

THE TREATMENT OF IRREGULAR IMMIGRANTS IN MALTA

DIJONISJU MINTOFF
EMANUEL SCICLUNA
(JOHN XXIII PEACE LAB MALTA)

The Peace Lab was founded with specific aims namely:

- To combat all theories and practices which propagate the superiority of one group over the other;
- To foster better understanding among all irrespective of creed, colour and nationality;
- To promote and preserve social justice.

In order to achieve these aims the Peace Lab has furnished schools with Social Science textbooks in which was given a description of the lives and work of people who preached and fostered among all peoples of the world the ideas of peace, cooperation, social justice, respect for human rights and respect for the environment - among others Mahatma Gandhi, Martin Luther King, John XXIII, Dag Hammarskjold, Albert Schweitzer, Jacques Cousteau, Albert Luthuli. Also, the Peace Lab

- Has a weekly programme on radio where issues concerning development and justice are discussed;
- Takes part in other broadcast and television discussions;
- Contributes articles to local newspapers;
- Organises seminars about peace, social justice, environment, racism etc.
- Collaborates with other NGOs on particular issues;
- Organises an annual Award for Kindness;
- Is giving shelter to “Illegal immigrants”.

We became involved with “illegal immigrants” when these persons started to be housed in the barracks at Hal Far and felt it our Christian duty to visit them and help them in their plight. As we came to know them better, to know about the circumstances which forced them to leave their families and country and came to know what happened to those who were repatriated, we protested with the civil authorities against the way they were being treated, against their being detained as if they were criminals and against the established

procedure which did not give them a chance to state their case when applying for refugee status. We also initiated court proceedings against their repatriation.

Now the situation has changed. A good number of these persons have been allowed to live in houses, centres or “open camps” put at their disposal by government, church or voluntary organisations. A good number are finding employment in the private sector.

From what these people tell us we came to know that they are paid less than Maltese citizens, that the hours of work tend to be longer, that the conditions of work tend to be different and that safety precautions are not always adhered to. We are aware that Maltese legislation regulates conditions of work.

During the National Conference on Irregular Immigrants held on 7-8 February 2005 we took part and presented our position.

We feel that the policy document as presented by the Government represents an improvement of the theoretical approach by the Maltese authorities to the issue concerning immigrants’ detention. However a number of ambiguities and unacceptable positions are still present.

The main sources of concern about the current legislation and practice are the following:

- a) A time limit for a person’s detention is not defined as he/ she is detained until his/her deportation.
- b) The detention is an automatic consequence of the irregular status of the person concerned.
- c) An ‘effective’ judicial review of his/her placement in detention is not provided by law as the possible instruments to appeal against detention are not suitable for the immigrants.

We can say that the Maltese authorities addressed (and continue to address) the issue of the irregular immigrants by adopting a policy of detention, irrespective of the status of asylum seekers or of illegal immigrants. Moreover in recent times the authorities faced and continue to face the increased number of arrivals by a massive resort to such an instrument: the deprivation of liberty.

They write: “Malta considers the fight against irregular migration as a priority issue, not only because such migration patterns undermine national stability and pose challenges to the labour market but also because it considers itself legally and morally obliged to combat human trafficking.” We can agree with these statements. However the fundamental rights of each person have a primacy over other considerations. Therefore the duty to offer *protection should predominate over any other consideration.*

It goes without saying that States have the right to protect their borders and to introduce measures controlling migration within their jurisdiction. However, the exercise of this right must be in accordance with a State’s international obligations, including those of a human

rights nature (falling under the ratified Conventions against ill-treatment and inhuman or degrading conditions of detention).

The Maltese authorities often emphasize that a large majority of immigrants, on arrival in Malta, apply for refugee status as soon as they are escorted into Maltese harbours. According to them such a large number of applications explains the absence of difference of treatment of asylum seekers and illegal immigrants. But such an approach is not acceptable.

How does the new policy address the above mentioned three issues?

Concerning Item a) above:

The government introduces the concept of “*unreasonable*” length of detention. This adjective is often used in other juridical contexts (for instance, the “unreasonable length of proceedings” is stigmatised by the European Court of Human Rights). However in such a context (automatic deprivation of the liberty under an administrative decision) it is too vague. *A time limit should be clearly indicated.*

In other paragraphs of the document they consider 18 months of detention as a reasonable duration. First, such a length is much longer than in other European countries; second it is unclear whether or not there is an obligation to release the person concerned after these 18 months have elapsed, even if his/her identification and/or deportation was not possible. Apparently the time limit is only indicative.

Concerning Item b) above:

The detention remains automatic, irrespective of any specific and personal consideration.

Concerning Item c) above:

The general guarantee given by section 34 of the Maltese Constitution and by section 409A of the Criminal code, allowing any person deprived of his/her liberty to challenge the legality of his/her detention before a Court is not an effective remedy to the situation as irregular immigrants have no effective possibilities to raise such an appeal to the Court, due to their vulnerability, to their ignorance of the domestic legislation and to their actual impossibility to have access to legal defence.

The authorities stress the importance of the new amendments to the Refugees Act (Cap. 420) and of the new procedure (Chamber of the Appeals Board etc). No doubt the newly adopted bill is an improvement on the current situation. However article 5 of the bill states: “Competence of the Appeals Board to determine whether a detention had an unreasonable length. Whenever the Board considers that a detention was unreasonably long, it can grant release from custody of the detained person. The released person shall report to the immigration authorities at least once a week.

However the release is forbidden if: the person has to be identified; when the persecution and the threats the person alleges in his country are not ascertained; when his/her release poses a threat to public security and order...”

The following observations should be considered:

- The new legal provisions determine a faster procedure (sections 1 and 2), but they are silent about the procedure itself, the lack of legal assistance and information, the lack of a hearing from the Appeals Board. On the contrary, their speed could open the way to fewer safeguards and a more perfunctory scrutiny of each case.
- The legal provision considered in section 3 is more restrictive than the present one. It is aimed only to limit the number of applications. No clear guidelines are given about the criteria applied to determine whether or not a country is considered as a “safe state” by the government.
- The procedure to examine the detention’s length is linked to an undefined criterion of ‘unreasonableness’, which is not determined in time and open to wide discretionary power in its application.
- The cases of exemption from release are those actually characterising the vast majority of irregular immigrants. They are detained either for identification or for supposed investigations concerning their countries and the grounds of their claims.

Therefore the practical implementation of this new legal provision might have no effect on the current situation.

The exclusions listed by the bill quote the wording of the “UNHCR Revised Guidelines and Applicable Criteria and Standards Relating to the Detention of Asylum Seekers” (February 1999). *However in the Maltese Law the logic is the inverse of that provided by these Guidelines.* In the Guidelines, detention is the exception and not the routine. In principle asylum seekers should not be detained, because of their presumed vulnerability as victims of abuses in their countries. Detention can be resorted to only in individual cases of exceptionality (examined case by case) and on exceptional grounds. The list of situations where it is possible to resort to detention includes the cases here mentioned in section 5. In the new bill the logic is opposite: detention is the routine and a release from detention is possible only in exceptional cases, excluding those listed in section 5. This means that the meaning and the aim of the Guidelines is misrepresented, even if the wording is the same.

Moreover in the Continental experience the body entrusted to review the detention could be considered an administrative body, as the president is appointed by the government. So it will fall short of meeting the level of independent scrutiny expected from *a judicial review mechanism*.

In some other parts of the document the overall conditions of detention are considered and some standards are listed. This part can be shared, but the effective instruments provided for its implementation should be made explicit.

The approach to the problem of accommodating these people should be in line with the position expressed by the CPT in its 7th General Report, published in 1997. It is inappropriate to hold foreigners who are neither convicted nor suspected of a criminal offence in a prison-like environment.

Measures alternative to detention could - and should - be developed and used wherever possible, in particular vis-à-vis asylum seekers. Resort to alternatives to detention has great importance as regards asylum seekers, who might have been imprisoned and/or tortured or otherwise ill-treated in their country of origin. In addition, some vulnerable categories should, as a rule, be exempted from detention, i.e. women with children, juveniles, elderly persons, mentally and physically handicapped.

Currently Malta has neither adequate facilities to accommodate people, nor trained staff to handle the situation whenever figures dramatically increase. People are accommodated in conditions that cannot be considered acceptable under the material and health profile: cramped conditions, sanitary facilities characterised by filth and disrepair.

A policy document is clear and significant only if the statements in it are accompanied by clear indications about their implementation.