex (LGBTI) asylum-seekers.

¹²⁴ See UNHCR Detention Guidelines: Guidelines 2, para. 14; Guideline 4, para. 18 – 20.

See also UNHCR’s Malta Position Paper, para.10.

¹²⁵ Article 10(1) of the Reception Conditions Directive:

“Detention of applicants shall take place, as a rule, in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners and the detention conditions provided for in this Directive shall apply.

As far as possible, detained applicants shall be kept separately from other third-country nationals who have not lodged an application for international protection.

When applicants cannot be detained separately from other third-country nationals, the Member State concerned shall ensure that the detention conditions provided for in this Directive are applied.”

¹²⁶ UNHCR Detention Guidelines, Guideline 8, paragraph 48 (i) and (iii).

separate applicants for international protection from the ordinary prison population in Regulation 6A(2). However, UNHCR notes that the mentioned provisions only partially transpose Article 10(1). Conditions of detention should ensure humane treatment with respect for the dignity of the person. UNHCR welcomes the general rule in Article 10 of the EU Reception Conditions Directive that Member States are to use separate detention facilities for asylum-seekers apart from convicted criminals or prisoners on remand. **Even where separate facilities are not possible, UNHCR notes the requirement to separate applicants for international protection from the ordinary prison population in Article 10(1) and that they are to enjoy the standards in the same Directive, notwithstanding that they are housed in prisons.**¹²⁷

64. UNHCR notes that Regulation 6A(3) states that “[a]pplicants in detention shall have access to open-air spaces.” **UNHCR welcomes this provision and notes that it transposes Article 10(2)¹²⁸ of the EU Reception Conditions Directive.**

Access to detention facilities

65. UNHCR notes the inclusion of Regulation 6A(4) regulating UNHCR’s access to applicants in detention, which states the following: “(4) *Representatives of the United Nations High Commissioner for Refugees (UNHCR) shall be given the possibility to communicate with and to visit applicants in detention in conditions that respect privacy.*” **UNHCR considers that Regulation 6A(4) also reflects and provides for the exercise of UNHCR’s mandate in terms of the Statute and the 1951 Convention, as well as the Country Agreement with the Government of Malta.**¹²⁹ **UNHCR notes that immigration detention centres should also be open to scrutiny and monitoring by independent national and international institutions and bodies.**¹³⁰ **In this context, UNHCR further notes that Legal Notice 425 of 2015 introduced amendments¹³¹ to Subsidiary Legislation 217.08 *Monitoring Board for Detained Persons Regulations.***¹³²

66. UNHCR notes the introduction of Regulation 6A(5) regulating communication and visits to applicants in detention, which states the following:

“(5) *Legal adviser, counsellors, representatives of relevant non-governmental organisations and family members of detainees shall be given the possibility to communicate with and visit applicants in detention in conditions that respect privacy, in accordance with rules and conditions that may be laid down in legislation regulating detention facilities:*

Provided that specialised detention facilities or facilities for the detention of sentenced persons may provide for limitations to access where necessary for purposes of administrative management or the upkeep of security and public order, as long as access is not severely restricted or rendered impossible.”

UNHCR notes that the new policy document also provides for access to detention centres.¹³³

UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, 28 December 1999, E/CN.4/2000/4, Annex II: Deliberation No. 5, “Situation regarding immigrants and asylum seekers”, Principle 9,

<http://www.unhcr.org/refworld/docid/3b00f25a6.html>

Council of Europe: Committee of Ministers, Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers, 16 April 2003, para. 10, <http://www.unhcr.org/refworld/docid/3f8d65e54.html>;

See too, United Nations, Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, para. 8,

<http://www.unhcr.org/refworld/docid/3ae6b36e8.html>;

See also UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

<http://www.un.org/documents/ga/res/43/a43r173.htm>

¹²⁷ See also UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 27.

¹²⁸ Article 10(2) of the Reception Conditions Directive: “*Detained applicants shall have access to open-air spaces.*”

¹²⁹ Article III(4) of the *Agreement between the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Government of Malta* states that: “*The Government shall at all times grant UNHCR personnel unimpeded access to refugees and other persons of concern to UNHCR and to the sites of UNHCR projects in order to monitor all phases of their implementation.*”

¹³⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 28.

¹³¹ Available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=27234&l=1>, accessed on 2 February 2015.

¹³² Available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9563&l=1>, accessed on 2 February 2015.

¹³³ Press release issued by the Ministry for Home Affairs and National Security: *New migration strategy draws a balance between human rights and security*, PR152933eng, 30 December 2015, available here:

<http://www.gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx>, (accessed 16 January, 2016), at p.17-18.

67. UNHCR welcomes the introduction of Regulation 6A(5) and considers that access to family members, legal advisers, counsellors, and civil society organisations is not only conducive to increased access to legal assistance, but also other much-needed services in detention provided by NGOs, such as psycho-social assistance and pastoral care.

68. UNHCR notes the introduction of Regulation 6A(6) seeking to partially transpose Article 10(5)¹³⁴ of the EU Reception Conditions Directive and which states the following:

“(6) The management of specialised detention facilities or facilities for the detention of sentenced persons shall provide to applicants in detention information concerning the rules of the facility, their rights and their obligations in a language that they may be reasonably presumed to understand.”

69. UNHCR notes the introduction of Regulation 6A(7) seeking to transpose Article 11(4)¹³⁵ of the EU Reception Conditions Directive and which states the following:

“(7) The management of specialised detention facilities or facilities for the detention of sentenced persons shall provide families in detention with separate accommodation guaranteeing adequate privacy.”

On this point, it is relevant to note that the new policy document provides that the Detention Service shall ensure that detainees are accommodated in accordance with a classification system:

- Single males;
- Single females; and
- Family units that do not comprise minors.¹³⁶

70. UNHCR notes and welcomes the introduction of Regulation 6A(8) seeking to transpose Article 11(5)¹³⁷ of the EU Reception Conditions Directive and which states the following:

“(8) The management of specialised detention facilities or facilities for the detention of sentenced persons shall ensure that female applicants in detention are accommodated separately from male applicants, unless the male applicants are family members and all applicants concerned give their consent to being accommodated together.”

71. UNHCR notes the introduction of Regulation 6A(9) seeking to transpose the second paragraph of Article 11(5)¹³⁸ of the EU Reception Conditions Directive and which states the following:

“(9) Notwithstanding sub-regulations (7) and (8), the management of specialised detention facilities or facilities for the detention of sentenced persons may designate common spaces for recreational or social activities, including the provision of meals for male and female applicants who are not part of a family unit in detention.”

The initial reception facility

72. UNHCR welcomes the establishment of an initial reception facility as described in the new policy document,¹³⁹ and which is intended to serve as an environment where asylum seekers who arrive in an irregular manner can be registered and granted medical clearance. **UNHCR notes that while this is a significant improvement when compared to the manner in which families and unaccompanied and**

¹³⁴ Article 10(5) of the Reception Conditions Directive: *“Member States shall ensure that applicants in detention are systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations in a language which they understand or are reasonably supposed to understand. Member States may derogate from this obligation in duly justified cases and for a reasonable period which shall be as short as possible, in the event that the applicant is detained at a border post or in a transit zone. This derogation shall not apply in cases referred to in Article 43 of Directive 2013/32/EU.”*

¹³⁵ Article 11(4) of the Reception Conditions Directive states: *“Detained families shall be provided with separate accommodation guaranteeing adequate privacy.”*

¹³⁶ Press release issued by the Ministry for Home Affairs and National Security: New migration strategy draws a balance between human rights and security, PR152933eng, 30 December 2015, available here:

<http://www.gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx>, (accessed 16 January, 2016), at p.16.

¹³⁷ Article 11(5) of the Reception Conditions Directive states: *“Where female applicants are detained, Member States shall ensure that they are accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto.”*

¹³⁸ Second paragraph of Article 11(5) of the Reception Conditions Directive states: *“Exceptions to the first subparagraph may also apply to the use of common spaces designed for recreational or social activities, including the provision of meals.”*

¹³⁹ Press release issued by the Ministry for Home Affairs and National Security: New migration strategy draws a balance between human rights and security, PR152933eng, 30 December 2015, available here:

<http://www.gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx>, (accessed 16 January, 2016), at p. 14.

separated children were received in the past,¹⁴⁰ the initial reception facility is still a form of detention as it involves the deprivation of liberty. In addition, the new policy document states that “reception standards in the facility shall be equivalent to those provided in Detention facilities.”¹⁴¹ UNHCR recommends that standards in the initial reception facility should be in line with Article 17(2) of the EU Reception Conditions Directive, which states that “[m]ember states shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.”

73. UNHCR notes an amendment to Regulation 8 of the Revised Reception Regulations. The amended regulation states the following:

“(1) The Director General Health may require medical screening for applicants on public health grounds.

“(2) For the purposes of this regulation, the Director General Health or any officer duly authorised shall apply the relevant provisions of the Prevention of Disease Ordinance and the Public Health Act whenever they deem necessary.”

In addition, the new policy document states: “[n]ewly arrived irregular migrants shall be accommodated at an Initial Reception Facility, a contained environment, in order for them to be medically screened and processed by the pertinent authorities, including AWAS and Police officials. The stay of an irregular migrant at an Initial Reception Centre shall be of limited duration and in no case shall such duration extend beyond the granting of medical clearance by the Health authorities.”¹⁴²

74. UNHCR acknowledges that there may be situation where there is a need for medical screening of applicants on public health grounds.¹⁴³ However, UNHCR also notes that while the above-mentioned provisions transpose Article 13¹⁴⁴ of the EU Reception Conditions Directive, they are not compatible with Article 9(1)¹⁴⁵ of the same Directive as they do not specifically require that medical clearance be issued within the shortest possible timeframe.¹⁴⁶ UNHCR further notes that Regulation 6(1) make no reference to detention on public health grounds. Carrying out health checks on individual asylum-seekers may be a legitimate basis for a period of confinement, provided it is justified in the individual case or, alternatively, as a preventive measure in the event of specific communicable diseases or epidemics. In the immigration context, such health checks may be carried out upon entry to the country or as soon as possible thereafter. Any extension of their confinement or restriction on movement on this basis should only occur if it can be justified for the purposes of treatment, authorised by qualified medical personnel, and in such circumstances, only until the treatment has been completed. Such confinement needs to be carried out in suitable facilities, such as health clinics, hospitals, or in specifically designated medical centres in airports/borders. Only qualified medical personnel, subject to judicial oversight, can order the further confinement on health grounds beyond an initial medical check.¹⁴⁷ Furthermore, UNHCR considers that medical screening should be accompanied with appropriate counselling in a language applicants can

¹⁴⁰ See UNHCR’s Malta Position Paper, para. 40.

¹⁴¹ Press release issued by the Ministry for Home Affairs and National Security: New migration strategy draws a balance between human rights and security, PR152933eng, 30 December 2015, available here: <http://www.gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx>, (accessed 16 January, 2016), at p.14.

¹⁴² Press release issued by the Ministry for Home Affairs and National Security: New migration strategy draws a balance between human rights and security, PR152933eng, 30 December 2015, available here: <http://www.gov.mt/en/Government/Press%20Releases/Pages/2015/Dec/30/pr152933eng.aspx>, (accessed 16 January, 2016), at p.10.

¹⁴³ UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 35.

¹⁴⁴ “Member States may require medical screening for applicants on public health grounds.”

¹⁴⁵ “1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.”

¹⁴⁶ In previous years, UNHCR has observed that delays in releases from detention centres were often attributed to the prolonged procedures for medical clearance (a chest x-ray to test for pulmonary infectious diseases).

¹⁴⁷ UNHCR Detention Guidelines, para. 29.

understand to explain the reason for the medical screening in a gender and age appropriate manner. The least invasive method should be used in respect of human dignity, as well as age and gender.¹⁴⁸

Schooling and education of children

75. UNHCR notes and welcomes the amendment of Regulation 9¹⁴⁹ (on schooling and education of children) of the Reception Regulations to include sub-regulation (3)¹⁵⁰ regarding preparatory classes for the minor children of applicants.

Access to the labour market

76. UNHCR notes and welcomes the substitution of Regulation 10¹⁵¹ (on employment) with a new regulation¹⁵² seeking to transpose Article 15¹⁵³ of the EU Reception Conditions Directive and providing access to the labour market after the lapse of 9 months from the date when the application was lodged. **While welcoming the reduction from 12 to 9 months, UNHCR recommends that access to the labour market be granted no later than 6 months from the date of lodging the application for international protection or sooner when the applicant is granted international protection within the 6-month period.** This timeline would coincide with Article 31(3) of the recast Asylum Procedures Directive, which foresees a 6-month maximum timeline (save for exceptional cases/circumstances) for processing applications for international protection.¹⁵⁴

¹⁴⁸ UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, accessed 1 February 2016, at p. 35.

¹⁴⁹ Regulation 9 of the Reception Regulations:

“9. (1) Minor children of asylum seekers and asylum seekers who are minors shall have access to the education system under similar conditions as Maltese nationals for so long as an expulsion measure against them or their parents is not actually enforced; such education may be provided as may be determined by the Director of Education.

(2) Access to the education system shall not be postponed for more than three months from the date the application for asylum was lodged by the minor or the minor’s parents:

Provided that this period may be extended to one year where specific education is provided in order to facilitate access to the education system.”

¹⁵⁰ *“(3) Preparatory classes for the minor children of applicants, including language classes, shall be provided where these are necessary with a view to facilitating their participation in the education system as provided in sub-regulation (1).”*

¹⁵¹ Regulation 10 of the Reception Regulations:

“10. (1) In accordance with labour market conditions prevailing at the time, the Ministry responsible for issuing employment licences shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.

(2) If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant or his legal representative, the Ministry responsible for issuing employment licences shall decide the conditions for granting access to the labour market for the applicant.

(3) Where an appeal is lodged against a negative decision, access to the labour market shall not be withdrawn during the appeal stage.

(4) The provisions of subregulations (1), (2) and (3) are without prejudice to priorities given, for reasons of labour market policies, to citizens of Member States and nationals of States parties to the Agreement on the European Economic Area and also to legally resident third country nationals.”

¹⁵² Regulation 10 of the Draft Reception Regulations:

“10(1) An applicant shall be granted access to the labour market after the lapse of nine months from the date when the application was lodged, provided that he is still an applicant when such a lapse has occurred.

(2) Where an appeal is lodged against a negative decision, access to the labour market shall not be withdrawn during the appeals stage.

(3) The provisions of sub-regulations (1) and (2) are without prejudice to priorities given, by reasons of labour market policies, to citizens of Member States and nationals of States parties to the Agreement on the European Economic Area and also to legally resident third-country nationals.”

¹⁵³ Article 15 of the Reception Conditions Directive:

“1. Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.

2. Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market.

For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.”

¹⁵⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, p. 38.

Material reception conditions

77. UNHCR notes and welcomes the amendment of Regulation 11¹⁵⁵ of the Reception Regulations (on general rules on material reception conditions and health care) to include a new sub-regulation (2)¹⁵⁶ regarding the provision of emergency health care and essential treatment of illness and serious mental disorders.
78. UNHCR notes the amendments to Regulation 12¹⁵⁷ of the Reception Regulations (on modalities for material reception conditions) to include two provisos under sub-regulation (1) and which state the following:
*“Provided that, when accommodating applicants, due regard shall be given to gender and age-specific concerns, as well as the situation of vulnerable persons:
Provided further that, wherever possible, dependent adult applicants are to be accommodated with close adult relatives who are in Malta.”*
79. UNHCR notes that sub-regulation (3) has been amended and states the following: *“[i]f appropriate, minor children of applicants or applicants who are minors shall be lodged with their parents or with the adult family member responsible for them whether by law or by custom or with their unmarried siblings.”* **UNHCR considers that children who find themselves without parental protection are dependent on States to uphold their rights. Malta is encouraged to uphold children’s rights by assessing what would be in the best interests of the individual child.**¹⁵⁸ In this context, UNHCR recognises the full applicability of the

¹⁵⁵ Regulation 11 of the Reception Regulations:

“11. (1) The authorities responsible for the management of reception centres shall ensure that material reception conditions are available to applicants when they make their application for asylum.

(2) The material reception conditions shall be such as to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence; the authorities referred to in subregulation (1) shall moreover ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with regulation 14, as well as in relation to the situation of persons who are in detention.

(3) The provision of material reception conditions and health care shall be subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.

(4) Where applicants have sufficient resources, or if they have been working for a reasonable period of time, applicants may be required to cover or contribute to the cost of the material reception conditions and of the health care provided for in these regulations; if it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when these basic needs were being covered, the asylum seeker may be asked for a refund.”

¹⁵⁶ *(2) Applicants shall be provided with emergency health care and essential treatment of illness and serious mental disorders. Medical and other assistance shall be provided to applicants who have special reception needs, including mental health care.”*

¹⁵⁷ Regulation 12 of the Reception Regulations:

“12. (1) Where accommodation is provided in kind, it should take one or a combination of the following forms:

(a) premises used for the purpose of accommodating applicants during the examination of an application for asylum lodged at the moment of entry into Malta;

(b) accommodation centres which guarantee an adequate standard of living;

(c) other premises adapted for accommodating applicants.

(2) The authorities responsible for such accommodation shall ensure that applicants provided with the accommodation referred to in subregulation (1)(a), (b) and (c) are assured:

(a) protection of their family life;

(b) the possibility of communicating with relatives, legal advisers and representatives of the United Nations High Commissioner for Refugees and recognised non- governmental organisations.

Particular attention shall be paid to the prevention of assault within the premises and accommodation centres referred to in sub-regulation (1)(a) and (b).

(3) If appropriate, minor children of applicants or applicants who are minors shall be lodged with their parents or with the adult family member responsible for them whether by law or by custom.

(4) Transfers of applicants from one accommodation facility to another shall take place only when necessary, and applicants shall be provided with the possibility of informing their legal advisers of the transfer and of their new address.

(5) Legal advisers or counsellors of asylum seekers and representatives of the United Nations High Commissioner for Refugees or non-governmental organisations designated by the latter and recognised by the authorities responsible for the management of reception centres shall be granted access to accommodation centres and other accommodation facilities in order to assist the said asylum seekers; in granting such access the authorities responsible for the management of reception centres may impose such limits as they may deem appropriate on grounds relating to the security of the centres and facilities and of the asylum seekers.

(6) In exceptional circumstances modalities may be set for material reception conditions which are different from those provided for in this regulation, for a reasonable period which shall be as short as possible, when:

(a) an initial assessment of the specific needs of the applicant is required,

(b) material reception conditions, as provided for in this regulation, are not available,

(c) accommodation capacities normally available are temporarily exhausted,

(d) the asylum seeker is in detention or confined to a border post:

Provided that these different conditions shall, in any case, cover basic needs.”

¹⁵⁸ For more on this point see UN High Commissioner for Refugees (UNHCR), *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at:

<http://www.refworld.org/docid/5423da264.html>, at p. 9.

principle of the best interests of the child in keeping with the Convention of the Rights of the Child and relevant UN CRC General Comments.¹⁵⁹

80. UNHCR welcomes the inclusion of family members in sub-regulation (5).¹⁶⁰
81. UNHCR notes and welcomes the deletion of paragraphs (b) and (d) in Regulation 12(6) of the Revised Reception Regulations, concerning different modalities set for material reception conditions, in the cases where material reception conditions are not available and where the asylum seeker is in detention or confined to a border post respectively. **As regards the interpretation of what constitutes an “adequate standard of living” UNHCR refers to Article 11(1) of the CESCR.**¹⁶¹ Pursuant to Article 11(1) of the Covenant, States parties recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.¹⁶² This provision is further elaborated in General Comment 4 of the Committee on Economic, Social and Cultural Rights which cites both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 as saying that: “Adequate shelter means... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost.”¹⁶³
82. UNHCR notes the insertion of the paragraph (7)¹⁶⁴ in Regulation 12 which transposes Article 18(6)¹⁶⁵ (regarding transfers of applicants from one housing facility to another) of the Reception Conditions Directive. UNHCR notes, however, that this new paragraph is almost identical to that in paragraph (4).¹⁶⁶ While UNHCR appreciates that this could be an inadvertent drafting error, it recommends a correction for the purposes of legal clarity and certainty.
83. UNHCR notes further provisions regulating the reduction or withdrawal of reception conditions which take into account vulnerable persons and provide that material reception conditions shall not be withdrawn or reduced before a decision is taken according to Article 20(5)¹⁶⁷ of the EU Reception Conditions Directive. UNHCR considers that adequate reception conditions are a precondition to an applicant’s ability to present his or her application for international protection. Reception conditions may only be withdrawn temporarily in the individual case where the applicant abandons his or her place of residence in the circumstances described in Regulation 13(1)(a)¹⁶⁸ and should be restored promptly upon his or her return subject to conditions set out in the last part of Article 20(1) of the Directive.¹⁶⁹

¹⁵⁹ See also para. 25, above. See too, UN CRC General Comments 5, 6, 12 and 14.

¹⁶⁰ “Family members, legal advisers or counsellors of asylum seekers and representatives of the United Nations High Commissioner for Refugees or non-governmental organisations designated by the latter and recognised by the authorities responsible for the management of reception centres shall be granted access to accommodation centres and other accommodation facilities in order to assist the said asylum seekers; in granting such access the authorities responsible for the management of reception centres may impose such limits as they may deem appropriate on grounds relating to the security of the centres and facilities and of the asylum seekers.”

¹⁶¹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, para. 7, <http://www.refworld.org/docid/47a7079a1.html>

¹⁶² UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, p. 41.

¹⁶³ CESCR, General Comment No. 4: The Right to Adequate Housing, para. 7.

¹⁶⁴ “(7) Transfers of applicants from one facility to another shall take place only when necessary. Applicants shall be granted the possibility to inform their legal advisers of the transfer and of their new address.”

¹⁶⁵ Article 18(6) of the Reception Conditions Directive:

“Member States shall ensure that transfers of applicants from one housing facility to another take place only when necessary. Member States shall provide for the possibility for applicants to inform their legal advisers or counsellors of the transfer and of their new address.”

¹⁶⁶ “(4) Transfers of applicants from one accommodation facility to another shall take place only when necessary, and applicants shall be provided with the possibility of informing their legal advisers of the transfer and of their new address.”

¹⁶⁷ “5. Decision for reduction or withdrawal of material reception conditions or sanctions referred to in paragraphs 1, 2, 3 and 4 of this Article shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 21, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a dignified standard of living for all applicants.”

¹⁶⁸ Or Article 20(1).

¹⁶⁹ UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, p. 47.

Detention of children

84. UNHCR notes the deletion of the current Regulation 14¹⁷⁰ of the Reception Regulations and the substitution with an entirely new provision¹⁷¹ establishing the general principle regarding vulnerable persons. **UNHCR welcomes the inclusion of specific provisions stating that children shall not be detained, except as a measure of last resort, and considers this to be a significant shift from the legislative framework previously in force.**¹⁷²

LGBTI asylum applicants

85. UNHCR notes that Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) individuals are not explicitly mentioned in Regulation 14(1) and considers this absence to be at odds with the strong legal protection framework which LGBTI persons enjoy in Malta.¹⁷³

¹⁷⁰ "14. (1) In the implementation of the provisions relating to material reception conditions and health care, account shall be taken of the specific situation of vulnerable persons which shall include minors, unaccompanied minors and pregnant women, found to have special needs after an individual evaluation of their situation.

(2) In the implementation of the provisions of these regulations, where these refer to minors, the best interests of the child shall constitute a primary consideration."

¹⁷¹ "(1) In the implementation of the provisions relating to material reception conditions and health care, including mental health, account shall be taken of the specific situation of vulnerable persons which shall include minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, found to have special needs after an individual evaluation of their situation:

Provided that minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment or who have suffered from armed conflicts shall be given access to pertinent rehabilitation services in terms of the Victims of Crime Act, further to being provided with the required mental health care.

For the purposes of this provision an evaluation by the entity responsible for the welfare of asylum seekers, carried out in conjunction with other authorities as necessary shall be conducted as soon as practicably possible:

Provided that applicants identified as minors shall not be detained, except as a measure of last resort:

Provided further that applicants who claim to be minors shall not be detained, except as a measure of last resort, unless the claim is evidently and manifestly unfounded.

(2) Whenever the vulnerability of an applicant becomes apparent at a later stage, assistance and support shall be provided from that point onwards, pursuant to a reassessment of the case.

(3) 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.

Provided that minors shall be detained in facilities separate from adults and provided with leisure activity.

(4) In the implementation of the provisions of these regulations, where these refer to minors, the best interests of the child shall constitute a primary consideration. When considering the best interest of the child due regard shall be taken to the possibilities of family reunification, the minor's general well-being and social development, safety and security considerations, and the views of the minor in accordance with his age and maturity.

(5) Minor applicants shall have access to leisure activity, including play and recreational activity appropriate to their age, and to open air activity whenever accommodated in accordance with regulation 12.

(6) The entity responsible for the welfare of asylum seekers shall, with the assistance of international organisations as necessary, initiate procedures to trace the family members of applicants who are unaccompanied minors. Whenever the circulation of data may place family members in jeopardy, the collection, processing and circulation of data shall be kept confidential."

¹⁷² See UNHCR's Malta Position Paper, paras. 34 – 40.

¹⁷³ In particular:

- 1) The introduction of the ground of "gender identity" in the list of grounds of non-discrimination found in the *Constitution of Malta (Amendment) Act, 2014*;
- 2) The inclusion of "gender identity" within the definition of a particular social group in the *Procedural Standards in Examining Application for Refugee Status (Amendment) Regulations, 2014* (L.N. 161 of 2014);
- 3) The inclusion of the ground of "gender reassignment" for purposes of sick leave and other rights and protections afforded under the *Employment and Industrial Relations Act*;
- 4) The amendment to the *Civil Code* allowing transgender persons to be fully recognized in the acquired gender and the right to marry their opposite sex partner through the *Civil Code (Amendment) Act, 2013* (Act No. VII of 2013);
- 5) The introduction of the *Civil Unions Act* (Act IX of 2014) providing for the registration of partnerships as a civil union between two persons of the same or of different sex.
- 6) The introduction of the *Gender Identity, Gender Expression and Sex Characteristics Act* (Act XI of 2015) providing for the recognition and registration of the gender of a person and to regulate the effect of such a change, as well as the recognition and protection of the sex characteristics of a person.

Assessment of special or particular needs

86. UNHCR notes that the new Regulation 14 seeks to transpose a number of articles (such as Articles 21¹⁷⁴ and 22¹⁷⁵) from the EU Reception Conditions Directive, however without addressing several important points. For example, Article 22 of the Reception Conditions Directive specifically mentions the assessment of the special needs of vulnerable persons and that Member States shall initiate such assessment within a reasonable period of time after an application for international protection and that account of special reception needs to be taken throughout the duration of the asylum procedure together with appropriate monitoring. **UNHCR recommends that any evaluations and assessments in terms of Regulation 14 are conducted as soon as possible in order to ensure the early identification of persons with special needs or in particular circumstances.** Special needs should ideally be identified at an early stage of the process, as they may otherwise inhibit severely the applicant's ability to communicate effectively, and the authorities' ability to gather evidence, or put applicants at risk in collective accommodation.¹⁷⁶
87. UNHCR notes and welcomes the insertion of paragraphs (4), (5) and (6) in Regulation 14 of the Revised Reception Regulations, concerning the best interest of the child, access to leisure activities, and the initiation of family tracing procedures. **UNHCR notes, however, that there is no clear provision in the law prescribing procedures for vulnerability and age assessment and when these are required, and no clear provision prescribing when a best interest assessment or determination is to be carried out.**¹⁷⁷ UNHCR recommends that such procedures are prescribed by law.

¹⁷⁴ Article 21 states: "Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive."

¹⁷⁵ Article 22 on the assessment of the special reception needs of vulnerable persons states:

"1. In order to effectively implement Article 21, Member States shall assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs.

That assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.

Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.

2. The assessment referred to in paragraph 1 need not take the form of an administrative procedure.

3. Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.

4. The assessment provided for in paragraph 1 shall be without prejudice to the assessment of international protection needs pursuant to Directive 2011/95/EU."

¹⁷⁶ UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, p. 51.

¹⁷⁷ Article 24(3) of the Reception Conditions Directive: "Member States shall start tracing the members of the unaccompanied minor's family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. In cases where there may be a threat to life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardizing their safety."

Appeals to the Immigration Appeals Board

88. UNHCR notes the introduction of the new Regulation 16¹⁷⁸ of the Revised Reception Regulations regarding appeals to the Immigration Appeals Board. UNHCR notes the limitation on free legal assistance and representation to *“the preparation of the required procedural documents and participation in the hearing before the Immigration Appeals Board.”* UNHCR understands this mean that free legal assistance does not extend to the First Hall Civil Court (in its constitutional jurisdiction), the Constitutional Court, the ECtHR and the CJEU. In addition, UNHCR notes that an appeal before the Immigration Appeals Board has a time limit of 3 working days, and there are no provisions containing guidance for the Immigration Appeals Board on how to assess cases relating to age and vulnerability assessment and material reception conditions. **UNHCR recommends that legal provisions are enacted to provide guidance to the Immigration Appeals Board on vulnerability and age assessment, as well as the minimum standards prescribed by the EU Reception Conditions Directive.**

¹⁷⁸ *“(1) Applicants who feel aggrieved by a decision taken in pursuance to the provisions of these regulations and by a decision in relation to age assessment in accordance with regulation 17 of the Procedural Standards in Examining Applications for International Protection Regulations, shall be entitled to an appeal to the Immigration Appeals Board in accordance with the provisions laid down in the Immigration Act:*

Provided that applicants who lack sufficient resources to appeal from a decision, are entitled to free legal assistance and representation.

(2) Free legal assistance and representation shall entail the preparation of the required procedural documents and participation in the hearing before the Immigration Appeals Board.”

Conclusion

89. In UNHCR's view, the revised legislative and policy framework introduces a number of important changes which, once implemented in practice, will lead to improved reception standards and treatment for many asylum applicants who arrive in Malta in an irregular manner. In particular, the revised legislation no longer supports the automatic and mandatory detention of asylum seekers who have entered Malta in an irregular manner. However, UNHCR notes that it remains within the discretion of the immigration authorities to detain asylum seekers and whether to consider less coercive measures other than detention in cases where grounds for detention have been identified.
90. UNHCR notes that some of the guidelines in the new policy document are not fully in line with well-established international human rights and refugee law standards, and could potentially lead to situations of arbitrary and unlawful detention. UNHCR is also concerned that the law and policy regulating the applicability of alternatives to detention is also not fully in line with well-established international human rights standards, in particular, it appears that there is a lack of clarity regarding when and how less coercive measures should be applied.
91. It is acknowledged that in order to fully assess the revised law and policy framework, there is a need to first observe how the Maltese authorities will implement this in practice. UNHCR stands ready to contribute to the further development of Malta's reception framework, including by providing guidance and advice relating to interpretation of relevant legal principles. In line with its general mandate, UNHCR will also continue to support the relevant authorities and monitor Malta's reception framework, in particular by conducting regular visits to arrival, reception and detention facilities.