

*UNACCOMPANIED MINOR
ASYLUM-SEEKERS IN MALTA:*

*A TECHNICAL REPORT ON AGE
ASSESSMENT &
GUARDIANSHIP PROCEDURES*

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**Unaccompanied Minor Asylum-Seekers in Malta:
A Technical Report on Age Assessment and Legal Guardianship Procedures**

In the Project, 'Supporting the Fulfilment of Rights of Specific Asylum-Seeking Groups' with the support of the Voices Foundation.



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aditus foundation is an independent, voluntary and non-profit organisation (NGO) established with a mission to monitor, act and report on access to fundamental human rights in Malta.

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MAP: MAJOR MIGRATION ROUTES



BBC, 28 May 2014, available at <http://www.bbc.com/news/world-europe-2759982>

I N T R O D U C T I O N

The vast majority of unaccompanied minor asylum-seekers (UAMs) arrive to Malta by boat, having risked their lives on a harrowing journey from their homes to reach the Libyan coast, where they are then smuggled by dinghy or other small boat to European shores. UAMs make up a significant percentage of asylum-seekers in Malta, and the number is growing. According to the Agency for the Welfare of Asylum-Seekers (AWAS)¹, 26% of boat arrivals in the first five months of 2014 were found to be UAMs and issued a Care Order² by the Ministry for the Family and Social Solidarity (MFSS), as compared to 18% in 2013.³ In 2013, 50% of boat arrivals were Somali nationals, 23% Eritreans and 8% Syrians.⁴

All persons arriving irregularly to Malta – including UAMs – are subject to a policy of mandatory detention. The mandatory detention of asylum-seekers is not specifically provided for or regulated by Maltese law. The European Court of Human Rights (ECtHR) has issued several decisions finding Malta’s detention practices in violation of the European Convention on Human Rights (ECHR),⁵ and the UN High Commissioner for Refugees (UNHCR) has taken the position that Malta’s mandatory and automatic detention of all asylum-seekers who arrive in an irregular manner, for the purposes of removal, is unlawful and arbitrary.⁶

Pending the conclusion of the age assessment procedure, which is conducted by AWAS, the asylum procedure is put on hold and UAMs remain in detention. They are typically detained with adults, and may face harsh detention conditions in the closed reception centres.⁷ Upon verification of their age, a Care Order is issued by the MFSS officially placing the child under the care of the Minister for the Family and Social Solidarity, and they are transferred to an open centre, where they are assigned a legal guardian and the asylum procedure resumes.

¹ AWAS is the public entity responsible for, *inter alia*, the overall coordination of Malta’s open reception centres, for the assessment of persons claiming to be vulnerable and for age assessment and care of UAMs.

² Explained below.

³ AWAS Presentation on Age Assessment, UAMs in Malta: A Technical Workshop on Age Assessment and Legal Guardianship Procedures, organized by **aditus foundation**, 6 May 2014.

⁴ UNHCR, 2013 Malta Fact Sheet, 2014, available at <http://www.unhcr.org/component/content/article/35-slideshow-news/723-2013-malta-fact-sheet>.

⁵ ECtHR, *Louled Massoud v. Malta*, App. No. 24340/08, 27 July 2010, paras. 46-47 (violation of art. 5§4), 71-74 (violation of art. 5§1); *Suso Musa v. Malta*, App. No. 42337/12, 23 July 2013, paras. 60 (violation of art. 5§4), 104-07 (violation of art. 5§1); *Aden Ahmed v. Malta*, App. No. 55352/12, 23 July 2013, paras. 99-100 (violation of art. 3), 123-24 (violation of art. 5§4), 145-46 (violation of art. 5§1).

⁶ UNHCR, UNHCR Position on the Detention of Asylum Seekers in Malta, 18 September 2013, p. 5, para. 90 [henceforth “UNHCR Position on the Detention of Asylum Seekers in Malta”].

⁷ Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 19 to 26 May 2008, 17 February 2011, para. 53 [henceforth “2011 Report of the European CPT”] (stating that “the situation found in the detention centres visited by the delegation had not substantially improved since the CPT’s previous visit in 2005. Indeed many of the problems identified in the report on that visit still remain unresolved. In several parts of the detention centres, the combined effects of prolonged detention in poor, if not very poor, material conditions, with a total absence of purposeful activities, not to mention other factors, could well be considered to amount to inhuman and degrading treatment”); See also, *ibid.* para. 60; UNHCR Position on the Detention of Asylum-Seekers in Malta, *supra* note 6, p. 4; Human Rights Watch, Boat Ride to Detention, 18 July 2012, available at <http://www.hrw.org/reports/2012/07/18/boat-ride-detention-0>; International Commission of Jurists, Not Here to Stay: Report of the International Commission of Jurists on Its Visit to Malta on 26-30 September 2011, May 2012, pp. 26-30 [henceforth “Not Here to Stay”]; Jesuit Refugee Service Malta (JRS), Becoming Vulnerable in Detention, Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union, 2010.

Particularly during the summer months of peak arrivals, Maltese authorities have at times struggled with issues of capacity and resources. In the past, the age assessment procedure is known to have lasted for up to 4-5 months, and delays in the release of UAMs from detention even after their age has been confirmed are not uncommon. Among new arrivals as of May 2014, 81% of arrivals (74 persons) claimed to be minors, and 26% (24 persons) were found to be minors and issued a Care Order. These figures are largely in line with forecasts for the coming years.⁸

UAMs are only assigned a legal guardian after a Care Order has been issued and they are released from detention. **The scope of the duties and responsibilities of a legal guardian for UAMs are not clearly specified in Maltese law or policy**, and in practice their role consists primarily of supporting the minor during the first instance asylum procedure and attending the asylum interview. Legal guardians are typically AWAS social workers, who must juggle multiple roles and responsibilities in the face of capacity and resource constraints. Legal guardians report at times being overwhelmed by caseloads of up to 40 – 50 UAMs during peak arrival periods, and must rely on the assistance and support of external organisations, such as Jesuit Refugee Service Malta (JRS) or UNHCR.

A number of **positive reforms are currently underway in Malta**. In March 2014, Prime Minister Joseph Muscat publicly stated⁹ that children should no longer be kept in detention centres in Malta, though it is unclear when and how this commitment will be applied in practice. The Ministry for the Family and Social Solidarity (MFSS) has also initiated a national review process to ensure implementation of the United Nations Convention on the Rights of the Child (CRC), including a focus on UAMs and aiming to revise national legislation and processes. In March 2014, the MFSS presented a new *Child Protection (Out of Home Care) Bill*¹⁰ to Parliament, currently in its second reading and which proposes significant reform of Malta's guardianship system, including for UAMs. AWAS is also currently in the process of reforming age assessment procedures, and has been piloting the new process on all new arrivals in 2014.

Unaccompanied minor asylum-seekers are entitled to both the full rights of children and the full rights of refugees, including rights and guarantees with respect to age assessment and guardianship procedures. In addition to their specific needs and rights as asylum-seekers or refugees, UAMs have the same needs for care, education and special consideration as other children. A number of different rights and responsibilities are implicated in age assessment and guardianship procedures, such as a minor's right to express his/her views freely,¹¹ the right to

⁸ Interview with AWAS, May 2014.

⁹ The Times of Malta, Migrant children should not be in 'prison' – PM, 31 March 2014, available at <http://www.timesofmalta.com/articles/view/20140331/local/Migrant-children-should-not-be-in-prison-PM.512887>.

¹⁰ Bill No. 45, An Act to replace the Children and Young Persons (Care Orders) Act, to establish Child Court Services, to introduce child protection orders, to provide for special care and protection for children removed or separated from their parents and placed in out-of-home care, 2014, available at <http://www.parlament.mt/billdetails?bid=469&legcat=13> [last accessed 27 May 2014] [henceforth "Child Protection Act (Out of Home Care)"].

¹¹ Convention on the Rights of the Child, art. 12, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990 [henceforth "CRC"]; Directive 2011/95/EU 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, art. 31(3) [henceforth "Qualification Directive (recast)"]; Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast), art. 23(2)(d) [henceforth "Reception Conditions Directive (recast)"].

privacy,¹² and the right to an effective remedy.¹³ In addition, age assessment and guardianship procedures directly influence whether UAMs will be able to fully access the package of rights to which they are entitled as refugee children.

This report examines the prevailing legislative and policy framework in Malta regarding age assessment and guardianship procedures for UAMs, as measured against international and regional law standards. Particular attention is paid to the reforms to age assessment and guardianship procedures currently underway at the time of writing. The report will present the key international and EU standards of relevance to age assessment and guardianship, an overview of the life cycle of an UAM within Malta's reception system, and a close examination of current and proposed age assessment and guardianship procedures with recommendations to the relevant national authorities.

¹² CRC, art. 16; Charter of Fundamental Rights of the European Union [henceforth "CFR"], art. 7 (respect for private and family life); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 8 (respect for private and family life), 4 November 1950, ETS 5, available at <http://www.refworld.org/docid/3ae6b3b04.html>ECHR [henceforth "ECHR"].

¹³ CFR, art. 47; ECHR, art. 6(1).

M E T H O D O L O G Y

This report was prepared by **aditus foundation**, with the support of the **Voices Foundation**, as part of a broader project entitled *Supporting the Fulfilment of Rights of Specific Asylum-Seeking Groups*. The component of the program which focuses on unaccompanied minor asylum-seekers (UAMs) aims to strengthen the level of protection of UAMs in Malta by obtaining a deeper and more accurate understanding of the extent of access to their fundamental rights in Malta's migration/asylum regime, and by supporting the sustainable establishment and strengthening of service-provision to UAMs.

As part of the project, **aditus foundation** organized a **technical workshop on 6 May 2014** *UAMs in Malta: A Technical Workshop on Age Assessment and Guardianship Procedures*.¹⁴ The workshop was attended by representatives of the Maltese Government, UNHCR, the European Asylum Support Office (EASO), the International Organisation for Migration (IOM) and local and international NGOs. The workshop included brief presentations by the Jesuit Refugee Service Malta (JRS), AWAS, EASO, **aditus** and the Nidos Foundation, a Dutch NGO that presented best practices in the Netherlands with regard to legal guardianship. These were followed by a structured discussion on possible areas for legal and policy reform of age assessment and guardianship procedures.

The **report** aims to present a comprehensive picture and analysis of the level of human rights access by UAMs in Malta with regards to age assessment and legal guardianship procedures, and to identify areas of concern and best practice for policy and/or practice recommendations in light of international and regional standards. The report reflects three months of desk-based and qualitative field research on UAMs in Malta, drawing on the expertise and experience of key actors operating at local, regional and international levels.

Interviews were conducted with the following organisations: UNHCR Malta, EASO, IOM, JRS, AWAS, and the Children and Young Persons Advisory Board. **aditus foundation** also conducted visits to two open reception centres, and met with a number of minors and former minors. The report also draws on the discussion and recommendations raised within the frame of the technical workshop organised on 6 May 2014.

At the time of writing of this report, **aditus foundation** is cooperating with AWAS in the Agency's reform of its age assessment procedures by providing technical input, *inter alia*, on AWAS' age assessment tools, access to information, the appeal process, and independent assistance throughout age assessment.

aditus foundation is a young, independent, voluntary, non-profit and non-governmental organization established in 2011 by a group of young lawyers dedicated to ensuring human rights access in Malta. Named for the Latin word meaning 'access', **aditus foundation's** mission is the attentive analysis of access in Malta to human rights recognition and enjoyment.

¹⁴ **aditus foundation**, Project Update: Stakeholders discuss policy reform on Unaccompanied Minor Asylum-seekers, Press Release, 10 May 2014, available at http://www.aditus.org.mt/aditus_foundation/Home/Entries/2014/5/10_Project_update__Stakeholders_discuss_policy_reform_on_Unaccompanied_Minor_asylum-seekers.html.

In practical terms, **aditus** was established to monitor, report and act on issues of fundamental human rights access for individuals and groups.

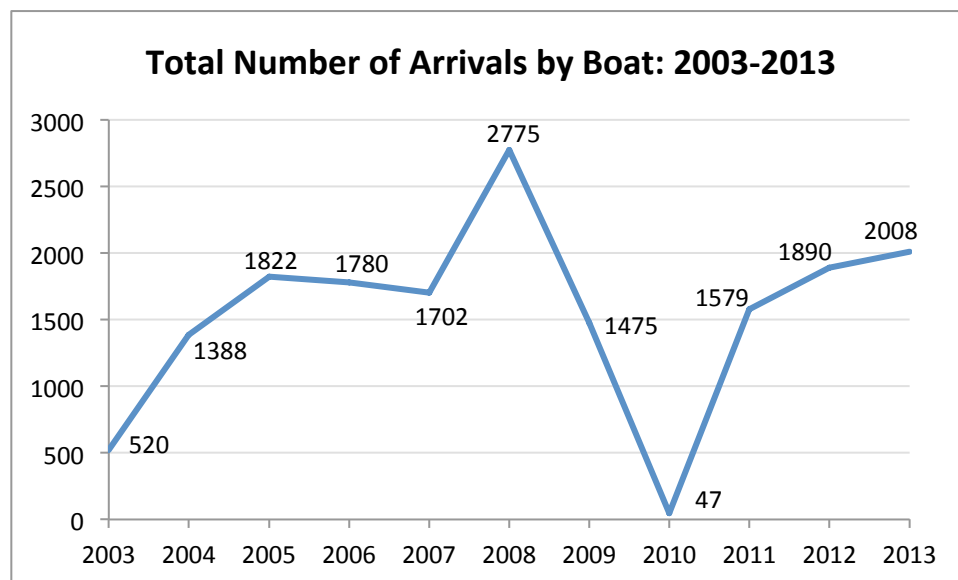
More information is available here: http://www.aditus.org.mt/aditus_foundation/VOICES.html

BACKGROUND

The particularities of the Maltese migration and arrival context have an important bearing on age assessment and guardianship procedures, and impact the extent to which UAMs have access to their fundamental rights in Malta. The small island nation is located at the crossroads of key migration routes from Africa to Europe, and is often viewed as a transit country by asylum-seekers. All persons arriving irregularly to Malta are also subject to a policy of mandatory detention, including UAMs who in the past have spent up to 4-5 months in detention before being released to the open centres.

On an institutional level, responsibility for the protection and support of UAMs in Malta is disaggregated among different state agencies, which has at times contributed to issues relating to coordination and capacity.

Migration flows to Malta are not a temporary phenomenon. Since 2003, approximately 17,000 persons have arrived to Malta irregularly by boat, of whom the vast majority applied for international protection.¹⁵



Source: UNHCR Malta Statistics, available at <http://www.unhcr.org/mt/statistics>.

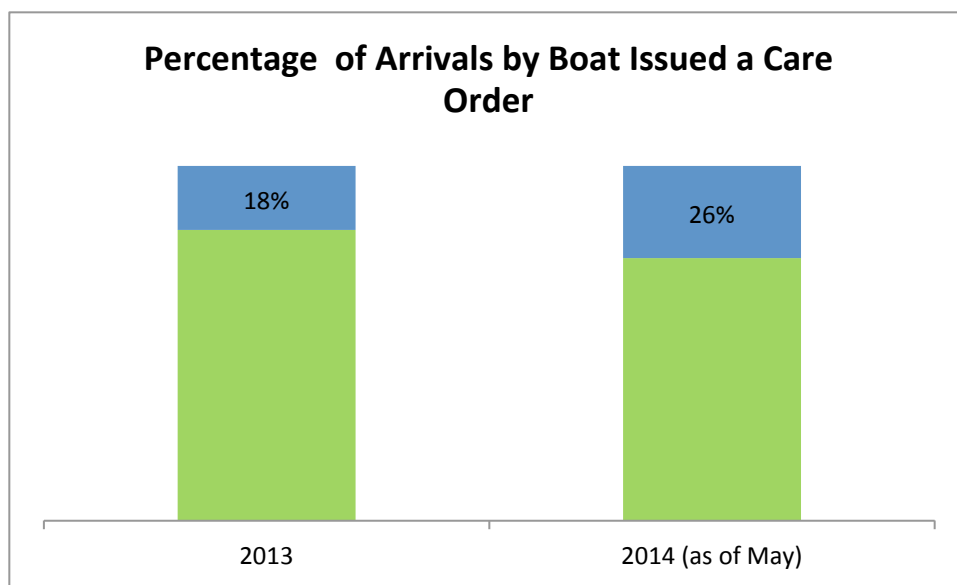
The Mare Nostrum operation¹⁶ initiated by the Italian authorities in October 2013 included an increase in search and rescue activities on the high seas and may be having at least a temporary impact on the number of boat arrivals to Malta. However, it is still too early to measure its impact, and it is unclear how long the Mare Nostrum operation will last.

¹⁵ In 2010, the number of persons arriving by boat dropped significantly to 47 due to Italian pushbacks.

¹⁶ Following the 3 October 2013 tragic shipwreck near Lampedusa, the Italian authorities launched a “military and humanitarian” operation in the Channel of Sicily called Mare Nostrum. The operation aims to strengthen surveillance and patrols on the high seas and increase search and rescue activities. See Consiglio Italiano per I Rifugiati (CIR), Access to Protection: A Human Right, 2014, funded by the European Program for Integration and Migration (EPIM), pp. 70-71, available at http://www.epim.info/wp-content/uploads/2014/04/CIR-Access_to_protection2014.pdf.

Due to Malta's small size, its location on the EU's southern border and the application of the Dublin III Regulation, Malta carries significantly large responsibilities with regard to asylum. While Malta ranks 16th among EU Member States in terms of the number of total asylum applicants in 2013, Malta had the highest ratio of asylum applicants to inhabitants of any Member State in 2013 (20.2 asylum-seekers per 1,000 inhabitants).¹⁷

UAMs constitute a significant and growing percentage of new arrivals.



Source: AWAS, May 2014.

In addition, a still higher percentage of asylum-seekers claim to be minors and are processed for age verification upon arrival. Between 2009 and 2013, AWAS conducted a total of 1,315 age assessment determinations, of which 567 in 2013.¹⁸ Between 2009 and 2013, 570 Care Orders were issued, of which 353 in 2013.¹⁹ In the first boat arrival in 2014, 81% claimed to be minors, and 26% were found to be children and issued Care Orders.²⁰

The majority of asylum-seekers arrive to Malta by boat, primarily from Libya. Having risked their lives on a harrowing journey to reach the Libyan coast and then smuggled by sea to Maltese shores, they have often been victims of trafficking and exploitation.²¹ Minors and former minors interviewed reported having paid between USD 4,000 and USD 10,000 to make the journey from their country of origin. Some perish from the harsh conditions along the way, while others may be arrested and detained indefinitely by the Libyan police.

¹⁷ Followed by Sweden (19.2), Liechtenstein (17.3), Luxembourg (11.9), Switzerland (11.5), Norway (11.4) and Cyprus (9.6). UNHCR, *Asylum Trends 2013: Levels and Trends in Industrialized Countries*, p.15.

¹⁸ AWAS Statistics.

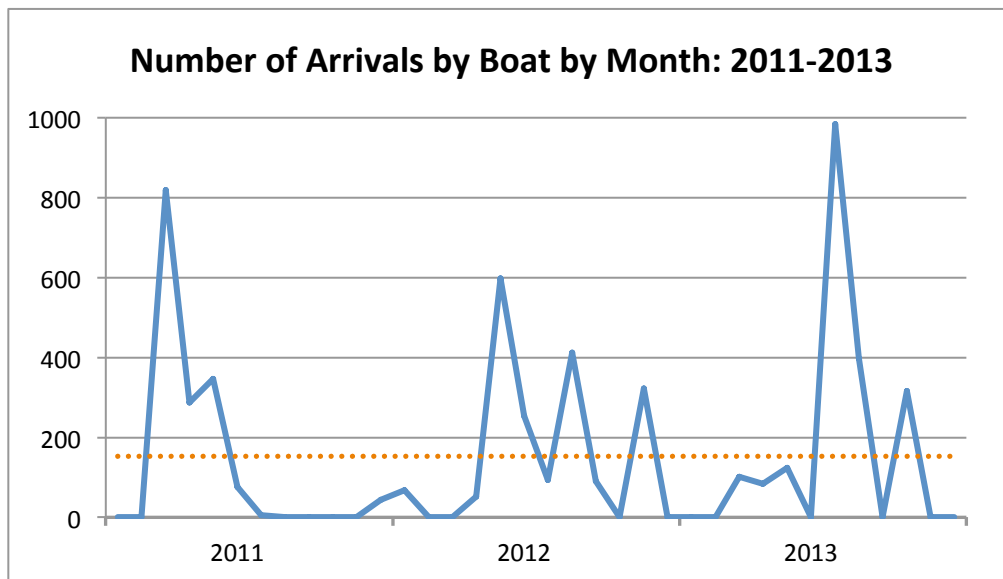
¹⁹ AWAS Statistics.

²⁰ AWAS Statistics.

²¹ See e.g. Human Rights Watch, *Boat Ride to Detention*, *supra* note 7; Farah Abdi Abdullahi, *A Child on the from Somalia to Malta*, Presentation within the frame of conference *Refugees Seeking Asylum: The Case of Unaccompanied Children and Young Asylum-Seekers*, University of Malta, Valetta, 19 May 2014.

Those who make it to Malta arrive exhausted and dehydrated, in need of several days of sleep to recuperate and sometimes in need of immediate medical attention. Minors and former minors interviewed stated that they had spent between three and six days at sea before reaching Malta, and had had no food or drink during their journey. One minor had spent six days at sea and explained that three persons had died during the journey, and there had been fights on board.

Most boats arrive in the summer months, but arrival flows are irregular and unpredictable. Boat arrivals also mean that asylum-seekers arrive in large groups – sometimes hundreds at a time – followed by periods with no arrivals.



Source: UNHCR Malta Statistics, available at <http://www.unhcr.org/mt/statistics>.

The stark fluctuations in arrival flows also indicate that significant flexibility in capacity and resources is required in order to ensure that any timeframes set in policy (e.g. for age assessment) can realistically be enforced in practice.

Most asylum-seekers, including UAMs, view Malta as a transit country.²² Some may have intended to reach Italy or other European Mediterranean countries, and wound up in Malta unintentionally. Almost all UAMs aspire to reach another EU Member State or to be resettled to the US.²³ Most arrive to Europe with high expectations, and may face pressure from family back home to send remittances. The situation is further compounded by the fact that asylum-seekers face difficulties integrating in Malta, and government integration measures remain largely inadequate.²⁴

²² See e.g. International Commission of Jurists, *Not Here to Stay*, *supra* note 7.

²³ The vast majority of persons resettled from Malta or relocated to another EU country are adults. UNHCR reports that since 2011, one minor was relocated to the UK under EUREMA and two minors were resettled to the United States. If a minor is resettled or relocated, it is typically to reunify the minor with a close relative who is able to take care of him/her. A minor may only be processed for resettlement or relocation following a Best Interests Determination by the legal guardian finding that it is the best durable solution for the minor.

²⁴ For information on the inadequacy of Malta's refugee integration policy and its impact on refugees, see the detailed study by **aditus foundation** and UNHCR, *Nitkellmu? Refugee Integration Perspectives in Malta, 2013*, available here http://aditus.org/mt/aditus/Documents/Nitkellmu_report.pdf.

A number of UAMs frequently go missing from the open centres, some of whom disappear permanently. Staff members at the HOV centre for minors, which runs a semi-independent living program, reported that on average two minors go missing permanently from the centre each week. This raises concerns regarding possible trafficking of minors out of Malta.

Policy of Mandatory Detention

Asylum-seekers who arrive to Malta in an irregular manner are subject to a **policy of mandatory detention** in contravention of international and European law.

The *Immigration Act* (1975) provides the legal basis for the detention of persons who enter in an irregular manner, including asylum-seekers;²⁵ however, **Maltese law does not specifically provide for or regulate the detention of asylum-seekers.**²⁶ Most persons who apply for asylum after being taken into custody **remain in detention until their asylum application is determined.** This practice is outlined in a 2005 national policy document produced by the Ministry for Justice and Home Affairs (MJHA) and the MFSS entitled *Irregular Immigrants, Refugees and Integration* (“National Policy Document”) and which does not have the status of law.²⁷

The National Policy Document makes an **exception for vulnerable asylum-seekers**, including minors, and states that they are exempted from detention and are to be accommodated in alternative centres.²⁸ However, the National Policy Document specifically provides that minors are to be **released from detention once their identification has been determined** and they have been medically screened and cleared.²⁹ As a result, all UAMs in Malta are detained in closed reception centres until completion of age assessment procedures.

There are no prescribed time limits in law or policy for early release on grounds of vulnerability. The age determination process in Malta has ranged anywhere from a few days for clear cases to 4-5 months for age-disputed cases during peak arrival periods.

²⁵ Under the Immigration Act, detention is automatic for persons who have been refused admission into Malta or issued with a Removal Order. Article 10 of the Immigration Act states that a person **refused admission** into Malta may be detained on land, and while they are detained, they shall be deemed to be in legal custody and not to have landed. Immigration Act, art. 10, Chapter 217 of the Laws of Malta [henceforth “Immigration Act”]. Article 14(3) states that a **Removal Order** may be issued against “prohibited immigrants,”²⁵ and that the person against whom it is issued shall be held in custody until they are removed from Malta. See Immigration Act, art. 5 (defining “prohibited immigrants”) and art. 14(3).

²⁶ The Immigration Act does not provide for differential treatment of asylum-seekers who arrive to Malta irregularly, and thus all persons arriving irregularly to Malta by boat- including asylum-seekers- are first either refused admission or issued with a Removal Order.

²⁷ The 2005 National Policy Document states that although by landing in Malta without the necessary documentation and authorization irregular immigrants are not considered to have committed a criminal offence, in the interest of national security and public order they are still kept in detention until their claim to their country of origin and other submission are examined and verified. It further states that “irregular immigrants will remain in closed reception centres until their identity is established and their application for asylum processed.” *Irregular Immigrants, Refugees and Integration*, 2005 National Policy Document, Ministry for Justice and Home Affairs and Ministry for the Family and Social Solidarity, p. 11 [henceforth “2005 National Policy Document”].

²⁸ *Ibid*, p. 11.

²⁹ *Ibid*, p. 12.

The European Court of Human Rights (ECtHR) has issued several decisions finding Malta's detention practices in violation of the ECHR, including Article 5§4 (lack of an effective and speedy remedy for challenging the lawfulness of detention), Article 5§1 (insufficient guarantees against arbitrary detention), and Article 3 (detention practices in Hermes camp amount to degrading treatment).³⁰ UNHCR has taken the position that Malta's mandatory and automatic detention of all asylum-seekers who arrive in an irregular manner, for the purposes of removal, is **unlawful and arbitrary**.³¹

While in detention, minors are detained with adults,³² at times facing tough detention conditions in closed centres, some of which are lacking basic minimum standards in several respects.³³ There have been reports in the past of unrelated female, male and children asylum-seekers being accommodated on the same premises with joint usage of common showers and toilets,³⁴ but interviewees reported that adult male and female asylum-seekers are now being detained in separate sections of the detention centres. There have also been reports of acts of violence and excessive use of force in detention centres in the past, especially in quelling peaceful demonstrations.³⁵

The *Convention on the Rights of the Child* indicates that, in exceptional circumstances where children are detained, they should receive care appropriate to their age, including the ability to contact family, appropriate medical treatment and psychological counselling and access to education.³⁶ Asylum-seekers in detention in Malta, including minors, have inadequate access to health services and assistance,³⁷ and rare to no access to psychological counselling. Children are only permitted minimal time for leisure,³⁸ and do not have access to education or any other care related to their age. They also have no means to challenge their detention.

Institutional Framework

Responsibility for the protection and support of UAMs in Malta is disaggregated among different state institutions, and Malta currently **has no comprehensive policy and strategy embracing all the other sectoral and regional plans of action relating to children**, including with respect to UAMs.³⁹ Disaggregation has in some instances given rise to issues relating to

³⁰ ECtHR, *Louled Massoud v. Malta*, App. No. 24340/08, 27 July 2010, paras. 46-47 (violation of art. 5§4), 71-74 (violation of art. 5§1); *Suso Musa v. Malta*, App. No. 42337/12, 23 July 2013, paras. 60 (violation of art. 5§4), 104-07 (violation of art. 5§1); *Aden Ahmed v. Malta*, App. No. 55352/12, 23 July 2013, paras. 99-100 (violation of art. 3), 123-24 (violation of art. 5§4), 145-46 (violation of art. 5§1).

³¹ UNHCR Position on the Detention of Asylum Seekers in Malta, *supra* note 6, p. 5, para. 90.

³² Interview with JRS, Interview with UNHCR, June 2014; Committee on the Rights of the Child, Concluding observations on the second periodic report of Malta, adopted by the Committee at its sixty-second session (14 January – 1 February 2013), U.N. Doc. No. CRC/C/MLT/CO/2, 18 June 2013, para. 57(b) [henceforth “CRC 2013 Observations on Malta”]; Human Rights Watch, *Boat Ride to Detention*, *supra* note 7, p.2.

³³ UNHCR Position on the Detention of Asylum-Seekers in Malta, *supra* note 6, p. 4; 2011 Report of the European CPT, *supra* note 7, paras. 53, 60; Human Rights Watch, *Boat Ride to Detention*, *supra* note 7; International Commission of Jurists, *Not Here to Stay*, *supra* note 7, pp. 26-30; Asylum Information Database, AIDA Country Report - Malta, last updated June 2014, p. 39.

³⁴ CRC 2013 Observations on Malta, *supra* note 32, para. 57(g).

³⁵ CRC 2013 Observations on Malta, *supra* note 32, para. 57(h).

³⁶ CRC, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, UN Doc. No. CRC/GC/2005/6, 1 September 2005, para. 63 [henceforth “CRC, General Comment No. 6”].

³⁷ CRC 2013 Observations on Malta, *supra* note 32, para. 57(i).

³⁸ CRC 2013 Observations on Malta, *supra* note 32, para. 57(f).

³⁹ CRC 2013 Observations on Malta, *supra* note 32, paras. 12-13.

communication and coordination of policies relating to UAMs, which has in turn contributed to gaps in Convention coverage and complicates the process of reforming procedures.

Two main ministries work with UAMs. The **Ministry for Home Affairs and National Security (MHAS)** is responsible primarily for migration- and asylum-related aspects, including detention and the asylum procedure. MHAS is responsible for the Malta Police Force, which is often the first contact UAMs have when arriving by sea, the Detention Services (DS) that manage the detention centres, and the Agency for the Welfare of Asylum-seekers (AWAS), responsible *inter alia* for the age assessment procedure and overseeing the daily management of the open reception centres.⁴⁰

The **Office of the Refugee Commissioner (RefCom)**, which was initially set up on a trial basis on 18 June 2001 and officially took up its work at the beginning of 2002, is the first instance body responsible for receiving and processing asylum applications lodged in Malta, including those of UAMs.⁴¹ Although the Office is also under MHAS, it is an independent body and the Ministry does not seem to intervene in its work.

In order to guarantee the asylum-seekers' the right to appeal, a Refugee Appeals Board has also been established within the same Ministry.

The **Ministry for the Family and Social Solidarity (MFSS)** is responsible for the welfare of immigrants and refugees, including UAMs. The Ministry takes on the guardianship of UAMs and is responsible for their accommodation and social welfare following release from detention. Attached to the MFSS is the Children and Young Persons Advisory Board (Advisory Board)⁴² composed of seven persons (social workers, psychologists, administrators etc.) who are required to have expertise on children's rights and child-specific situations. The Advisory Board is responsible among other things for reviewing all Care Orders issued by the MFSS, approving the appointment of legal guardians, and reviewing the individualized Care Plans prepared for each UAM.

The **Department of Social Welfare Standards (DSWS)** was established under the MFSS as the central authority for coordinating the implementation of the *Convention on the Rights of the Child (CRC)*. However, the Committee on the Rights of the Child noted in its 2013 report on Malta that DSWS lacks a clear mandate and adequate resources for effectively coordinating the overall implementation of the Convention.⁴³

In addition, the **Ministry of Health** is responsible for conducting and analysing the bone density test for purposes of age assessment, for issuing the medical clearance of UAMs before they leave detention and for granting of healthcare during their stay in the specialised residential centres for UAMs.

⁴⁰ Agency for the Welfare of Asylum-seekers Regulations, reg. 6(2)(a), S.L. 271.11 [henceforth "AWAS Regulations"].

⁴¹ The office is made up of ten persons (December 2006); however the office is in the process of recruiting more caseworkers. The staff complement consists of the Refugee Commissioner, the Assistant Refugee Commissioner, the Head of Administration, four caseworkers, two clerks and one messenger.

⁴² Children and Young Persons (Care Orders) Act, art. 11, Chapter 285 of the Laws of Malta [henceforth "Children and Young Persons (Care Orders) Act"].

⁴³ CRC 2013 Observations on Malta, *supra* note 32, para. 14.

The *Commissioner for Children Act*⁴⁴ (2004) establishes the **Office of the Commissioner for Children** and aims to monitor the situation of children in Malta, raise awareness on the rights of children, work on individual complaints and facilitate training of persons working with different groups of children. The Commissioner also has a specific focus on the situation of unaccompanied minors, and in the past it has carried out research on their situation and contributed to a policy statement of the European Network of Ombudspersons for Children (ENOC).

Other key actors working with UAMs in Malta include international organisations such as UNHCR and the International Organisation for Migration (IOM), as well as local NGOs such as **aditus foundation**, Jesuit Refugee Service Malta (JRS), the Emigrants Commission and the Organisation for Friendship in Diversity (OFD). The NGOs face severe resource constraints and are not able to meet all the needs of asylum-seekers in Malta, including those of UAMs.

⁴⁴ Chapter 462 of the Laws of Malta.

INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

Unaccompanied minor asylum-seekers are entitled to both the full rights of children and the full rights of refugees. In addition to their specific needs and rights as asylum-seekers or refugees, UAMs have the same needs for care, services and special consideration as other children. Minors are also often more vulnerable than adults in situations of forced displacement and may have special needs as asylum-seekers because of their age, social status and physical and mental development. International protection claims made by minors should be examined in a child-sensitive manner, and require different procedural standards and measures than those made by adults.⁴⁵

As will be discussed in further detail below, a range of rights and responsibilities are implicated in age assessment and guardianship procedures, such as a minor's right to express his/her views freely,⁴⁶ the right to privacy,⁴⁷ and the right to an effective remedy.⁴⁸ In addition, age assessment and guardianship procedures directly influence whether UAMs will be able to fully access a number of further rights and protections to which they are entitled under international, EU and national law.

Refugee children are entitled to a package of rights that includes, for example, access to rehabilitation services for minors who have been victims of abuse,⁴⁹ access to education,⁵⁰ and the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.⁵¹

Key Terms

In this report **age assessment** refers to the procedures through which authorities seek to establish the chronological age of an individual, including any attempts to establish an individual's age.

⁴⁵ See e.g. Qualification Directive (recast), Recitals 27-28 & art. 20; Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), art. 25, [henceforth "Procedures Directive (recast)"]; CRC, General Comment No. 6, art. 59; See also UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, available at <http://www.refworld.org/docid/4b2f4f6d2.html> [henceforth "UNHCR, Guidelines on International Protection No. 8"]; Executive Committee of the High Commissioner's Programme (ExCom), Conclusion No. 107, 5 October 2007, available at <http://www.unhcr.org/4717625c2.html> [henceforth "ExCom Conclusion No. 107"].

⁴⁶ CRC, art. 12; Qualification Directive (recast), art. 31(3); Reception Conditions Directive (recast), art. 23(2)(d).

⁴⁷ CRC, art. 16; CFR, art. 7 (respect for private and family life); ECHR, art. 8 (respect for private and family life).

⁴⁸ CFR, art. 47; ECHR, art. 6(1).

⁴⁹ CRC, art. 39; Reception Conditions Directive (recast), art. 23(4).

⁵⁰ Convention relating to the Status of Refugees, art. 22, 28 Jul. 1951, 189 U.N.T.S. 2545 [hereinafter 1951 Refugee Convention]; CRC, art. 28; Reception Conditions Directive (recast), art. 14; Qualification Directive (recast), art. 47; Reception of Asylum Seekers (Minimum Standards) Regulations, reg. 2, S.L. 420.06.

⁵¹ CRC, art. 27; Reception Conditions Directive (recast), art. 23.

Under Maltese law⁵², and in accordance with the CRC and European law, a **child** is defined as a person below the age of eighteen years.⁵³

A **guardian** refers to an independent person with specialized skills who ensures the child's best interests and general well being.

A **legal representative** refers to a lawyer or other person qualified to provide legal assistance to, and inform, the child in the asylum proceedings and in relation to contacts with the authorities on legal matters.

In Malta, the term **legal guardian** is typically used to refer to a person appointed by the MFSS to assist the minor during the asylum procedure.

Applicable Law

Malta is party to the 1951 *Convention relating to the Status of Refugees* and its 1967 Protocol (1951 Refugee Convention)⁵⁴ and the ECHR.⁵⁵ Malta ratified the *Convention on the Rights of the Child* (CRC) in 1990,⁵⁶ and while the Maltese government has publicly declared its intention to incorporate the CRC into domestic law, it has yet to do so.⁵⁷

State obligations under the CRC apply to each child within the State's territory and to all children subject to its jurisdiction,⁵⁸ including asylum seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness.⁵⁹ Malta's obligations under the CRC are

⁵² Civil Code, Article 157, Chapter 16 of the Laws of Malta.

⁵³ CRC, art. 1; Reception Conditions Directive (recast), art. 2(d); Procedures Directive (recast), art. 2(l); Qualification Directive (recast), art. 2(k); 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, art. 2(i) [henceforth "Dublin III Regulation"]. The Committee on the Rights of the Child raised the concern in its 2013 Second Periodic Report of Malta that in numerous areas of legislation, such as the provision of welfare services and support, Malta does not provide coverage of children above the age of 16 years, resulting in a de facto definition of the child being a person under 16 years of age in these cases. CRC 2013 Observations on Malta, *supra* note 32, para. 26.

⁵⁴ Malta ratified the 1951 Refugee Convention in 1971, and lifted the geographic limitation in 2002. The Maltese Refugees Act states that it incorporates the obligations assumed by Malta under the Convention. Refugees Act, art. 3, Chapter 420 of the Laws of Malta.

⁵⁵ Malta ratified the ECHR in 1967, see www.echr.coe.int/Documents/CP_Malta_ENG.pdf.

⁵⁶ As reaffirmed in CRC General Comment No. 5, States parties to the Convention must ensure that the provisions and principles of the treaty are fully reflected and given legal effect in relevant domestic legislation. CRC, General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child (arts. 4, 42, and 44, para. 6), UN Doc. No. CRC/GC/2003/5, 27 November 2003, paras. 18-23 [henceforth "CRC, General Comment No. 5"]. In case of any conflict in legislation, predominance should always be given to the Convention, in light of article 27 of the 1969 *Vienna Convention on the Law of Treaties*. CRC, General Comment No. 6, para. 14.

⁵⁷ The Minister for Justice, Dialogue and the Family has publicly declared that the Government of Malta intends to incorporate the CRC into domestic law in the same manner as has been done with regard to the ECHR and other international Conventions. In this manner although a comprehensive sectoral Children's Act will not be enacted at least for the time being, the rights guaranteed by the Convention will become autonomously enforceable as Convention rights in the domestic courts. CRC, Committee on the Rights of the Child considers the report of Malta, OHCHR Press Release, 17 January 2013, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12935&LangID=E>.

⁵⁸ CRC, art. 2.

⁵⁹ CRC, General Comment No. 6, para. 12.

both negative and positive in nature. Not only must Malta refrain from measures infringing on such children's rights, but also it must also to take measures to ensure the enjoyment and fulfilment of these rights without discrimination.⁶⁰

As a Member State of the European Union (EU) since 2004, Malta is also bound by relevant EU law,⁶¹ namely the Charter of Fundamental Rights and EU asylum legislation, in particular the Qualification Directive (recast), Procedures Directive (recast), Reception Conditions Directive (recast) and the Dublin III Regulation.⁶² The recast Procedures Directive and Reception Conditions Directive must be transposed into national law by July 2015 and include a number of heightened provisions of relevance to age assessment and guardianship procedures. This report will thus refer to the recast Directives as the EU law standards of relevance to the analysis.

For a list of most relevant international, regional, EU and Maltese legal sources, please see Annex A.

Guiding Principles and Generally Applicable Considerations

The Committee on the Rights of the Child has identified the following four Articles of the CRC as general principles for its implementation:⁶³

- **Principle of Non-discrimination:** Article 2 CRC requires States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction **without discrimination** of any kind, including on the basis of the status of a child as being unaccompanied or a refugee, asylum-seeker or migrant.
- **Principle of the Best Interests of the Child:** Pursuant to Article 3(1) CRC, the **best interests of the child** shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.⁶⁴

According to the Committee, a determination of what is in the best interests of the child requires **a clear and comprehensive assessment of the child's identity**, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.⁶⁵

⁶⁰ CRC, General Comment No. 6, para. 13.

⁶¹ The TFEU creates an explicit obligation for EU legislation on asylum to conform to the 1951 Convention. TFEU, Art. 78, para. 1 (providing that the policy on asylum "must be in accordance with the [1951 Convention] and other relevant treaties"). The primacy of the 1951 Convention is further recognized in European Council Conclusions and related Commission policy documents, which affirm that the CEAS is based on the "full and inclusive application" of the 1951 Convention. European Commission, EU Agenda for the rights of the child, February 2011 (recalling that the standards and principles of the CRC must continue to guide EU policies and actions that have an impact on the rights of the child). See also Procedures Directive (recast), Recital 33; Receptions Conditions Directive (recast), Recital 9; Qualification Directive (recast), Recital 18; Dublin III Regulation, Recital 13.

⁶² Qualification Directive (recast); Procedures Directive (recast); Reception Conditions Directive (recast); Dublin III Regulation.

⁶³ CRC, General Comment No. 5, para. 12.

⁶⁴ CFR, art. 24; Procedures Directive (recast), Recital 33; Receptions Conditions Directive (recast), Recital 9; Qualification Directive (recast), Recital 18; Dublin III Regulation, Recital 13.

⁶⁵ CRC, General Comment No. 6, para. 20.

The assessment should be carried out in a **friendly and safe atmosphere by qualified professionals** who are trained in age and gender sensitive related interviewing techniques.⁶⁶

At any stage of the displacement cycle, a best interests determination must be **documented** in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.⁶⁷

- **The Right to Life:** Article 6 CRC recognizes a child's inherent **right to life** and a State's obligation to ensure to the maximum extent possible the survival and development of the child.
- **The Right to Express his/her Views Freely:** Article 12 CRC recognizes a child's **right to express his/her views freely** regarding all matters affecting the child, and that those views be given due weight. Children shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.⁶⁸

In its General Comment 12, the Committee stresses that UAMs are in a particularly vulnerable situation, and it is *"urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings."*⁶⁹

The Committee further explains that *"a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age."*⁷⁰

In its General Comment 6, the CRC states that *"to allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin (arts. 13, 17, 22(2))"*.⁷¹

Such information must be provided in a manner that is appropriate to the maturity and level of understanding of each child.⁷²

As participation is dependent on reliable communication, where necessary, **interpreters/translators** should be made available at all stages of the procedure.⁷³

⁶⁶ CRC, General Comment No. 6, para. 20.

⁶⁷ CRC, General Comment No. 6, para. 19.

⁶⁸ CRC, art. 12.

⁶⁹ CRC, General Comment No. 12: The right of the child to be heard, UN Doc. No. CRC/C/GC/12, 1 July 2009, para. 123 [henceforth "CRC, General Comment No. 12"].

⁷⁰ CRC, General Comment No. 12, para. 34.

⁷¹ CRC, General Comment No. 6, para. 25.

⁷² Ibid.

⁷³ Ibid.

The CRC also requires States to ensure **protection** to every child from any form of neglect, abuse, violence and exploitation (arts. 19, 32, 34, 35, 36 CRC), and to provide **special protection and assistance** to children deprived of their family environment (art. 20 CRC).

Requisite training and competence: The Reception Conditions Directive (recast) provides that those working with unaccompanied minors “*shall have had and shall continue to receive appropriate training concerning their needs*”.⁷⁴

Confidentiality: The Committee on the Rights of the Child states that States “*must protect the confidentiality of information received in relation to an unaccompanied or separated child, consistent with the obligation to protect the child’s rights, including the right to privacy (art. 16). This obligation applies in all settings, including health and social welfare. Care must be taken that information sought and legitimately shared for one purpose is not inappropriately used for that of another.*”⁷⁵

The Reception Conditions Directive (recast) provides that those working with unaccompanied minors shall be bound by confidentiality.⁷⁶

Tracing: The Committee on the Rights of the Child states that States must commence tracing activities “*as soon as possible*”,⁷⁷ and where possible and if in the child’s best interests, reunify separated and unaccompanied children with their families as soon as possible.⁷⁸ The Reception Conditions Directive (recast) also requires MS to start tracing “*as soon as possible*” after an application for international protection whilst protecting the UAM’s best interests.⁷⁹ The Dublin III Regulation requires that where a UAM has lodged an application for international protection, the Member State shall “*as soon as possible*” take appropriate action to identify the family members, siblings or relatives of the UAM on the territory of the Member States.⁸⁰

Age Assessment

Most experts agree that age assessment is not a determination of chronological age but rather an educated guess.⁸¹ There are risks that due to the inaccuracy of age assessment techniques, persons claiming to be minors may have their age mis-assessed. There are also instances when minors may claim to be adults, and attention should also be paid to persons claiming to be adults but who may instead be minors.⁸²

CRC General Comment No. 6 states that: the identification of a child as an unaccompanied and separated child includes age assessment, which should take into account physical appearance, but also psychological maturity. The assessment must be conducted in a scientific, safe, child

⁷⁴ Reception Conditions Directive (recast), at. 24(4). See also Qualification Directive (recast), art. 31(6).

⁷⁵ CRC, General Comment No. 6, para. 29.

⁷⁶ Reception Conditions Directive (recast), at. 24(4). See also Qualification Directive (recast), art. 31(6).

⁷⁷ CRC, arts. 22(2), 9(3) and 10(2); CRC, General Comment No. 6, para. 31(E).

⁷⁸ CRC, General Comment No. 6, para. 13.

⁷⁹ Reception Conditions Directive (recast), art. 24(3).

⁸⁰ Dublin III Regulation, art. 6(4).

⁸¹ UNICEF, Age Assessment Practices: A Literature Review and Annotated Bibliography, by Terry Smith and Laura Brownlees, 2011, p.13.

⁸² Separated Children in Europe Program (SCEP), Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012, p. 7-8 [henceforth “SCEP Report”].

and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child, and giving due respect to human dignity.

States must take all necessary measures to identify children as being unaccompanied or separated at the earliest possible stage, including at the border.⁸³ Further, age assessment should only be undertaken where there are doubts about the claimed age, for the legitimate purpose of determining whether an individual is an adult or a child.⁸⁴ Medical examinations should only be conducted when other age assessment methods have been exhausted and it should be possible to appeal against the results of this assessment.⁸⁵

Benefit of the Doubt

The principle of the benefit of the doubt functions as a key safeguard in the age assessment procedure and applies both during the process and in the case of remaining uncertainty after the assessment.⁸⁶

In the event of remaining uncertainty, the person should be accorded the benefit of the doubt such that if there is a possibility that the person is a minor, she or he should be treated as such.⁸⁷

The benefit of the doubt should also be applied during the age assessment process in a similar way to how it is applied to the asylum application. In this way, the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim.⁸⁸ If the facts of the case cannot be fully ascertained and/or the minor is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt.⁸⁹

Further, as age is not calculated in the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age.⁹⁰

Persons must be clearly informed about the procedure

Persons claiming to be minors must be given clear information about the purpose and process of the age assessment procedure in a language they understand.⁹¹

Appointment of a guardian and/or legal representative

⁸³ CRC, General Comment No. 6, para. 13.

⁸⁴ UNHCR, Guidelines on International Protection No. 8, para. 75 (is in doubt); EASO, Age Assessment Practice in Europe, Dec. 2013, p. 6 (where there are doubts) [henceforth "EASO Report"]; Parliamentary Assembly Resolution (1810 (2011)), Unaccompanied Children in Europe: Issues of Arrival, Stay and Return, para. 5.10 (where there are reasonable doubts), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1810.htm> [henceforth "Parliamentary Assembly Resolution 1810(2011)"].

⁸⁵ EASO Report, *supra* note 84, p. 8.

⁸⁶ See e.g. *ibid.*, p. 16.

⁸⁷ CRC, General Comment No. 6, art. 31(A). See also UNHCR, Guidelines on International Protection No. 8, para. 75.

⁸⁸ UNHCR, Guidelines on International Protection No. 8, para. 73.

⁸⁹ UNHCR, Guidelines on International Protection No. 8, para. 73.

⁹⁰ UNHCR, Guidelines on International Protection No. 8, para. 75.

⁹¹ UNHCR, Guidelines on International Protection No. 8, para. 75.

Before an age assessment procedure is carried out, it is important that a qualified independent guardian is appointed to advise the child⁹² (see also below on appointment of a guardian and legal representative).

Use of documentation provided by the applicant

Many UAMs arrive without valid identity or travel documents, as these may have been lost or confiscated prior to or during travel, or they may lack documentation altogether because they come from a country where their birth was not registered. When children do sometimes travel with identity or travel documents, there may be issues with their validity.

The Committee on the Rights of the Child states in its General Comment No. 6 that initial assessment and measures – including age assessment⁹³ – should take into account all available information to determine the potential existence of international protection needs.⁹⁴

More generally, the Qualification Directive (recast) states that the assessment of an application for international protection includes taking into account the relevant statements and documentation presented by the applicant.⁹⁵

The EASO report recommends that before resorting to a medical examination, consideration should first be given to **documentary and other sources of evidence available**.⁹⁶ The SCEP report recommends that age assessment should be undertaken as a measure of last resort, where a) there are grounds for serious doubt, and where b) other approaches have failed to establish the person's age, **including attempts to gather documentary evidence**.⁹⁷

Medical Examination

The Procedures Directive (recast) states that States “*may use medical examinations to determine the age of the [UAM]...where, following general statements or other relevant indicators, Member States have doubts concerning the applicant's age.*”⁹⁸ If Member States are still in doubt about the applicant's age following the medical examination, then “*they shall assume that the applicant is a minor.*”⁹⁹

Due to the invasive nature of medical examinations, these should only be conducted when other age assessment methods have been exhausted.¹⁰⁰

Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.¹⁰¹

⁹² UNHCR, Guidelines on International Protection No. 8, para. 75.

⁹³ CRC, General Comment No. 6, art. 31(A).

⁹⁴ CRC, General Comment No. 6, art. 31(C).

⁹⁵ Qualification Directive (recast), art. 4(3)(b).

⁹⁶ EASO Report, *supra* note 84, p. 6.

⁹⁷ SCEP Report, *supra* note 82, p. 8.

⁹⁸ Procedures Directive (recast), art. 25(5).

⁹⁹ *Ibid.*

¹⁰⁰ European Parliament initiative report on the situation of unaccompanied minors in the EU (2012/2263(INI)), Strategic Guideline 15, Rapporteur Natalie Griesbeck, adopted 12 Sept. 2013, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0251+0+DOC+XML+V0//EN> [henceforth “2013 European Parliament Initiative Report”].

¹⁰¹ Procedures Directive (recast), art. 25(5).

In the case of a medical examination, states must ensure the UAM is **informed** prior to the examination in a language that they understand or are reasonably supposed to understand that their age may be determined by medical examination, the consequences of the result for their application for international protection, and the consequences of a refusal to undergo the medical examination.¹⁰² States must also ensure that the unaccompanied minor and/or their representative **consent** to a medical examination.¹⁰³

In some cases, minors may not be able to consent due to their age, immaturity, and inability to understand what this entails or for other reasons.¹⁰⁴ In such situations, their appointed guardian will grant or deny consent on their behalf taking into account the views of the child.¹⁰⁵

With regard to the **consequences of a refusal** to undergo a medical examination, the Procedures Directive (recast) specifies that *“the decision to reject an application for international protection by an unaccompanied minor...shall not be based solely on [the refusal to undergo a medical examination].”*¹⁰⁶

Due to the inaccuracy of medical examination techniques, the **margin of error** of medical and other examinations should be clearly indicated and taken into account.¹⁰⁷ Malta applies a medical examination in the final phase of its age assessment procedure in the form of a bone density analysis by way of carpal x-rays (Greulich and Pyle method). This method has been known to have error margins of up to five years.¹⁰⁸

Training

The Reception Conditions Directive (recast) provides that those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by confidentiality.¹⁰⁹

The SCEP Report states that age assessment should be undertaken by professionals who are (a) independent (whose role is not in potential/actual conflict with the interests of the individual), (b) with appropriate expertise (adequately trained) and (c) familiar with the individual’s ethnic and cultural background.¹¹⁰

Remedy

If an individual disagrees with the outcome of an age assessment there should be an opportunity for them to challenge the decision through administrative or judicial appeal.¹¹¹

¹⁰² Procedures Directive (recast), art. 25(5)(a).

¹⁰³ Procedures Directive (recast), art. 25(5)(b).

¹⁰⁴ UNHCR, Guidelines on International Protection No. 8, para. 76.

¹⁰⁵ UNHCR, Guidelines on International Protection No. 8, para. 76.

¹⁰⁶ Procedures Directive (recast), art. 25(5)(c).

¹⁰⁷ Parliamentary Assembly Resolution 1810(2011), *supra* not 84, para. 5.10.

¹⁰⁸ CRC 2013 Observations on Malta, *supra* note 32, para. 57.

¹⁰⁹ Reception Conditions Directive (recast), at. 24(4). See also Qualification Directive (recast), art. 31(6).

¹¹⁰ SCEP Report, *supra* note 82, p. 10.

¹¹¹ EASO Report, *supra* note 84, p. 21; 2013 European Parliament Initiative Report, *supra* note 100, Strategic Guidelines 15; Parliamentary Assembly Resolution 1810(2011), *supra* not 84, para. 5.10.

Decisions need to be communicated to minors in a language and in a manner they understand. Minors need to be informed of the decision in person, in the presence of their guardian, legal representative and/or other support person, in a supportive and non-threatening environment.¹¹² The UNHCR Guidelines on International Protection No. 8 stress in particular that if the decision is negative, particular care will need to be taken in delivering the message to the minor and explaining what next steps may be taken in order to avoid or reduce psychological stress or harm.¹¹³

While EU asylum legislation does not explicitly provide for the appeal of an age assessment determination, Article 47 of the Charter (CFR) recognizes the right to access an effective remedy and applies to Member States when they are implementing EU law.

As per the case law of the ECtHR, a remedy “*must be **sufficiently certain not only in theory but in practice**, failing which they will lack the requisite accessibility and effectiveness.*”¹¹⁴ In *Louled Massoud v. Malta*, the Court found that the accessibility of a remedy implies that established procedures and structures must ensure that they afford the applicant a **realistic opportunity** of using the remedy.¹¹⁵ The Court in *Massoud* also stressed the importance of individual circumstances when looking at whether a remedy was effective.

Article 6 (1) ECHR, which by virtue of Article 52 (3) is applicable to asylum cases, has been found to contain a specific right of access to the court without any improper obstacles being placed in its way.¹¹⁶

Consequence of a Negative Age Assessment Determination

The Receptions Directive (recast) states that the assessment of whether the applicant is a person with special needs – including whether he/she is a minor or an unaccompanied minor – shall be without prejudice to the assessment of international protection needs.¹¹⁷

Appointment of a Guardian and a Legal Representative

An independent, qualified **guardian** needs to be appointed immediately, free of charge in the case of unaccompanied or separated minors,¹¹⁸ with the responsibility of ensuring the child’s best interests and overall well-being. Minors who are the principal applicants in an asylum procedure are also entitled to a **legal representative**,¹¹⁹ and such representatives should support the child throughout the procedure.¹²⁰ At all times minors should be informed of arrangements with respect to guardianship and legal representation and their opinions should be taken into consideration.¹²¹

¹¹² UNHCR, Guidelines on International Protection No. 8, para. 77.

¹¹³ Ibid.

¹¹⁴ ECtHR, *Conka v. Belgium*, Application no 51564/99, 5 February 2002, para 43.

¹¹⁵ ECtHR, *Louled Massoud v. Malta*, Application no. 24340/08, 27 July 2010, para 39.

¹¹⁶ ECtHR, *Deweert v Belgium*, Application no. 6903/75, 27 February 1980.

¹¹⁷ Receptions Directive (recast), art. 22(4). See also art. 21 (stating that vulnerable persons include minors and unaccompanied minors).

¹¹⁸ UNHCR, Guidelines on International Protection No. 8, para. 69.

¹¹⁹ ExCom Conclusion No. 107, para. (g)(viii).

¹²⁰ UNHCR, Guidelines on International Protection No. 8, para. 69.

¹²¹ CRC, General Comment No. 6, para. 37.

With respect to representatives appointed to represent the child's views, the Committee on the Rights of the Child stresses that the representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons, institutions or bodies (e.g. residential home, administration or society).¹²² Codes of conduct should be developed for representatives who are appointed to represent the child's views,¹²³ and representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process.¹²⁴

EU law requires that a representative be appointed in order to assist and represent an unaccompanied minor in procedures with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary.¹²⁵ The minor must be informed immediately of the appointment, and the representative shall be changed only when necessary.¹²⁶ Individuals or organisations whose interests conflict or could potentially conflict with those of the minor shall not be eligible to become representatives.¹²⁷

Article 25 of the Procedures Directive (recast) further specifies that States must ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview, and where appropriate, how to prepare himself or herself for it.¹²⁸ The representative should also be present at the interview and have an opportunity to ask questions or make comments.¹²⁹

The SCEP- UNHCR *Statement of Good Practice*¹³⁰ provides a comprehensive policy framework and good practice standard for the protection and care of UAMs in Europe. Section D3 on the appointment of a guardian recommends that the responsibilities of the guardian or legal advisor should be as follows:

- Ensure that all decisions have the child's best interests as a primary consideration
- Ensure the child's views and opinions are considered in all decisions that affect them
- Ensure that the child has suitable care, accommodation, education, language support and health care provision and that they are able to practice their religion
- Ensure the child has suitable legal representation to assist in procedures that will address protection claims and durable solutions
- Explore, together with the child, the possibility of family tracing and reunification
- Assist the child to keep in touch with his or her family where appropriate

¹²² CRC, General Comment No. 12, para. 37.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Procedures Directive (recast), art. 2(n); Reception Conditions Directive (recast), art. 2(j).

¹²⁶ Procedures Directive (recast), art. 25(1)(a); Reception Conditions Directive (recast), art. 24(1).

¹²⁷ Procedures Directive (recast), art. 25(1)(a); Reception Conditions Directive (recast), art. 24(1).

¹²⁸ Procedures Directive (recast), art. 25(1)(b).

¹²⁹ Procedures Directive (recast), art. 25(1)(b).

¹³⁰ Separated Children in Europe Programme, Statement of Good Practice, Fourth Edition, 2009, available at <http://scep.sitespirit.nl/images/18/219.pdf>.

- Contribute to a durable solution in the child’s best interests
- Provide a link, and ensure transparency and cooperation between the child and the various organisations who may provide them with services
- Engage with the child’s informal network of friends and peers
- Consult with and advise the child
- Advocate on the child’s behalf

Training

The Reception Conditions Directive (recast) provides that those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by confidentiality.¹³¹

The recast Procedures Directive and Receptions Conditions Directive specify that the legal representative “*shall have the necessary expertise*” to perform his duties in accordance with the best interests of the child.¹³² In addition, UAMs and their representatives shall be provided, free of charge, with legal and procedural information,¹³³ including at least information on the procedure in the light of the applicant’s particular circumstances and information on how to challenge a first instance decision.¹³⁴

Timing

The Committee on the Rights of the Child stresses that a competent guardian must be appointed “*as expeditiously as possible*”, and that this serves as a key procedural safeguard to ensure respect for the best interests of the unaccompanied child.¹³⁵ The Procedures Directive (recast) and the Receptions Conditions Directive (recast) state that Member States shall “*as soon as possible*” take measures to ensure that a representative represents and assists the UAM.¹³⁶

In accordance with the principle of the best interests of the child, a qualified independent guardian or representative should be appointed to advise the child before an age assessment procedure is carried out.¹³⁷ The Committee on the Rights of the Child specifies that a child should only be referred to asylum or other procedures after the appointment of a guardian, and that where an unaccompanied child is referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.¹³⁸

¹³¹ Reception Conditions Directive (recast), art. 24(4). See also Qualification Directive (recast), art. 31(6).

¹³² Procedures Directive (recast), art. 25(1)(a).

¹³³ Procedures Directive (recast), art. 25(4).

¹³⁴ Procedures Directive (recast), art. 19(1).

¹³⁵ CRC, General Comment No. 6, para. 21.

¹³⁶ Reception Conditions Directive (recast), art. 24(1); Procedures Directive (recast), art. 25(1)(a).

¹³⁷ UNHCR, Guidelines on International Protection No. 8, paras. 69, 75; EASO Report, *supra* note 84, p. 22; SCEP Report, *supra* note 82, p. 12.

¹³⁸ CRC, General Comment No. 6, para. 21.

With regard to the requirement of consent to a medical examination for purposes of age assessment under Article 25(5)(b) of the Procedures Directive (recast), the Directive stresses the need for informed consent by the minor and/or representative.¹³⁹

The SCEP report recommends in particular that the guardian (or representative) should have oversight of the age assessment procedure and be present if requested to attend by the individual concerned.¹⁴⁰

The appointment of an independent guardian and/or representative at this early stage is critical to ensuring both the effective application of existing procedures, including age assessment; and access to the rights to which UAMs are entitled.

With regard to the effective application of age assessment procedures, the appointment of a guardian or representative is critical for ensuring, *inter alia*, the minor's right to express his/her view freely, the minor's right to privacy,¹⁴¹ the minor's right to be informed about the procedures and their implications, the provision of informed consent to a medical examination, and an effective right to challenge the age assessment determination.

Assigning a guardian or representative only after age assessment creates a gap in protection, effectively putting the child's best interests, needs and rights 'on hold' until the government is able to confirm the minor's age. Failure to take into consideration the best interests of the child during this first, sensitive period after arrival risks creating new vulnerabilities and aggravating existing vulnerabilities.

Particularly within the context of lengthy age assessment procedures or age assessment in detention, failure to appoint a guardian or representative prior to age assessment may result in a failure to identify and address special needs and ensure access to rights. For example, the absence of a guardian may impede the minor's right to access appropriate medical and psychological treatment or care in cases where the minor was subjected to torture, rape or other serious acts of violence,¹⁴² and – in the case of detention – to challenge the lawfulness of his/her detention.¹⁴³

¹³⁹ Procedures Directive (recast), art. 25(5)(b).

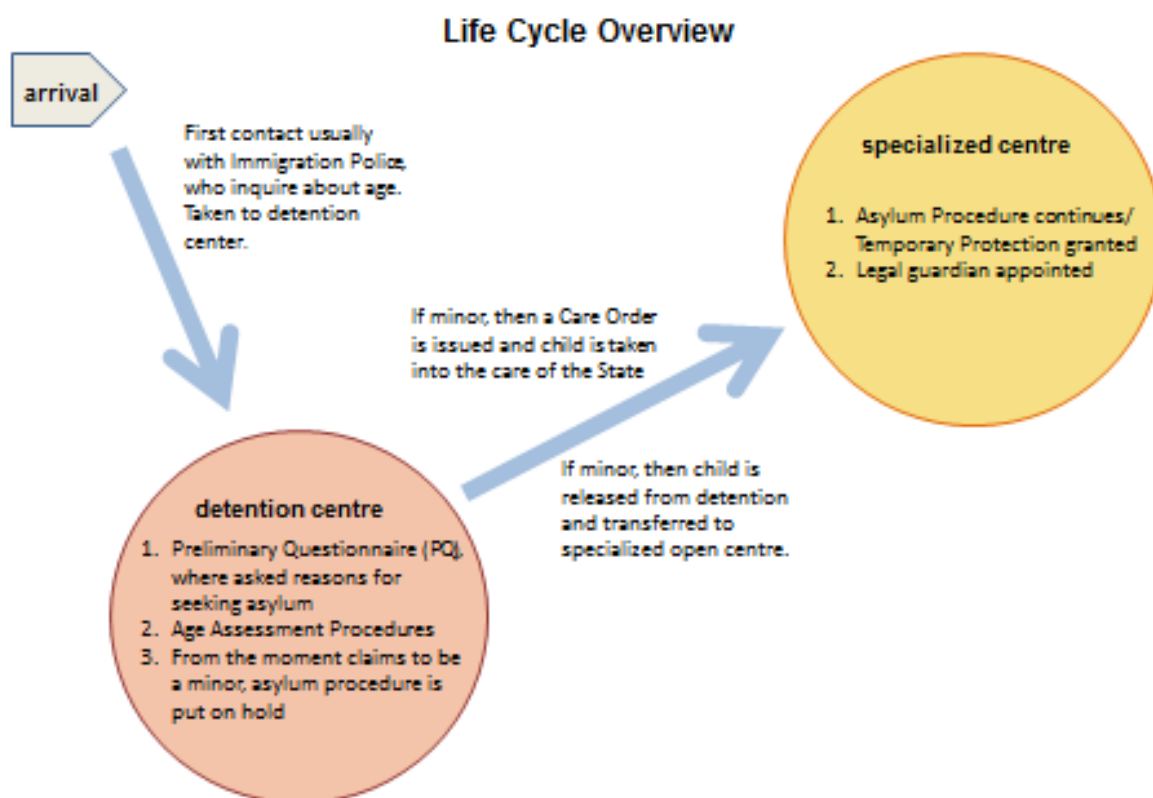
¹⁴⁰ SCEP Report, *supra* note 82, p. 12.

¹⁴¹ CRC, art. 16.

¹⁴² Reception Conditions Directive (recast), art. 25(1).

¹⁴³ International Covenant on Civil and Political Rights, art 9(4), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; ECHR, art. 5 & 5(4); See, for example, ICCPR, art. 2(3); ECHR, art. 13. UNHCR Guidelines on Detention, para. 47(v).

A N U A M I N M A L T A



Arrival and Application

Immediately upon arrival, most UAMs' first contact with the Maltese authorities is with the Immigration Police, who conduct an interview to obtain basic biodata, including age. No trained interpreters are present during this interview. Following the interview, all persons are taken to a detention centre.

In the detention centre, new arrivals are given an information session by staff members of the Office of the Refugee Commissioner (**RefCom**), responsible for examining and determining applications for international protection at first instance,¹⁴⁴ and is the only entity authorised by law to receive such applications. They are then required to fill a form known as the **Preliminary Questionnaire (PQ)**, in which they are asked their reasons for seeking asylum. The PQ is considered to be the registration of the asylum-seeker's desire to seek international protection.

¹⁴⁴ Refugees Act, Article 4.

UAMs who declare that they are below the age of eighteen upon arrival or during the filling in of the PQ are immediately referred to AWAS for age assessment.¹⁴⁵ Minors may also be referred by any number of actors, including RefCom, or by other entities working in detention, such as Detention Service staff, UNHCR, NGOs, etc.

Upon referral for age assessment, a UAM's asylum application is placed on hold and the age assessment procedures are conducted while the minor is in detention.

If AWAS comes to a positive age assessment determination, a Care Order is issued by the MFSS, placing the minor under the Minister's care whereby the Minister is granted full parental authority over the child. This authority is managed through the Children and Young Persons Advisory Board. Following medical clearance, the minor is released from detention and transferred to an open centre intended to provide for the needs of children. A legal guardian is appointed, the Refugee Commissioner is informed and the asylum procedure resumes.

AWAS runs all open centres, including those housing UAMs, and an AWAS social worker is usually present several days a week at each of the open centres for minors (Dar is-Sliem, Dar il-Liedna and HFO). A few days/weeks after being transferred to the open centre, AWAS social workers meet with each UAM to assess their needs and an individualized Care Plan is developed for each minor.

If AWAS comes to a negative age assessment determination, the person claiming to be a minor is deemed to be an adult, RefCom is informed of the decision and the asylum procedure resumes in detention as for all adult asylum-seekers.¹⁴⁶ In theory, an age determination may be challenged within three days through an administrative appeal procedure, but as of June 2014 there have been no recorded appeals of age decisions.

If at any stage prior to a final decision on the application for international protection, a person provides information that, *prima facie*, renders him eligible for a transfer to another EU Member State under the **Dublin III procedure**, the person is in theory referred to the Dublin Unit within the Immigration Police. While the Refugee Commissioner is designated as the head of the Dublin Unit, the Immigration Police are charged with actually implementing the process. The examination of the application for protection is suspended pending the outcome of the Dublin procedure. Malta does not generally systematically implement family tracing for asylum-seekers, including for children.

The First Instance Procedure for UAMs

RefCom resumes the asylum procedure after the Children and Young Persons Advisory Board has officially appointed the minor a legal guardian. The legal guardian is responsible for informing the minor about the asylum procedure and accompanies the minor during the

¹⁴⁵ AWAS Regulations, reg. 6.

¹⁴⁶ An appointment is scheduled for an interview with the applicant. When the applicant is called for the interview he is first asked to fill in an Application Form that contains questions similar to those in the PQ. The application form is considered to be the official application for international protection. The Applications for international protection constitute a single procedure, according to which RefCom examines and determines a person's eligibility for both asylum and subsidiary protection within the context of the same procedure. Then the recorded interview takes place and the applicant is informed at the end of the interview that he will be notified of the decision in due course.

interview. In practice, information about the asylum procedure is frequently provided by NGO staff members/volunteers or UNHCR in the open centres.

The asylum procedure for UAMs differs from the normal process and assessment in several respects.¹⁴⁷ The threshold of the standard of proof is lower for minors and RefCom is more lenient in giving the benefit of the doubt should there be some concern regarding the credibility of part of the minor's claim.¹⁴⁸

Appeal of an Asylum Determination

The *Refugees Act* establishes the Refugee Appeals Board as an administrative tribunal and entrusts it with the power to hear and determine appeals against a recommendation of the Refugee Commissioner.¹⁴⁹ Appeals must be made within fifteen days of notification to the applicant of the recommendation of the Refugee Commissioner, and may be entered by the applicant or the Minister.¹⁵⁰ An appeal to the Board has suspensive effect such that an asylum-seeker may not be removed from Malta prior to a final decision being taken on his appeal.¹⁵¹ Appellants have the right to free legal aid under the same conditions applicable to Maltese nationals.¹⁵²

A decision of the Refugee Appeals Board is final and conclusive,¹⁵³ and may not be appealed, although it is possible to submit a judicial review application to the First Hall of the Civil Court. Notwithstanding, no appeal lies on the merits of the decision except the possibility of filing a human rights claim alleging a violation of fundamental human rights in terms of the European Convention on Human Rights and/or the Maltese Constitution should the rejected appellant be faced with a return that is prejudicial to his or her fundamental human rights.¹⁵⁴

If the final decision at appellate stage is a rejection of an individual's application for protection, the individual may be returned to the relevant country of origin. As detention may not exceed eighteen months, if removal is not effected within this time, a failed asylum-seeker will be released upon the lapse of eighteen months in detention.¹⁵⁵ Subsequent pre-removal detention is possible and often resorted to.

¹⁴⁷ Office of the Refugee Commissioner, Email of 4 June 2014.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Refugees Act*, art. 7(1).

¹⁵⁰ *Refugees Act*, art. 7(2).

¹⁵¹ Procedural Standards in Examining Applications for Refugee Status Regulations, reg. 12, S.L. 420.07 [henceforth "Procedural Regulations"].

¹⁵² *Refugees Act*, art. 7(5).

¹⁵³¹⁵³ *Refugees Act*, art. 7(9)

¹⁵⁴ *Ibid.*

¹⁵⁵ This is regulated in the 2005 National Policy Document and the Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations, reg. 11(8), S.L. 217.12 (elaborated further below).

A G E A S S E S S M E N T

While most countries in Europe have legal provisions concerning age assessment,¹⁵⁶ the age assessment procedure in Malta is not set out in or regulated by law, though there are some minor references to it in legal and policy documents. The only reference to age assessment procedures in law is found in Regulation 15(2) of the *Procedural Standards in Examining Applications for Refugee Status Regulations*, dealing with the use of a medical examination to determine age.

Regulation 15(2) transposing Article 17(5) of the EU Procedures Directive 2005/85/EC provides that medical examinations may be carried out to determine the age of the UAM, so long as:¹⁵⁷

- The UAM is informed prior to the examination of their application for asylum, and in a language which they may reasonably be supposed to understand, of the possibility that their age may be determined by medical examination;
- The UAM and their representatives consent to carry out the age determination;
- The decision to reject an asylum application from a UAM who has refused to undergo the medical examination is not based solely on that refusal.

The national policy on the reception of irregular arrivals, including UAMs, is outlined in the National Policy Document, which states that *“in order to ensure that Care Orders are only issued in respect of true minors, provisions for minors are not abused and actual minors are not deprived of the accommodation and services to which they are entitled”*.¹⁵⁸

The Ministry for Justice and Home Affairs in consultation with the Ministry for the Family and Social Solidarity shall, in those cases where there is good reason to suspect the veracity of the minority age claimed by the immigrant, require the individual concerned to undertake an age verification test as soon as possible after arrival.

The National Policy Document also states that *“the detention of minors should be no longer than what is absolutely necessary to determine their identification and health status”* and that interviews must be carried out in a child-friendly manner.¹⁵⁹

AWAS is currently in the process of revising the procedure and methods used to conduct age assessment and has introduced a number of positive improvements to the procedure (discussed below). These have been piloted on all new arrivals in 2014.

Impact of the Detention Context

Conducting age assessment within the hostile environment of detention and in the absence of a guardian or legal representative may impede a minor’s ability to express his or her views freely

¹⁵⁶ SCEP Report, *supra* note 82, p. 8.

¹⁵⁷ Procedural Regulations, reg. 15(2).

¹⁵⁸ 2005 National Policy Document, *supra* note 27, p. 13.

¹⁵⁹ *Ibid.*

in the procedure, including willingness to share what may be crucial information for purposes of age determination. The Committee on the Rights of the Child has stressed that *“a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age.”*¹⁶⁰

Malta’s policy of mandatory detention has also strongly impacted the extent to which children and young adults may be inclined or convinced to declare a false age upon arrival. NGOs have received reports both of instances where adults have declared to be minors, as well as where minors have declared to be adults. In previous years, lengthy periods of detention have led adults to declare that they are minors as a means of getting out of detention.

With regard to minors declaring to be adults, this is sometimes due to the desire to more easily access work and independent living conditions rather than attend compulsory schooling and live within a disciplined environment, or to join friends or acquaintances already living independently in Malta. Older UAMs may also be under pressure from family members and communities to send home remittances.

A further factor is linked to the fact that the age assessment procedure has in the past sometimes lasted longer than the asylum determination procedure for adults – leading minors in some cases to declare that they are adults as a means of getting out of detention.

The Former Procedure (– 2014)

The former age assessment procedure implemented prior to 2014 consisted of three main phases. If at any phase of the procedure the person was found to be a minor, a Care Order was issued by the MFSS and the minor was released from detention and placed in an appropriate open centre.

In the past, UAMs are reported to have spent up to 4-5 months in detention during peak arrival periods before issuance of a Care Order and release to an open centre. It is also noted that release within days or weeks of arrival was not uncommon. Together with the institutional difficulties of conducting age assessment with limited resource capacity and from within an extremely challenging detention environment, it seems that delays also occurred due to lack of effective coordination between key actors. In particular, delays seemed to occur due to lengthy bone density procedures as well as procurement of required medical clearance for release from detention.

The latter two elements are both conducted by the Ministry of Health. Furthermore, delays in the issuance of the Care Order by the MFSS following age determination by AWAS also resulted in the child remaining in detention. It is unclear to what extent the new procedure, outlined below, will be able to tackle these institutional challenges as they extend beyond AWAS’ own remit and require inter-ministerial coordination and commitment.

Phase 1: Initial meeting with the minor

Following referral, an AWAS staff member would meet with the minor. In clear cases, AWAS would inform the MFSS, and a Care Order would be issued.

¹⁶⁰ CRC, General Comment No. 12, para. 34.

Phase 2: Age Assessment Team (AAT)

If the initial meeting was inconclusive, the person claiming to be a minor was referred to the Age Assessment Team (AAT) for an interview. The AAT consisted of a 3-person panel composed of AWAS staff members. Where the AAT was convinced that the individual concerned was not a minor, the age claim was rejected. Where a doubt remained, the minor was referred for a bone density analysis.

In the past, final positive determinations were only rarely made at this stage, and the vast majority of cases referred to the AAT were then also referred for further age verification via a bone density analysis.

Phase 3: Bone Density Analysis

Further age verification consisted of a bone density analysis by way of carpal X-rays (Greulich and Pyle method) conducted by Ministry of Health (MoH) staff members. Although the AAT was not officially bound by the results of the test, in most cases the bone density test results determined the outcome of the assessment.

Pursuant to Regulation 15(2) the minor was informed of the bone density analysis procedure prior to undergoing the examination, and was required to consent to undergo the procedure. According to the interviewees, there are no reported cases where a person refused to consent to a bone density test.

Following the bone density analysis, the results were sent to AWAS stating the age of the minor or stating “adult” in cases where the MoH determined the person was an adult. The bone density analysis methods used in Malta are known to have error margins of up to five years,¹⁶¹ and it is unclear whether and to what extent a margin of error or benefit of the doubt is applied by the MoH in coming to their determination.

In practice, UAMs were sometimes issued a Care Order and released from detention on the general finding that they were minors, and then further age assessment procedures were conducted once the minor was in an open centre to determine a specific age.¹⁶² Three minors and former minors interviewed reported feeling like they had undergone multiple age assessments.¹⁶³ There are also reports of minors who declared a new minor age following release from detention, and which triggered a new age assessment determination.

Minors usually lack valid official documentation of their age, and when children do sometimes travel with identity or travel documents, there may be issues with their validity. **Identification documentation provided by persons claiming to be minors is not systematically taken into account in the age assessment process.** The Immigration Police typically confiscates identification documentation of the person upon arrival and holds it in their file. AWAS reported that they do not take documentation into consideration because they lack the skills and ability to determine the validity of documents, and there seems to be lack of coordination with

¹⁶¹ CRC 2013 Observations on Malta, *supra* note 32, para. 57.

¹⁶² Interviews with Open Centre staff members at HOV and Hal-Far, 29 May 2014. Interview with AWAS legal guardians, 22 May 2014.

¹⁶³ Focus group discussion with minors and former minors at HOV and Hal-Far Open Centres, 29 May 2014.

Immigration Police in this regard.¹⁶⁴ There have been isolated cases where documentation was taken into consideration, such as that of a small group of Syrians who arrived in 2013 with passports.

It is not uncommon for minors from certain countries to be unaware of their exact birthdate or birth year. Chronological age milestones also differ by country of origin, and UAMs have often experience atypical chronologies of major life events (e.g. schooling). Further, past traumas and the detention experience may impact their memory or notions of time and chronology. There have been concerns in the past that AWAS age assessment team members may lack adequate socio-cultural knowledge about the country of origin or understanding of child-specific vulnerabilities for accurate decision making.

When a specific birthdate cannot be identified, minors are typically assigned the birthdate of 1 January of their determined birth year. There are reports that age assessment determinations are sometimes based heavily on the identification of contradictions in minors' stories, and **aditus** is concerned that undue weight may be given to credibility related factors. In addition, minors generally believe that if they change the age they declared upon arrival in the detention centres this will have a negative bearing on their asylum application, even if this means persisting with a false age declaration that is to their disadvantage with regards to accessing rights.¹⁶⁵

The New Procedure

AWAS introduced a new procedure¹⁶⁶ in early 2014, which involves a new three phase structure and incorporates a number of welcome reforms to the system, including the use of a more holistic approach in age assessment, greater integration of the benefit of the doubt in decision making, and an effort to minimize the period children spend in detention by introducing a time limit of 10 days to the first stages of the procedure and reducing the number of cases referred for a bone density analysis.

As under the old procedure, age assessment is still conducted in detention, and referrals to AWAS may be made by the Immigration Police upon arrival, or by other actors such as RefCom or an NGO for persons who were not identified upon arrival as potential minors.

Phase 1 consists of an interview conducted jointly by an AWAS staff member and a transcultural counsellor. For persons visibly under the age of 14, AWAS begins Phase 1 of the Age Assessment on the next day (including weekends and holidays). For other claims, AWAS begins Phase 1 of the Age Assessment two working days later and it must be completed by the 6th working day.

The interview lasts between 30 and 40 minutes, and uses an open narrative approach. Under the new procedure, greater emphasis is placed on the following elements: physical appearance and demeanour of the person, contextual information (including culture, journey), general observations and chronological age assessment. There is no obligation to take into

¹⁶⁴ Interview with AWAS.

¹⁶⁵ Interview with AWAS cultural mediator, 29 May 2014.

¹⁶⁶ This information is valid as at the time of writing, being June 2014.

consideration any documentation (e.g. ID, birth certificate) provided by the person. AWAS lacks the skills to assess the validity of documents, and stated that it is considering asking the Immigration Police for greater cooperation in assessing the validity of presented documents- however, this does not appear to be formally part of the procedure and it is unclear how this would work in practice.

If at the end of Phase 1, the team determines that the person is a minor, a Care Order is issued and the minor is transferred to an open centre where the asylum procedure resumes. If the team determines the person to be an adult, RefCom is informed of the decision and the asylum procedure resumes in detention. If the team determines that their assessment is inconclusive, then the person is referred to Phase 2 for further age assessment.

Under Phase 2, a team of three transcultural counsellors will conduct a more in-depth interview with the person that lasts between 60 and 75 minutes. The interview must be conducted and completed by the 8th working day since referral.

Like Phase 1, the Phase 2 interview also uses a free narrative approach. The interviewers are guided by several possible interview topics, and may choose which and how many of these to cover in the interview according to the flow of the interview and gaps in information.

Following the interview, a member of the team explains the upcoming process to the person. The panel meets independently to discuss the outcome of the interview, including a comparison of the findings from both Phase 1 and Phase 2. The team then prepares a document with their recommendations and reasons for the recommendation, which are then presented to a Chairperson.

The transcultural counsellors consist of a team of recent university graduates trained by JRS, and they will be working with AWAS within the capacity of a “placement.” While they are not official AWAS employees, they fall under AWAS supervision and responsibility. It should be noted that as of May 2014, the transcultural counsellors are still in training, and thus this component of the new procedures has not yet been tested in the pilot phase.

In Phase 3, the Chairperson examines the recommendations and reasoned analysis of the team and comes to a decision on the age assessment determination. The Chairperson must come to a determination by the 10th working day since referral.

Where the person is found to be a minor, a Care Order will be issued, and the minor will be transferred to an open centre, where the asylum procedure will resume. Under this procedure, a Social Report is first prepared by AWAS recording the findings and outcome of the age assessment. The Social Report is then shared with the Department of Social Welfare Standards, which signs it and sends it on to the MFSS, which issues the Care Order.

If the Chairperson determines that the age assessment is still inconclusive, the Chairperson has discretion to either (a) refer the person for a second age assessment; or (b) refer the person for a bone density test. The second age assessment consists of a fluid panel discussion similar to Phase 2. The bone density test is the same as under the old procedure. It is unclear how the decision of which further procedure to use will be made. However- in theory- if a person were to

refuse to consent to undergo a bone density test, then the Chairperson could refer the person for a second age assessment.¹⁶⁷

The new procedure sets no time limit on the bone density test, which is still conducted by the MoH and thus cannot be regulated by AWAS, though AWAS has met with MoH representatives to stress the need to complete the procedure as rapidly as possible. Under the old procedure, nearly all cases referred for further age assessment after the first interview were also referred for a bone density analysis- and the bone test tended to be the lengthiest phase of the procedure. The new procedure addresses this issue primarily by seeking to reduce the number of cases referred to a bone density analysis.

Preliminary Findings on the New Procedure in Practice: Pilot Test on Boat 14A

While it is still too early to gauge how the new procedure will work in practice, it was piloted on the first boat arrival in 2014 (Boat 14A), providing some preliminary insight.

Out of a total of 91 arrivals on Boat 14A, 74 claimed to be UAMs, of which 24 were found to be minors and Care Orders issued. Of the 74 who claimed to be UAMs, AWAS came to a conclusive decision for approximately 40% at Phase 1, and 60% at Phases 2/3. Among those who were referred to Phase 2/3, AWAS came to a conclusive decision for the vast majority following the second interview. Only 5 persons were referred for a bone density test, and these were completed within two weeks of referral. None were referred for a second age assessment.

According to AWAS, a number of persons who arrived on Boat 14A also had with them documentation containing or relevant to their date of birth, issued by Tunisian authorities. AWAS reportedly asked the Immigration Police to provide its input on the validity and authenticity of the documents, but no response was received.

Appeal of an Age Assessment Determination

There is no procedure of automatic judicial oversight over age and vulnerability assessment procedures in Malta, either under the old or the new procedure. This is especially problematic in the Maltese context, where a negative age assessment determination has the consequence of determining whether an asylum-seeker will continue to remain systematically detained.

In theory, an age determination may be challenged within three days through an administrative appeal procedure,¹⁶⁸ but to date there have been no recorded appeals of age decisions. Under the old procedure, persons were not adequately informed of the possibility of appeal, and it was only mentioned in print in English on the bottom of the age determination document. Persons were also typically not informed of the reasons for a negative decision. Within the detention context, persons have no access to any practical means by which to appeal, and no procedures are in place in this regard.

Some key improvements have been introduced under the new procedure. In case of a negative determination, AWAS will provide a motivated decision letter to the person, explain the reasons

¹⁶⁷ It is unclear the extent to which under either the old or new procedure, minors truly consent to undergo a bone density analysis. AWAS reports that there have been no instances in the past where a minor refused to consent to a bone density analysis.

¹⁶⁸ Immigration Act, art. 25A.

for the decision via an interpreter, as well as information on how to appeal. In theory the decision and possibility of appeal will also be explained to the person by an interpreter in a language he or she can reasonably be expected to understand. Otherwise, the appeal procedure remains the same as under the old procedure.

Conflict of Interest Concerns

aditus is concerned that the agency conducting the age-assessment is the same one requesting the minor's release, accommodating the child once released, and providing legal guardianship—leading to potential conflicts of interest. A single staff member may be involved in age assessment, vulnerability assessments in detention, requesting a minor's release, legal guardianship, working as a social worker for minors and other administrative tasks.

Availability of Interpreters

Interpreters are typically hired by the hour and are often themselves members of the refugee/migrant communities. AWAS has a pool of Somali interpreters (which represent the largest percentage of new arrivals), but in the past has faced trouble finding interpreters for rare languages, including in particular West African languages. People being interviewed are always asked for consent before use of an interpreter.

Female interpreters are not always available, and there have been cases where no interpreter was available at all. Maintaining a consistent pool of available interpreters is complicated, because refugee arrivals are not consistent and services may be in high demand in certain months, but not in others. Further, interpreters have typically received no training on the asylum procedure or the special needs and vulnerabilities of children.

Consequences of a Negative Age Assessment Determination

Upon completion of the age assessment determination- whether a negative or positive decision- the Refugee Commissioner is informed of the outcome and the asylum procedure resumes.

No specific data was available regarding the consequences of a negative age assessment determination on a person's asylum application, though there are a few reported cases where the RefCom decided to apply a different age conclusion than that provided by AWAS. However, a number of interviewees raised the concern that a negative age assessment determination may influence RefCom's decision on the asylum claim, whether in the form of a rejection on credibility grounds, influence on the decision-maker's perception of the applicant's credibility on other matters, or the burden of proof required to substantiate other elements of his/her application that are not supported by documentary or other evidence.¹⁶⁹

This is problematic for several reasons. First, age assessment determinations remain educated guesses. As a result, even in the most optimal of systems, there will be cases of mis-assessment. Second- particularly in the Maltese context- the falsity of an age claim has little or no bearing on the validity of a person's international protection claim. Our research suggests

¹⁶⁹ See generally Qualification Directive (recast), art. 4.

that within the Maltese context, false age claims are almost always driven by an attempt to avoid or escape the situation of unlawful and arbitrary detention that is systematically imposed on all adult asylum-seekers.

Of further concern, our research also suggests that **persons claiming to be minors are not informed of the possible impact a negative age determination may have on their asylum application.**

Key Concerns and Recommendations

The new age assessment procedure contains a number of welcome improvements, however **aditus foundation** has identified a number of key concerns and recommendations, as follows.

Welcome reforms

aditus welcomes the new reforms to the age assessment procedure, in particular the intention to use a more holistic approach in age assessment, greater integration of the benefit of the doubt in decision-making and the use of persons with specific training on transcultural issues and country of origin information.

Formalise the process

The age assessment procedure is still not set out or regulated by law, and the rules and procedure applied are not publicly available.

The age assessment procedure should be expressly set out and regulated by Maltese law and state that the best interests of the child shall be a primary consideration in the procedure. In particular, the law should also expressly provide for adequate safeguards, such as the person's right to information on the process, the right to be informed of the reasons for a decision, and the right to appeal an age assessment determination.

Age assessment procedures ought to be characterised by transparency and accountability, as well as consistency. This is also critical to ensuring the effectiveness of the right to challenge an age assessment determination.

We recommend the publication of policy guidelines, and further recommend the formalization and publication of the age assessment procedure, containing clear statements on core elements such as the procedure's intended duration, panel composition, assessment criteria, appeal and review criteria and procedure, representation and assistance, conduct of the assessment, relevance of documentation, etc.

Age assessment should not be conducted in detention

While the new procedure aims to reduce the amount of time minors spend in detention, age assessment continues to be conducted while the minors are in closed centres. This concern is further aggravated when the migrant is detained with adults pending the outcome of the age assessment procedures.

Age assessment procedures must take into consideration Malta's obligations under international and EU law with regard to the detention of minors. Under the current system, age assessment has the direct consequence of determining how long a minor is held in detention.

aditus believes that the detention of migrant children is unacceptable and that alternative accommodation measures can and should be resorted to. The Committee for the Rights of the Child states that the underlying approach should be one of care and not of detention, and that detention is never to be justified on the basis of the child being unaccompanied or separated, or on their migratory or residence status or lack thereof.¹⁷⁰

The Reception Conditions Directive (recast) requires Malta to ensure that *“minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.”*

The Directive further states *“unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible.”*

The *Convention on the Rights of the Child*, as well as the *International Covenant on Civil and Political Rights*, obliges states parties to separate adults from children in detention,¹⁷¹ and the Committee on the Rights of the Child reinforces that this obligation specifically applies to migrant children in detention.¹⁷²

With regards to the current policy of mandatory detention of all UAMs pending age assessment, **aditus** strongly recommends finding and implementing alternatives to detention. One alternative may be to transfer persons claiming to be minors to an open or semi-closed centre pending age assessment.

Pending such reform and within the current context of mandatory and systematic detention, it is imperative that measures be taken to separate persons claiming to be minors from adults in detention. In the past there have sometimes been delays in the issuance of a Care Order after a person has been confirmed to be a minor. Provisions must be made to ensure that- should such a situation arise again- confirmed minors will also be separated from adults in detention.

In light of the current on-going government discussions to end detention for minors, any reforms to age assessment procedures must be made in view of a policy of no detention for minors.

Participation in the process

aditus is concerned that the age assessment procedure does not sufficiently ensure the right of UAMs to actively participate in the age assessment procedure and to express their views freely (CRC, art. 12). UAMs are obligated to undergo the age assessment procedure and interviews in the absence of a guardian or legal representative. We are concerned the procedural information provided to persons undergoing age assessment is extremely limited, which further excludes the applicant from active participation in the process.

¹⁷⁰ CRC, General Comment No. 6.

¹⁷¹ CRC, art. 37(c) (“every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so”); ICCPR, art. 10(b).

¹⁷² “Special arrangements must be made for living quarters that are appropriate for children and that separate them from adults[.]” CRC, General Comment No. 6, para. 63.

Article 12 CRC states that “*that the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.*” The Committee on the Rights of the Child further specifies that the decision of how to be heard- either directly or through a representative or appropriate body- *should be made by the child.*¹⁷³

aditus recommends that persons claiming to be minors be duly informed, in a language they understand, of all aspects of the age assessment procedures *prior to its commencement*, including any possible impact (or not) that a negative age determination might have on their asylum application.

aditus also recommends that persons claiming to be minors should have access to and/or have the option of being heard through a representative during the age assessment procedure.

Benefit of the doubt and credibility

aditus welcomes the intention of the new procedures to better incorporate the benefit of the doubt in decision making.

aditus stresses the critical importance of the benefit of the doubt as a key safeguard both during the process and in the case of remaining uncertainty after assessment.¹⁷⁴

Caution needs to be exercised in making adverse inferences of credibility, such as where cultural or country standards appear to lower or raise a child’s age. The child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim.¹⁷⁵ Decision-making must also take into account elements such as lack of memory, lack of maturity, communication hurdles and limited documentation. Trauma related to events experienced in countries of origin, countries of transit and the hostile environment of detention may also further exacerbate these challenges.

Procedural guarantees

While the new age assessment procedure introduces a requirement that persons be provided with a motivated decision letter and be explained the reasons for the negative decision and possibility of appeal, **aditus** is concerned that there is still no effective means by which to challenge an age determination.

All decisions should be provided in accordance with administrative requirements: clear, intelligible, motivated and reasoned. Written decisions should be supported by clear reasons, and presented to the person in a language he or she can reasonably be expected to understand (i.e. via an interpreter as necessary), including an explanation of the procedures for appeal.

Persons should be provided with a real possibility of appeal or review, including the existence of procedures that can realistically be undertaken by and are accessible to an applicant in the detention context. In addition, is important to ensure a real possibility of professional assistance

¹⁷³ CRC, General Comment No. 12, para. 35.

¹⁷⁴ See e.g. EASO Report, *supra* note 84, p. 16.

¹⁷⁵ UNHCR, Guidelines on International Protection No. 8, para. 73..

or representation in case an age assessment determination is challenged, as well as adequate guarantees of independence and impartiality.

Relationship between age assessment and asylum claims

aditus is concerned that a negative age assessment determination may factor negatively into the assessment of a person's asylum claim.

In accordance with Article 22 of the Reception Conditions Directive (recast),¹⁷⁶ **aditus** stresses that a negative age assessment determination should not factor into RefCom's assessment of a person's asylum claim. Further, persons claiming to be minors should be informed prior to the age assessment procedure of any possible impact (or not) of a negative age assessment determination on their asylum application.

Roles and resources

aditus is concerned that both under the old and new procedure, AWAS staff members who work on age assessment are also responsible for a range of other roles and tasks, which may lead to potential conflicts of interest. These include the role of social worker for minors in the open centres, conducting vulnerability assessments in detention, accommodation in the open centres following release, and legal guardianship. AWAS staff members have reported at times feeling overwhelmed by their workload. Although AWAS has made age assessment a priority in 2014, staff continues to face limited time and resources in their day-to-day responsibilities and work.

aditus stresses the importance of ensuring adequate staffing and financial resources and distinction in personnel between the persons carrying out the assessment of vulnerability and those requesting for the child to be released. An establishment of an independent body would be preferred.

Further, the new procedure requires still greater staffing capacity per age assessment determination than the former procedure, and **aditus** is concerned that it will be difficult to keep to the new timeframes in practice during periods of peak arrivals.

Use of personal documentation

aditus is concerned that identity documents provided by persons claiming to be minors are not systematically taken into account in the age assessment process.

The Committee on the Rights of the Child states in its General Comment 6 that initial assessment and measures- including age assessment¹⁷⁷- should take into account all available information to determine the potential existence of international protection needs.¹⁷⁸

More generally, the Qualification Directive (recast) states that the assessment of an application for international protection includes taking into account the relevant statements and documentation presented by the applicant.¹⁷⁹ The EASO report recommends that before

¹⁷⁶ Receptions Directive (recast), art. 22(4).

¹⁷⁷ CRC, General Comment No. 6, art. 31(A).

¹⁷⁸ CRC, General Comment No. 6, art. 31(C).

¹⁷⁹ Qualification Directive (recast), art. 4(3)(b).

resorting to a medical examination, consideration should first be given to documentary and other sources of evidence available.¹⁸⁰

aditus recommends that identification documentation provided by persons claiming to be minors be taken into account in the age assessment procedure, including the implementation of measures to ascertain the validity of any documentation as required.

Interpreters

aditus understands that sometimes interpreters may be unavailable or it may be difficult to find an interpreter for rare languages.

The availability of an interpreter is critical to ensuring a minor's right to actively participate in the procedure and to express his/her views freely. **aditus** stresses the critical importance of ensuring an interpreter is available, and that interpreters shall have had and shall continue to have appropriate training on the procedure and minor-specific issues. As far as possible, minors must also have access to an interpreter of the same gender, if preferred.

Bone density tests

The new procedure is expected to reduce the number of cases referred for a bone density test; however, the bone test assessment and analysis fall under the responsibility of the Ministry of Health, and have not been modified under the new procedure. Further, it remains unclear whether and to what extent a margin of error and benefit of the doubt are applied in the bone density analysis.

Clear timeframes should be established and applied for the conduct and analysis of the bone density test.

In addition, a margin of error and benefit of the doubt should be applied and clearly outlined in a public policy document.

Contingency plans

Age assessment procedures must take into consideration the stark fluctuations in arrival flows in Malta. Significant flexibility in capacity and resources is required in order to ensure that any timeframes and standards set in policy can realistically be enforced in practice.

aditus also recommends the creation of a contingency plan for "irregular situations" (e.g. large influx of women, large influx of children) to ensure adequate response capacity, for example through the creation of a registry of persons trained in conducting age assessment- perhaps in coordination with local NGOs- who could be called upon during such periods.

On-going evaluation

Further research and evaluation will be needed to assess how the new procedures are applied in practice.

¹⁸⁰ EASO Report, *supra* note 84, p. 6.

G U A R D I A N S H I P

The issuance of a Care Order following age assessment commits a UAM to the care of the **Minister for the Family and Social Solidarity** (MFSS), who has the “*same powers and duties with regard to his care and custody as the parents or guardian of such child or young person would.*”¹⁸¹ The Minister has the duty to exercise his powers “*so as to further [the minor’s] best interests and to afford him the opportunity for the proper development of his character and abilities.*”¹⁸²

Article 15(a) of the Maltese Procedural Regulations¹⁸³ (transposing the Qualification Directive 2004/83/EC and Procedures Directive 2005/85/EC) also states:

*“It shall be ensured that the appointed **representative** of the unaccompanied minor is given the opportunity to inform the [UAM] about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself for the interview. The representative shall be present at the interview and may ask questions or make comments within the framework set by the person who conducts the interview.”*

The National Policy Document states that the MFSS shall ensure, as far as possible, that “the necessary mechanisms to enhance efficiency in the appointment of guardians are developed within the existing administrative framework.”¹⁸⁴

After a Care Order is issued, the Children and Young Persons Advisory Board appoints what is referred to as a **legal guardian** for each UAM. In practice, an AWAS social worker working with the UAMs in the residential homes applies to become the minor’s legal guardian, and the proposal is then approved by the Children and Young Persons Advisory Board (under the MFSS). Persons working as legal guardians for UAMs in Malta thus have multiple roles and responsibilities, which contributes to legal guardians sometimes being overwhelmed by their workload and raises potential conflict of interest issues.

The duties and responsibilities of a legal guardian for UAMs are not clearly specified in law or policy. While the legal guardian is officially the representative of the minor in all legal and administrative procedures, in practice his or her main role is that of supporting the minor in the asylum procedure as specified in Article 15 of the Procedural Regulations. Thus while the Minister technically becomes the guardian of the UAM, Maltese law and policy do not clearly assign to any particular person(s) the different duties and responsibilities of a **guardian** for UAMs as intended under international and regional standards.

Appointment of a Guardian

In Malta, UAMs **do not have immediate access to a guardian or legal representative upon arrival and while they are in detention.**¹⁸⁵ A legal guardian is only assigned after a Care

¹⁸¹ Children and Young Persons (Care Orders) Act, art. 11.

¹⁸² Children and Young Persons (Care Orders) Act, art. 9.

¹⁸³ Procedural Regulations, reg. 15.

¹⁸⁴ 2005 National Policy Document, *supra* note 27, p. 22.

Order has been issued by the Ministry for the Family and Social Solidarity and the minor is released from detention. In cases where the person claiming to be a minor is obviously a child, this may happen within a few days or weeks of arrival. If the minor is referred for more extensive age assessment procedures, minors may remain without a guardian or legal representative for months until they are released from detention. Minors thereby take part in a number of administrative actions- such as filling the Preliminary Questionnaire (PQ) and undergoing age assessment procedures- in the absence of parents and/or legal guardians.

As soon as a Care Order has been issued by the MFSS, an AWAS social worker sends an email- usually on the same day- to the Children and Young Persons Advisory Board requesting to be appointed as legal guardian to the minor. In practice, the Children and Young Persons Advisory Board may take anywhere between one week and several months to officially appoint the guardian. **The AWAS legal guardian- who in practice is also the minor's social worker- immediately begins working with the minor** after the email has been sent to the Advisory Board.

On the same day or the next day after a Care Order is issued, the minor is **transferred from detention** to an open centre. Sometimes the legal guardian will meet the minor in detention and accompany him or her to the open centre. In the case of large groups, the guardian may instead meet the minors upon arrival at the open centre.

RefCom does not resume the asylum procedure until the legal guardian has been officially appointed by the Children and Young Persons Advisory Board. As discussed above, where the age assessment procedure in detention has resulted only in identification of the person as a minor and no specific age has been provided, then age assessment may continue after the minor has been transferred to an open centre for purposes of identifying an exact age. RefCom will not resume the asylum procedure until completion of any final age assessment determination.

Caseloads vary depending on arrival numbers. In May 2014, AWAS legal guardians reported that they each had between 11 and 20 minors under their responsibility. However, during peak arrival times in the past, a single legal guardian could be appointed to as many as 40 or 50 minors. As the total number of AWAS legal guardians remains the same as in previous years, it is expected that caseloads during peak arrival months will likely be comparable. Within the frame of their current duties and responsibilities, the guardians interviewed for this report recommended that a manageable caseload size would be 11 -18 minors.

One issue of concern is that as of 2014, at least two of the AWAS legal guardians are also involved in implementing the new Age Assessment Procedure. This raises serious concerns with regard to caseload- both for age assessment and guardianship. **Absent recruitment of new legal guardians or staff members to conduct age assessment, both age assessment procedures and guardians will likely face still greater capacity constraints in coming years than in the past.**

Also of concern, UAMs are not asked whether they would prefer a male or female guardian. While it may not always be possible to accommodate the child's preference in this respect,

¹⁸⁵ In most countries and cases, a guardian is not appointed and does not represent him/her throughout the age assessment procedure. SCEP Report, *supra* note 82, p. 12.

doing so wherever possible could assist the process of building a relationship of trust between child and guardian that can be critical for the effective provision of support. In particular, some unaccompanied girls may have concerns they cannot freely express during meetings and/or asylum interviews if they are represented by a male guardian or are assisted by a male interpreter.

Responsibilities of a Legal Guardian

The scope of the duties and responsibilities of a legal guardian for UAMs are not clearly specified in law or policy. Although the Children and Young Persons Advisory Board is responsible for appointing the legal guardians, the Board reported that they do not have information on the role of the guardians.¹⁸⁶ While the legal guardian is officially the representative of the minor in all legal and administrative procedures, in practice his or her main role is that of supporting the minor in the asylum procedure as specified in Article 15 of the Procedural Regulations.

According to Article 15, the representative is responsible for informing the UAM about the asylum interview, preparing him for the interview (where appropriate) and being present at the interview. In practice, although the legal guardian does attend the interview together with the minor, information and advice regarding the asylum procedure is typically provided by NGOs upon referral by the minors' guardians. AWAS keeps JRS and usually also UNHCR informed of new arrivals to the open centres. Within the first weeks of arrival, JRS meets with all the new minors (usually as a group) to provide an overview of the asylum procedure and upcoming steps. The minor is also informed that JRS or UNHCR are available upon request to provide or arrange for legal assistance, although there is limited capacity to do so and legal assistance is typically provided at the appeal stage, particularly in more complex cases such as LGBTI claims.

Due to workload and capacity issues, legal guardians are in practice not always able to meet individually with each minor to prepare him or her for the interview (though they do usually meet with the minors individually within their capacity as social workers for other purposes- see below). In the past, legal guardians have been responsible for as many as 40 – 50 minors during peak arrival times, and they reported at times being appointed to minors whom they do not have a chance to meet prior to the asylum interview. Minors interviewed said they sometimes had to wait as many as seven months after their release from detention before having their asylum interview with RefCom.

Under the Care Order Act, all minors under the care of the MFSS- including UAMs- have access to the input and support of the mainstream children and family services. The signature of a guardian is required for a number of legal and administrative procedures, such as admittance to a hospital, enrolment in a school, an application for school fees exemption, or even police records if a UAM is apprehended for alleged criminal activity. While Maltese law and policy do not specify whether the Minister has delegated this responsibility to the legal guardians, no other individual has been assigned this responsibility and in practice the legal guardians interviewed reported sometimes signing as guardians for the UAMs in this regard.

¹⁸⁶ Email of 2 June 2014.

As discussed above, the recast Procedures Directive and Reception Conditions Directive specify that the legal representative *shall have the necessary expertise* to perform his duties in accordance with the best interests of the child.¹⁸⁷ Article 24 of the Reception Conditions Directive specifies that “those working with [UAMs] *shall have had and shall continue to receive appropriate training* concerning their needs.”¹⁸⁸ The members of the Care Team interviewed reported feeling comfortable and well informed on matters relating to the asylum procedure. However, most have a background in social work and acquired their knowledge of asylum procedures and related issues “on the job.” It is unclear whether introductory training measures are in place should new staff members be recruited in the future.

Care Team members report attending trainings from time to time, including one on LGBTI asylum claims in May 2014. However, they also report a **need for further training**, especially on particular vulnerabilities, such as LGBTI, trafficking, and country /culture of origin information.

Other Roles and Responsibilities of Persons Appointed Legal Guardians

EU law specifies that individuals or organisations whose interests conflict or could potentially conflict with those of the minor shall not be eligible to become representatives.¹⁸⁹ **aditus is very concerned that the multiple roles and responsibilities of persons currently working as representatives for UAMs coupled with limited capacity and resources may result in conflict of interest issues to the detriment of the minors.**

In practice, the persons appointed as legal guardians for UAMs are members of the AWAS Care Team that includes three social workers and two welfare workers. As a result, persons working as legal guardians have many other duties and responsibilities in addition to their role as legal guardian. **Multiple responsibilities coupled with generally limited capacity and resources have contributed to legal guardians sometimes being overwhelmed by their workloads and at risk of burnout.** Whether in their capacity as legal guardians or as social workers, it is not possible for them to follow each UAM in depth. The situation also presents a high risk of conflict of interest, for example, as Care Team members may find themselves obligated to choose between duties or prioritize responsibilities under time pressure.

AWAS’ responsibilities include overseeing the daily management of accommodation facilities for asylum-seekers,¹⁹⁰ and the Care Team is responsible for working with the minors in the open centres as social workers or welfare workers after the UAMs are released from detention. The Care Team members are also involved in a number of other tasks, such as conducting vulnerability assessments in the detention centres. As of 2014, at least two AWAS social workers also assist with the implementation of age assessment procedures.

Each social worker in the Care Team is typically assigned as a “visiting social worker” to one of the main open centres housing minors- Dar is-Sliem, Dar il-Liedna, and HFO¹⁹¹- and the welfare workers assist with various tasks and may share the responsibilities of the social workers depending on the workload. As the number of minors varies by open centre and minors are

¹⁸⁷ Procedures Directive (recast), art. 25(1)(a).

¹⁸⁸ Reception Conditions Directive (recast), art. 24(4).

¹⁸⁹ Procedures Directive (recast), art. 25(1)(a); Reception Conditions Directive (recast), art. 24(1).

¹⁹⁰ AWAS Regulations, reg. 6(2)(a).

¹⁹¹ At the time of our research, Dar il-Liedna was closed for renovation.

also sometimes accommodated in other open centres, a social worker may work with minors in different centres so that the burden is more evenly shared. Some social workers are also responsible for some adult asylum-seekers.

A member of the Care Team is always on call in case of emergency (24/7, weekends and holidays). They may be contacted by the Coordinator of the open centre, the minors themselves, or other authorities (police, hospitals, etc.) if any issues arise, such as a medical emergency, apprehension of a minor attempting to leave Malta unlawfully or arrest for criminal activity. On weekdays, the Care Team members are on call for the minors, and on weekends they are on call for both minors and adults. In addition, a Coordinator of each open centre is also on call 24/7, as well as a more senior staff member at AWAS- and these persons typically first screen calls before a member of the Care Team is contacted.

Upon arrival at the open centre, a Care Team member introduces them to the open centre staff. The minors are also provided with a welcome packet containing toiletries and a phone card to call their family. The Care Team member informs the minor of their role, the upcoming procedures, and the general rules and procedures in the open centre. The Care Team member also opens a file for each minor and an identification photo is taken for his or her records.

The minors are then typically given a few days to settle in to their new surroundings, after which the Care Team member meets with them again to explain a second time their role, the rules in the centre and general information about the procedure. AWAS has found this second explanatory meeting to be especially helpful, as minors may not have understood all of the information in the introductory meeting. If there have been many new arrivals, then the second explanatory meeting may be provided to the group, rather than on an individual basis. As far as possible, AWAS tries to ensure that an interpreter is present, but there have at times been issues with locating an available interpreter or an interpreter for rare languages.

AWAS social workers are integrally involved in the development of an individualized **Care Plan** for each minor, detailing needs, priorities and assistance to be provided during the minor's stay in the open centre. Within the first two weeks of being transferred to an open centre, the social workers organize an **individual meeting with each minor** for purposes of assessing their needs and interests in view of preparing the Care Plan. The meeting consists of an informal discussion with the minor, during which the social worker discusses such issues as health, education, employment and family members in the country of origin- in order to identify the minor's needs and preferences. In some cases, the minor may indicate an interest in education or in work, and the Care Plan will be tailored accordingly. The social worker may also identify a need for psycho/social support or anger management, and refer the minor to the appropriate care. The individualized meeting will also enable the social worker/guardian to identify when the minor may be ready to conduct the asylum interview.

A Case Conference is then organized involving the social worker, the Coordinator of the centre and a senior AWAS staff member to discuss the Care Plan. It is considered crucial for minors to be an active participant in the decisions being made regarding their life, and the Care Plan is also discussed with the minor, who must agree to it.

The Care Plan is then presented to the Children and Young Persons Advisory Board, who are responsible for helping support the recommendations. It was reported that the Advisory Board is usually very cooperative and supportive in this regard. A new Case Conference may be

organized a few months later to review the Care Plan if the minor's needs and interests have changed. There is no fixed time period for review of the Care Plan, and it seems this occurs primarily when the persons working with the minor become aware of a change or issue.

The Children and Young Persons Advisory Board is kept informed of key developments relating to the minors, such as if they are admitted to a hospital for care or if they go missing. In principle, members of the Care Team must receive the approval of the Board on key decisions regarding the minor, such as removing the minor from open centre for an outing- though this is not always the case in practice.

Thereafter, the social workers meet with the minors as needs arise and do not have a system of regular follow up or appointments. As some of the social workers spend several days each week at the open centres, a minor may approach them at that time on his or her own initiative. The AWAS office is also open at select times during the week for walk-in meetings, and members of the Care Team are available should a minor seek to stop by with any requests or concerns.

Missing Children and Disappearances

There is growing concern that a number of minors frequently go missing from the open centres, and the issue is currently under discussion by AWAS and the Children and Young Persons Advisory Board. According to interviewees, most only go missing for a couple of days because they have gone to stay with friends, but some also disappear permanently- most likely because they have left the country. According to some reports, as many as two minors go missing permanently from the open centres every week.

According to the current procedure, a staff member at the centre should report the missing minor to the police and inform the Children and Young Persons Advisory Board, which in turn will inform the MFSS.

This situation may be linked to inadequate monitoring of the open centres and lack of individualized follow up with the minors. It also raises concerns of a heightened risk and vulnerability to trafficking or other exploitation of minors.

Determination of the Child's Best Interests and the Impact of Detention

In its 2013 Second Periodic Report on Malta, the Committee on the Rights of the Child stated that it was particularly concerned at the inadequate understanding and application of the principle of the best interests of the child in asylum-seeking, refugee and/or immigration detention situations in Malta.¹⁹²

Minors are not assigned a guardian or legal representative while in detention, and there is no system or procedure in place to ensure a best interests determination or comparable evaluation is conducted until at least several weeks after a minor has been transferred to an open centre. As mentioned above, an in depth individualized assessment is conducted by the social worker several weeks after transfer to the open centre for purposes of developing a Care Plan. UAMS

¹⁹² CRC 2013 Observations on Malta, *supra* note 32, para. 30.

thus spend this initial phase without any systematized assessment of their interests and any special needs, which impedes their incorporation as a primary consideration in the administrative and other actions taken during this phase- including reception conditions, age assessment, detention and the first weeks in an open centre. As a result, the child's best interests, needs and rights are effectively put "on hold" for what may amount to a period of several months upon arrival.

In practice, the special needs of some UAMs may come to the attention of NGO workers in the detention centres, such as for extreme cases requiring medical attention. JRS also helps facilitate access to a psychologist in some cases, but there is a waiting list. Access to psycho/social support services or other assistance for UAMs in detention remains an issue.

The Care Team members reported that in general they face difficulties in building relationships of trust with the minors in the open centres. In some instances, they reported that minors do not feel comfortable opening up to tell their stories for several months after transfer to the open centres, and sometimes not at all - which may also impact the quality of asylum determinations. AWAS social workers reported cases where minors have opened up to them only after the situation had "become critical" (e.g. violent behaviour, attempted suicides, need for medical assistance). Lack of time and capacity to spend adequate one-on-one time with minors and lack of systematized best interests determination and follow up are key factors. The initial experience of detention also contributes to this situation.

Interviewees also raised concerns about the negative impact of detention on UAMs and asylum-seekers more generally. Detention may exacerbate existing vulnerabilities, such as the effect of past traumas, as well as cause new vulnerabilities. Detainees feel disempowered and vulnerable. AWAS social workers interviewed noted that they have never heard minors speak about their time in detention.

AWAS staff members who work with minors both during age assessment and in the guardianship context reported a significant difference in the willingness of the minor to share information and open up with regards to their story and experience after they are released from detention and have spent some time in the open centres. However, they also report that experience in detention contributes to the difficulty in building relationships of trust with minors in the open centres. Interviewees report that minors do not appear to fear they may be returned to detention.

Key Concerns and Recommendations

Formalise the system

Clear and public policy guidelines on a system of guardianship and legal representation for unaccompanied minor asylum-seekers should be created, including terms of reference for guardians and legal representatives.

Guardian versus legal representative

UAMs should be appointed an independent, qualified **guardian**, free of charge, and who is responsible for looking after the child's best interests and well-being. Minors should also be

appointed a **legal representative**,¹⁹³ and such representatives should support the child throughout the procedure.¹⁹⁴

Guardianship pending age assessment

UAMs should be appointed a guardian and a legal representative **as soon as possible**. In accordance with the principle of the best interests of the child and to ensure a minor's right to actively participate and express his/her views freely regarding all matters affecting the child, a qualified independent guardian or representative should be appointed to advise the child **before an age assessment procedure is carried out**.¹⁹⁵

Best interests of the child, in practice

The **best interests of the child** must be a primary consideration in all actions concerning children, including those undertaken by administrative authorities.¹⁹⁶

To this end, a determination of what is in the best interests of the child (BID) must be conducted and clearly provided for in policy guidelines and regulations. A BID should involve **a clear and comprehensive assessment of the child's identity**, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.¹⁹⁷

At any stage of the displacement cycle, a best interests determination must be **documented** in preparation of any decision fundamentally impacting on the unaccompanied or separated minor's life.¹⁹⁸

Who should be a guardian?

aditus is concerned that the current arrangements fail to ensure the appointment of legal guardians with **sufficient expertise** in asylum issues. Furthermore, since the legal guardians are also the social workers responsible for the children, we feel that the necessary distinction between the two roles is blurred. Whilst appreciating that capacity and resources are limited, we are also concerned that each legal guardian is responsible for a relatively large number of minors, with a possible negative impact on the quality of the services offered.

aditus stresses the importance of ensuring **adequate staffing and financial resources** and distinction in personnel between the persons carrying out age assessment, requesting release from detention, responsible for accommodation and those working as a guardian and/or legal representative.

aditus reminds the Maltese government that EU law requires States to ensure that individuals or organisations whose interests conflict or could potentially conflict with those of the minor shall not be eligible to become representatives.¹⁹⁹

¹⁹³ ExCom Conclusion No. 107, para. (g)(viii).

¹⁹⁴ UNHCR, Guidelines on International Protection No. 8, para. 69.

¹⁹⁵ UNHCR, Guidelines on International Protection No. 8, paras. 69, 75; EASO Report, *supra* note 84, p. 22; SCEP Report, *supra* note 82, p. 12.

¹⁹⁶ CFR, art. 24; Procedures Directive (recast), Recital 33; Receptions Conditions Directive (recast), Recital 9; Qualification Directive (recast), Recital 18; Dublin III Regulation, Recital 13.

¹⁹⁷ CRC, General Comment No. 6, para. 20.

¹⁹⁸ CRC, General Comment No. 6, para. 19.

¹⁹⁹ Procedures Directive (recast), art. 25(1)(a); Reception Conditions Directive (recast), art. 24(1).

All guardians and legal representatives working with UAMs must have had and must continue to receive appropriate training concerning their needs.²⁰⁰

Missing minors

While it is important to allow minors to visit family/friends in other Member States, **aditus** is concerned about the high numbers of **minors who go missing** from the open centres, some permanently. In this regard, **aditus** would like to highlight the vulnerability of minors to human rights violations such as trafficking, child prostitution, slave labour, etc.

Procedures should be established to ensure proper monitoring of UAMs in the open centres, and to ensure they do not go missing locally or overseas.

Contingency planning

The guardianship and legal representative system must take into account the stark fluctuations in arrival flows to Malta and provide for **flexibility of capacity and resources**. To this end, **aditus** suggests the creation of a registry of trained guardians who could be called upon during such periods.

Family tracing activities

In accordance with international and EU law, Malta has an obligation to commence **tracing** activities *as soon as possible*,²⁰¹ and where possible and if in the child's best interest, reunify separated and unaccompanied children with their families as soon as possible.²⁰²

The duty to conduct tracing activities must be clearly articulated in Maltese law and policy, identifying a clear timeframe and who is responsible for conducting tracing activities.

The asylum procedure

aditus is concerned that there are excessive delays in the processing of UAM asylum applications following their release from detention, and there are reports of minors waiting up to seven months in the open centres to have their asylum interviews with RefCom. Excessive waiting periods further delay minors' access to the package of rights to which they are entitled as children refugees. Delays may also further encourage minors who are disappearing from the centres and seeking to leave Malta.

Identity documents

aditus is also concerned that there are excessive delays in the issuance of personal identity documents to UAMs, which inhibits their ability to access key rights and services, such as education or lawful employment for older minors. At present, JRS issues minors in the open centres of age to work with a computer fiche of personal information; however, employers typically do not accept this in lieu of official identity papers.

aditus reminds the Maltese government that the 1951 Refugee Convention requires states to issue identity papers to any asylum-seeker "in their territory who does not possess a valid travel

²⁰⁰ Reception Conditions Directive (recast), art. 24(4).

²⁰¹ CRC, arts. 22(2), 9(3) and 10(2); CRC, General Comment No. 6, para. 31(E).

²⁰² CRC, General Comment No. 6, para. 13; Dublin III Regulation, art. 6(4); Reception Conditions Directive (recast), art. 24(3).

document,” and that the issuance of identity documents is not contingent upon completion of the asylum application.²⁰³

The Committee on the Rights of the Child also states that *“unaccompanied and separated children should be provided with their own personal identity documentation as soon as possible.”*²⁰⁴

²⁰³ 1951 Refugee Convention, art. 27.

²⁰⁴ CRC, General Comment No. 6, para. 31(D).

KEY TERMS

1951 Refugee Convention	1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees
AAT	Age Assessment Team
AWAS	Agency for the Welfare of Asylum-Seekers
Bone density analysis method)	Bone density analysis by way of carpal x-rays (Greulich and Pyle)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
Dublin III Regulation	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
DSWS	Department of Social Welfare Standards
EASO	European Asylum Support Office
ECHR	European Convention for Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
ENOC	European Network of Ombudspersons for Children
FAV	Further Age Verification
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organization for Migration
MFSS	Ministry for the Family and Social Solidarity
MOH	Ministry of Health
MJHA	Ministry for Justice and Home Affairs
National Policy Document	<i>Irregular Immigrants, Refugees and Integration</i> , 2005, produced by MJHA and MFSS
PQ	Preliminary Questionnaire
Recast Procedures Directive	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 Qualification Directive	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 Reception Directive	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
RefCom	Office of the Refugee Commissioner
SCEP Report	Position Paper on Age Assessment in the Context of Separated Children in Europe, Separated Children in Europe Program, 2012
UAM	Unaccompanied minor asylum-seeker
UNHCR	UN High Commissioner for Refugees
TFEU	Treaty on the Functioning of the European Union

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