European Network on Statelessness

# PROTECTING STATELESS PERSONS FROM ARBITRARY DETENTION


## IN MALTA

aditus
accessing rights

# SUMMARY OF FINDINGS

The 1954 Statelessness Convention defines a stateless person as someone who is not considered as a national by any State under the operation of its law. According to UNHCR, the identification of such a person requires "a careful analysis of how a State applies its nationality laws in an individual's case in practice ... This is a mixed question of fact and law." In the immigration detention context in particular, the protection needs of those at risk of statelessness – often stemming from their unreturnability - significantly overlap with those of the stateless.

Statelessness appears to be an invisible issue in Malta, with very little stakeholder awareness and very limited legislative coverage. It is not surprising therefore, that Malta mainstreams stateless people with migrants and refugees entering the country irregularly. As a consequence they are almost automatically channelled into the asylum determination procedure, but do not have the opportunity to apply for recognition as stateless persons. Another consequence is their subjection to Malta's mandatory detention regime, in many cases despite the impossibility of their removal. Within this context, a 2014 UNHCR report on statelessness in Malta was presented to key government counterparts. While no definite commitments were expressed by the government, its response appeared positive. Malta is currently exploring accession to the 1954 Statelessness Convention.

## LAW AND POLICY CONTEXT

The right to a nationality and/or protection of stateless persons is reinforced by a range of international and regional instruments, to which Malta is party, including the ICCPR, CERD, CRC and CEDAW. Significantly though, Malta has not acceded to the 1954 and 1961 Statelessness Conventions and has signed but not ratified the European Convention on Nationality. The practice of (administrative) detention is also governed by a variety of instruments, including the ICCPR, the European Convention on Human Rights and the EU Returns Directive, all of which protect against arbitrary detention.

Malta's national legal framework is inadequate at present to identify and protect stateless persons, including from arbitrary detention. In this regard, Malta clearly falls short of its current international and regional obligations, and would also benefit from acceding to the Statelessness Conventions, which provide further clarity on relevant requirements. Moreover, Malta's mandatory immigration detention regime contravenes international standards. The arbitrary nature of the law has been somewhat mitigated through the transposition of the Return Directive into national law in 2011, followed by further amendments in 2014, which introduced compulsory regular reviews of detention of persons awaiting return. Further reform in Malta's use of administrative detention is imminent with the transposition of the Recast Reception Conditions Directive.

## DATA ON STATELESSNESS AND DETENTION

Perhaps because of the significant lack of awareness and legislative gaps on statelessness in Mata, existing data on statelessness is very limited and remains largely hidden within wider statistics on third country nationals. In these statistics, just one person who arrived irregularly by boat in 2014 is recorded as having an "unspecified" nationality. While the 2011 census showed there to be 200 stateless persons in the country, UNHCR's research revealed that many of these persons had a nationality recorded elsewhere. At the same time, it must be emphasised that efforts to pin down exact numbers of stateless detainees are frustrated by the current absence of a dedicated determination mechanism.

Given Malta's geographical location, it has served as a key entry point to Europe for refugees and migrants crossing the Mediterranean Sea. A significant increase in arrivals since 2002, saw the country strengthen its mandatory detention regime, which in turn resulted in detention centres being heavily populated. Since 2013 though, detention numbers have dramatically declined, mainly due to the Mare Nostrum naval operation initiated by Italy. While this operation ended in 2015, the number of boat arrivals to Malta remain low, with just 93 arrivals recorded for 2015, and the majority of refugees now arriving by plane. As a result, Malta's detention centres are, at the time of writing, almost empty.

## KEY ISSUES OF CONCERN

Based on desk research, legal analysis and stakeholder interviews, the following key areas of concern were identified with regard to the detention of stateless persons in Malta:

### a) Identification & determination procedures

There is no formal procedure to identify and determine statelessness. Furthermore, a stateless person is defined under Maltese law as someone "destitute of any

nationality". This definition is different to, and narrower than the international law definition, and thus, identification based on this definition risks excluding those in need of protection. In the absence of a procedure, the Immigration Police identify and assess all irregular migrants, resulting in the mainstreaming of stateless persons, or persons at risk thereof, with other migrants. If a statelessness claim arises during an interview under an application for international protection, it will be assessed, but only in relation to the risk of persecution. Therefore, stateless people who have not faced persecution will not receive refugee protection, though they may be granted Temporary Humanitarian Protection. It appears that Malta's cautious approach to the establishment of a statelessness determination procedure seems to be largely based on administrative and financial concerns, rather than on a failure to acknowledge the challenges faced by stateless persons.

### b) Decision to detain and procedural guarantees

Under Maltese law, detention of 'prohibited migrants' – those who have no right to enter and/or remain in Malta, including those who seek asylum after having been apprehended - is mandatory. Hence, there is no procedure (or decision) to detain. The mandatory and arbitrary nature of Malta's detention regime, contravenes its obligations under international law. Domestic procedural guarantees related to detention have been found to be insufficient by the European Court of Human Rights, which also condemned Malta for not protecting against arbitrary detention. The imminent transposition of the recast Reception Conditions Directive, will include significant reform of the detention system, shifting from a system of automatic detention to an individual assessment process resulting in decisions not to detain, to impose alternatives to detention or to detain, and strengthening of the procedural guarantees allowing a detained person to challenge the legality of his/her detention.

### c) Length of detention

While Maltese law does not set a maximum time limit, national policy does, in line with the Return Directive. However, it is not clear how this maximum detention duration operates with regard to migrants who, having already been detained for the maximum period, are re-detained in the context of return proceedings. Moreover, while new regulations provide for the review of detention at reasonable intervals, it is too early to assess how effectively these provisions are applied in practice. Previously Malta has been condemned by the ECtHR for the extended detention of a migrant without the ability to prove or demonstrate efforts to conduct the removal process.

### d) Removal and re-documentation

The main challenge in this regard stems from the lack of communication from authorities of the countries of origin and a related failure by the Maltese authorities to respond to this or the resulting impact on individuals affected. As of early 2015 the Immigration Police has around 2800 pending requests for travel documents, some of which have been pending for years, primarily to Cote d'Ivoire, Nigeria, Ethiopia, Eritrea and Sudan. It must be noted that in relation to Malta, the European Court of Human Rights has reiterated that detention for purposes of removal is only justified when removal proceedings are being carried out with due diligence. Where returnability is no longer an option, continued detention becomes unjustified.

### e) Alternatives to detention

Despite having clear international obligations to only detain as a last resort, and only if all other less coercive measures are not suitable, Maltese law makes no provision for alternatives to detention, saving the possibility for detained migrants to request bail from the Immigration Appeals Board. It is expected that the transposition into Maltese law of the recast Reception Conditions Directive will require Malta to introduce alternatives to detention into national law.

### f) Children, families and vulnerable groups

Although Maltese legislation does not provide for the identification of vulnerable groups, the Agency for the Welfare of Asylum Seekers is responsible for the assessment and determination of vulnerability in the context of detention, including through determining the age of children. The recently adopted Reception Regulations contain specific provisions for those with special needs, minors, unaccompanied minors and pregnant women, also enshrining the principle of maintenance of family unity. Upon confirmation of vulnerability or minor age of unaccompanied children, persons should be released from detention. However, there have been concerns raised that some vulnerable individuals are either never identified or, once identified, are unable to access the care and support they require.

### g) Conditions of detention

Conditions of detention in Malta have been extremely poor, receiving condemnation of the European Court of Human Rights and international human rights organisations alike. The European Court has held that the conditions suffered by vulnerable detainees amount to violations of Malta's obligation to protect against cruel, inhumane or degrading treatment or punishment.

### h) Conditions of release and re-detention

Detainees can be released in any of the following three situations: when they are granted a form of international protection; when they are determined to be vulnerable adults or unaccompanied minors; the lapse of the maximum period of 18 months in the case of failed asylum-seekers, with the subsequent possibility of re-detention when removal proceedings become feasible.

Following release from detention, Immigration authorities can apprehend and re-detain a person where the prospects for his/her return materialises. This possibility should usually, in theory at least, present no risk to a stateless person given that the 'due diligence' principle in return proceedings ostensibly requires real prospects of return for the migrant's detention to be lawful. However, in view of Malta's over-reliance on administrative detention, it is not possible to rely on or assume full compliance in this regard. Stateless persons therefore remain at risk of re-detention.

## CONCLUSIONS AND RECOMMENDATIONS

In the Maltese context, it appears that the issue of statelessness is not visible enough to push the state to introduce a system of identification and protection specific to the needs of stateless people and those at risk of being stateless. On the other hand, the state has articulated its fear that accession to the Convention would lead to "a strain of the system", in itself a paradox as the numbers appears so negligible. The specific situation of detained persons is problematic due to the broader human rights concerns related to Malta's detention regime, with detention for purposes of removal being particularly problematic in the case of stateless persons, or persons at risk thereof.

It is nonetheless positive to note ad hoc attempts at granting, as a minimum, national protection, to persons who although not formally identified as stateless, present themselves as such. In this regard, the positive efforts of the Office of the Refugee Commissioner are noted. Also noted are the comments by the Ministry regarding possible accession to the 1954 Convention, and its openness at discussing this with civil society organisations.

On the basis of the above, the following recommendations are made. Both aditus foundation and ENS stand ready to constructively engage in a technical discussion with the relevant stakeholders, and provide all relevant information and input:

1. State authorities should collect accurate data regarding stateless persons, including those in detention. Data on statelessness is necessary to ascertain the extent of the problem and to design effective solutions. Accurate information is necessary in order to understand who the affected persons are, and how they are being treated.
2. Malta should accede to the Convention relating to the Status of Stateless Persons of 1954 and the Convention on the Reduction of Statelessness of 1961, which provide part of the legal framework for the protection of the rights of stateless persons, as well as reducing and preventing statelessness. Malta should also fulfil its obligations by the stateless under international and regional human rights law, including obligations to not discriminate against and to not arbitrarily detain the stateless.
3. Malta should establish a dedicated statelessness determination procedure. In order to build on lessons learnt, to maximise limited resources, and to capitalise on existing expertise, the Office of the Refugee Commission readily presents itself as a viable option for the responsible authority. In order to avoid abusive applications, appropriate information ought to be provided to applicants in order to clarify the purpose and implications of the procedure, including the possibility of identifying a country willing to engage in a return process. Any procedure should enshrine all necessary procedural guarantees, including access to information, legal aid, and effective remedy.
4. Determination of statelessness in a dedicated procedure (see above) should unequivocally rule out detention, as it precludes the view to expulsion. This procedure should provide a possibility of regularisation of legal residence status of such persons and issuance of identity and travel documents. Accordingly, the law should set clear rules governing statelessness determination procedure providing inter alia, that everyone who wishes to request statelessness status can do so quickly and effectively.
5. Malta should finalise the move from an immigration regime based largely on automatic detention towards one based on individual assessments, and bring Malta's use of administrative detention in line with human rights standards. In particular, the circumstances facing stateless persons should be considered as a significant factors during the process of determining the lawfulness of immigration detention. The initial decision to detain should always be based on the individual circumstances and personal history of the person in question. Decisions should contain clear reasons why other non-custodial measures would be inadequate for the purpose and, in the light of existing alternative measures, there should be clear proportionality between the detention and the end to be achieved. In particular, when detention proceedings are carried out, state authorities should identify whether or not a person is stateless or at the risk of statelessness (inter alia due to the fact that a person claims to be from one of the countries known for generating statelessness) having in mind that the lack of appropriate documentation or presenting expired documentation should not per se justify the decision to detain and should not be equalled to a risk of absconding. Failure to do so is likely to render detention arbitrary.
6. Malta should ensure that detention is always used as a last resort, after all alternatives (starting with the least restrictive) are exhausted. Less restrictive

measures must be shown to be inadequate before detention is applied. The choice of alternative to detention should be influenced by the individual assessment of the circumstances of stateless persons.

7. Malta should formalise the detention review procedure contained in the Returns Regulations, so as to more appropriately establish a transparent and accountable procedure that conforms to human rights standards. In this regard, the notion of "due diligence" in the context of return procedures, should be maintained as a key priority. Throughout detention – state authorities must be diligent enough to identify if people who they initially assessed as not being at risk of statelessness are now at risk – and act accordingly. Decisions to continue detention of a stateless person should always contain a detailed justification explaining what measures aimed at determining the nationality of the person in question were already taken, what the reaction of the diplomatic mission of the country contacted was and what the prospect of a successful return of this person to the country of origin/former habitual residence is.
8. In the case of failed asylum-seekers, particular attention ought to be paid to the relationship between the migrant and the presumed or claimed country of origin in order to ensure that where legal and/or practical returnability is not possible, detention is not resorted to. Furthermore, such individuals should be referred to the statelessness determination procedure.
9. Malta should raise the profile of statelessness and train those public authorities potentially engaging with this issue, particular the Department for Citizenship and Expatriates Affairs.
10. Malta should conduct an internal assessment of those scenarios whereby Maltese law or practice related to, inter alia, citizenship, residence permits, and marriage creates or heightens risks of statelessness, and such gaps in the law and practice should be addressed.
11. Malta should ensure effective access to protection for stateless persons, through the provision of legal stay status and the formal recognition of their civil, political, economic, social and cultural rights.

## ABOUT THE PROJECT

The European Network on Statelessness (ENS), a civil society alliance with 103 members in over 39 European countries, is undertaking a project aimed at better understanding the extent and consequences of the detention of stateless persons in Europe, and advocating for protecting stateless persons from arbitrary detention through the application of regional and international standards.

The project will deliver a series of country reports (including this report) investigating the law, policy and practice related to the detention of stateless persons in selected European countries and its impact on stateless persons and those who are 'unreturnable' and therefore often at risk of statelessness. The methodology for all country reports follows a common research template – combining desk-based analysis alongside interviews with relevant stakeholders (civil society and government) as well as stateless persons.

In addition the project has developed a regional toolkit for practitioners on protecting stateless persons from arbitrary detention – which sets out regional and international standards that states must comply with. The toolkit, along with the full version of this and other country reports, will be available on the ENS website at www.statelessness.eu

Please refer to the full version of this report for citation purposes and for more detailed acknowledgements.

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