

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN **MALTA**

IN 2005

submitted to the Network by **Professor Ian REFALO** *

on 15 December 2005

Reference: CFR-CDF/MT/2005



The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

* This report was prepared with the assistance of Dr. Theres Cachia and Dr. Mark Refalo

EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX
CFR-CDF

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Le Réseau UE d'Experts indépendants en matière de droits fondamentaux a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (suppléant Birgitte Kofod-Olsen) (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyses (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. Tchèque), Edita Ziobiene (Lituanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.

Les documents du Réseau peuvent être consultés via :

http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The EU Network of Independent Experts on Fundamental Rights has been set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyses (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.

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CHAPTER I. DIGNITY**Article 1. Human dignity***Legislative initiatives, national case law and practices of national authorities*

While the position on this issue has not changed since the report for 2004 it is interesting to note that the concept of human dignity was one of the underlying principles of the statement presented by the Hon. Dr Michael Frendo, Minister of Foreign Affairs before the Sixtieth Session of the United Nations General Assembly on the 21st September 2005. The concept of human dignity, even if not expressed in the form of a right, is at the basis of the declaration of principles¹ and the fundamental human rights² as found in the Constitution of Malta.

Positive aspects

The Maltese system of government and its legal system is generally respectfully of the dignity of the human person and lays great stress on the protection and upholding of this concept. There have been in Malta no generalized threats to the dignity of the human person, even though the continuing waves of illegal migrants, already reported upon in 2004, especially in the summer months, have put both the system and the government under stress to cope with a situation which endangers the dignity of man. There have been unfortunate incidents which however have been the subject of inquiry and redress. There are no causes of grave concern and the situation continues to be, in the main, satisfactory.

Article 2. Right to life**Euthanasia***Legislative initiatives, national case law and practices of national authorities*

The position in relation to euthanasia has not changed since 2004. Active euthanasia and assisted suicide remain on the Criminal Code recognised as a crime under section 213 of the Criminal Code. On the other hand the position of passive euthanasia is not clearly defined. While Section 213 speaks of active euthanasia and assisted suicide, no mention of passive euthanasia is found in the domestic laws. Neither have any judicial proceedings been brought before the domestic courts on this matter. A legal practice does not seem to exist on this issue while a medical practice is very difficult to identify. The only comment that can be made is that as yet there has not been any official or public information that relates to a case of passive euthanasia in Malta.

Reasons for concern

The position in Malta continues to reflect main stream traditional thinking on this issue. The problems raised by concerns of privacy as well as by the suffering which the prolongation of life of the terminally ill may in certain situations impose have not been sufficiently addressed.

¹ Chapter 2 of the Constitution of Malta

² Chapter 4 of the Constitution of Malta

Domestic violence

Legislative initiatives, national case law and practices of national authorities

The year 2005 saw the publication of a Parliamentary Bill to make special provision for domestic violence. Bill number 45 was published in the government gazette of the 13th May 2005 after a different version of this Bill had been tabled before Parliament seven years earlier. Bill number 45 of 2005 has not as yet been enacted and therefore has not entered into force, however it seeks to address the deficiencies that exist in relation to domestic violence both in the domestic laws and also in the national infrastructure.

In view of this, the Bill proposes the introduction of special provisions to be entered into the Criminal and the Civil Code that will domestic violence equal recognition as a criminal offence as other offences related to violence that were already included in the Criminal Code. The Bill furthermore establishes a Commission on Domestic Violence and provides for the designation of one or more agencies which will be responsible for the organisation of preventive, therapeutic and treatment programmes.

While this Bill has long been awaited for since the incidence of domestic violence has been recorded for several years, NGOs working the field of women's rights have also criticised the manner in which domestic violence is being proposed to be regulated. While reporting of incidents of domestic violence is being encouraged by both state agencies and NGOs and these agencies and NGOs provide services to victims of domestic violence, it is not possible to calculate the seriousness of the problem in Malta with certainty and it is only possible to say that from statistics it seems that for example the state agency Appogg deals with about 300 such cases in a year.

Focus on domestic violence has been given for a number of years within the Police Force with the establishment of a special unit, the Domestic Violence Unit. While dealing with receiving criminal reports and investigates cases of domestic violence that are referred to the Unit, the persons working within the Unit are also expected to provide support to victims of abuse, assist them in finding adequate shelter, and offer them referrals and links to other support services. In 1996, the Domestic Violence Unit launched a support line for women and children victims of abuse and has also formulated guidelines for doctors, police, social workers, and counsellors to enable them to appropriately deal with victims of violence.

In its 656th Meeting, the Committee on Elimination of Discrimination against Women urged Malta to accede to the Optional Protocol to the CEDAW. However this has not been acceded to as yet, thereby not recognising the competence of the Committee to receive and consider communications under the protocol.

The regulation of domestic violence in Malta was also questioned by the Committee on Economic, Social and Cultural Rights in its 33rd session held on the 9th November 2004. In that meeting the Committee noted domestic violence should be recognised as an offence in itself and that legislation is required for preventive measures such as orders to remove abusers from the household. With the publication of the Bill on Domestic Violence while domestic violence is being explicitly recognised as an offence, the extent of the adoption of removal orders is dubious. The Bill foresees the issue of protection orders in certain circumstances and under certain limitations which include even limitations of time.

Despite the publication of the Bill, this has as yet not been enacted as an Act of Parliament and therefore the current situation remains the same as that reported for the year 2004.

Positive aspects

The introduction of the above bill in Parliament marks a considerable advance on the previously obtaining situation. Though social attitudes are particularly difficult to change, the bill certainly constitutes a great advance on the obtaining situation and evidences the determination of the government to address this problem. This is therefore to be considered as a positive step in the right direction.

Reasons for concern

The reasons for concern which existed in relation to domestic violence are addressed in the pending legislation. Before expressing a definite opinion one has to see how it actually works in practice.

Article 3. Right to the integrity of the personBreaches of the right to the integrity of the person*Legislative initiatives, national case law and practices of national authorities*

There has been no legislative development in the field of the integrity of the person throughout the year under review and the position may be said to have remained the same as reported in 2003 and 2004. However, this year has seen an increase in the discussion of issues that relate to the integrity of the person especially in the field of bio-ethics. A Bioethics Xonsultative committee has also been set up which is meant to assist the government in developing a bio-ethics committee. The position is Malta, however, as far as bio-ethics is concerned, is sparsely regulated

Positive aspects

There has been throughout 2005 a greater awareness among the public and through the media of the problems posed by medical advances especially in realtation to stem cell expirementation. This may eventually lead to the development of a more formal regulatory framework to the present informal position.

Rights of the patients*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

As already reported in 2003 Malta has not signed the Convention on Human Rights and Biomedicine allegedly because it finds the Convention too liberal and since it is thought to give insufficient protection to human beings, especially human embryos.

Legislative initiatives, national case law and practices of national authorities

The rights of the patient as an issue is given importance within the medical profession and is one of the elements in which persons within the medical and health care field are trained in. To this effect, persons receiving training or education in any health care area are required to study the issue.

Although there does not seem to be a written code which is specific to Malta, the medical professions follow international standards that are commonly used in a number of

jurisdictions. A representative also participated in the conference organized by the European Parliament between the 28th February and 1st March 2005 on Patients' Rights in Europe.

While it appears that the medical profession bases itself on the UK practices in relation to patients' rights, focus is centered on informed consent as based on five conditions and that is disclosure of information, understanding, voluntariness, competence and consent. It is somewhat difficult to comment on how this is put into practice as no statistical data is available.

Redress for complaints is provided through various methods. The public hospital itself has a patients relation officer who is responsible for receiving complaints from patients and their relatives. At the same time the Medical Council also plays a role in addressing complaints received against doctors. Other methods of redress are through the normal channels and that is through the Ombudsman and the Courts. Medical malpractice may fall both within criminal and civil court proceedings depending on the effect of the malpractice.

Issues relating to bioethics were until the previous year not publicly discussed, however the situation changed in 2005 and such issues have been raised to the spotlight.

Such discussion was initiated with the Government proposing an amendment to the Constitution whereby the act of abortion would not only remain a crime in the Criminal Code but be prohibited also in the Constitution. This proposal raised debate by the general public in which NGOs, professional entities and the general public participated. Although the proposal related only to abortion, the debate included issues related to In Vitro Fertilisation and other methods of conception and other issues of bio-ethics. It seems that the proposal initially made by the Government has now been shelved, however no public statement to this effect has been officially made.

Positive aspects

The setting up of the Bioethics Consultative Committee is a result of greater awareness and a step towards better regulation of the modern problems raised in the field of medical experimentation. A robust medical set up and a traditionally well ordered medical profession has avoided any major problems.

Reasons for concern

Despite the development of greater awareness in the sphere of public debate the legal position has not changed and Malta still does not have any legislation on issues of bio-ethics. Yet during 2005 several NGOs, professional entities and the public have lobbied for adequate regulation.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

Conditions of detention and external supervision of the places of detention

Penal institutions and institutions for the detention of persons with a mental disability

Legislative initiatives, national case law and practices of national authorities

As already reported in 2003, following the report of the Ombudsman regarding prison conditions, Government has undertaken the refurbishment of those places of detention where persons with a mental disability are held. This has continued further. However the legal

framework for protection of such places has not changed and the Mental Health Act remains the unaltered.

Centres for the detention of foreigners

Legislative initiatives, national case law and practices of national authorities

The situation in centres for detention of foreigners must in the case of Malta be based on a distinction between those foreigners who are detained following a sentence delivered by a court and the detention of foreigners who enter Malta in an improper manner and who generally then seek refugee status. While the position of the former remains unchanged and the conditions under which they are kept seem to be the same as previously report, the position of the latter seems to have escalated during 2005.

A change in the Refugee Act and in the Immigration Act has been effected with the aim to deal with the situation in a more effective manner. Such changes have sought to increase the resources of the bodies set up to deal with the relative proceedings with the aim of shortening the time taken for the finalisation of such proceedings. While the detention upon arrival policy has been retained, this has been somewhat relaxed in that detainees may submit a request for conditional release on grounds that the continued detention would be unreasonable as regards duration or because there is no reasonable prospect of deportation within a reasonable time. While these changes were aimed at providing a system which would work within a shorter time frame and also for providing a relaxation in the rules of detention, the amendments have been criticised by both national and foreign NGOs predominantly for the reason that no criteria have been given in the law to establish what would be considered as reasonable or unreasonable.

At the same time, persons whose application is pending have also been housed in open centres where the conditions have been rather bettered. At the same time children who are found within this situation are being given refuge at Institutions, often Church run institutions, who cater for less privileged children and are also placed at schools. This is not to say however, that all the children are so housed or are given the opportunity to attend school without delay or without difficulties.

Despite the efforts made by the Government to better the conditions of detention, the ever increasing number of arrivals by sea, a number which has greatly increased in 2005, has once again led to a situation where all the efforts made seem rather useless. For example although new centres were prepared it still became necessary to house some persons in tents due to the large number of arrivals which was disproportionate to the national infrastructure. This led not only to persons being housed in tents with the discomfort and inadequacies that this brings with it, but also led to a situation of over crowding.

Tensions have also arisen within the detention centres themselves where a number of protests have been held by the immigrants. In one such incident force was used by the members of the Police and the Armed Forces. An independent inquiry was established to analyse the behaviour of the police and the armed forces in such instance. This incident has been highly publicised by the media and several national and foreign NGOs and international institutions have condemned such incidents.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has on the 25th August 2005 published its report on its visit which was held between the 18th and the 22nd January 2004. This report, together with the Governments replies has been published with the approval of the Government. Although some comments were made about his in the report submitted for 2004, the report of the CPT has only been published in 2005 and an analysis of the finding may only be made in this year's report.

The CPT has presented a number of recommendations which include:

- The putting into place of “steps to be taken to ensure that any foreign national detained under the Immigration Act benefits from an effective legal remedy enabling him to have the lawfulness of his detention decided speedily before a judicial body”, stating that “this judicial review should entail an oral hearing with legal assistance and interpretation, if necessary provided free of charge to the person concerned. Moreover, detained foreign nationals should be expressly informed of this legal remedy”.
- The CPT has asked “the Maltese authorities to deliver a clear message to the members of the Police Force and the Armed Forces, entrusted with custodial duties in respect of foreign nationals, that all forms of ill-treatment, including verbal abuse, are not acceptable and will be the subject of severe sanctions.” Such a recommendation was made after the CPT received a number of allegations of verbal abuse and forms of ill-treatments. Included in such allegations were practices by which detainees were called by their nationality or their file tag rather than by their personal name.
- -The CPT has also considered the manner in which interviews with the detainees are held and has recommended that measures “be taken to ensure that the initial interviews, as well as any other interview conducted during the asylum proceedings, are carried out in a manner guaranteeing their confidentiality. Free, qualified and impartial interpretation should be made available, on request, during the whole procedure and the use of fellow detainees as interpreters should, in principle, be avoided. Female asylum seekers should as far as possible be interviewed by female interviewers (assisted, if necessary, by female interpreters).”
- -difficulty that was mentioned in our report for 2003 in relation to the lack of reasons being given by the Refugee Commissioner and the Refugee Appeals Board for their decision has also been considered by the CPT as being inadequate. In fact the CPT has recommended that “immediate steps ... be taken to ensure that every decision taken by the Refugee Commissioner or the Refugee Appeals Board vis-à-vis a particular foreign national explicitly states the reasons supporting it. The appeal procedure should include the right for the foreigner concerned to be heard in person before the Refugee Appeals Board.”
- A recommendation to provide free legal aid to foreign nationals detained under the immigration legislation has also been made.
- The conditions of detention were largely criticised as being inadequate in the light of international standards. This has led to the CPT recommending a significant improvement in the material conditions throughout the establishments accommodating foreign nationals detained pursuant to the immigration legislation and the taking of measures to remedy deficiencies in respect of the quality and lack of variety of food offered to detainees.
- Other recommendations in relation to the conditions of detention of such detainees refer to the provision of more developed regime activities and appropriate means of recreation, including access to newspapers/magazines.
- -The CPT has also established that the over crowding exists within the detention centres and has made specific recommendations against this, identifying not only the number of persons to be kept in each detention centre, but also denouncing a couple of the centres as wholly inadequate and recommending that they are not used further.

Other issues which were found to be lacking in standard related to disciplinary regulations which remain informal. The CPT has recommended that formal disciplinary regulations are issued for the establishments which accommodate foreign nationals detained pursuant to the immigration legislation. Such regulations should provide detainees with a right to be heard on the subject of the offences which they are alleged to have committed, and to appeal to a higher authority against any sanctions imposed. Furthermore, it was also recommended that house rules be drafted for all establishments visited and copies made available to foreign nationals detained on their arrival at these establishments, in a variety of languages frequently spoken by them.

- In the light of these recommendations the measures that are being taken by the Government carry some importance. A Task Force made up of Government and Opposition, as well as NGO's representatives together with the Principal Immigration Officer, has been set up to prepare a National Policy document in relation to Irregular Immigration. At the same time, on a Ministerial level, a specific Cabinet Sub-Committee, chaired by the Deputy Prime Minister and Minister for Justice and Home Affairs, and including major stakeholders, was appointed to monitor overall issues related to irregular immigration and to ensure ongoing operational coordination.
- In seeking to strengthen the structures involved in the refugee determination process according to the recommendations made by the CPT some changes have been done. This includes the appointment of an Assistant Refugee Commissioner as well as additional duly qualified Case Workers at the Refugees Commissioner's Office. Moreover, a second Chamber of the Refugees Appeals Board was set up. These measures are aimed at ensuring a faster status determination process and thus a reduced duration of detention.
- A change in the duration of the period of detention has been implemented establishing that the detention of asylum seekers be reduced to 12 months. At the same time changes have been implemented whereby a work permit will now be given not only to those who have refugee status but also to those given a temporary humanitarian status. A work permit will now also be given to those whose determination of their application has been prolonged to more than 12 months and who are consequently released.
- In seeking to provide legal aid services two private lawyers have been appointed as Government legal aid officers specifically to deal with appeals cases.
- A policy has been adopted whereby the detention of vulnerable persons, including mothers with children and unaccompanied minors is discontinued once their identification and health screen is completed.
- In seeking to provide adequate accommodation a new permanent accommodation block at Safi barracks, accommodating around 170 persons has been recently opened whilst another structure, with an estimated capacity of about 225 third country nationals, is in the process of being finalised. It has been stated by the Government that these projects have an estimated cost, excluding labour expenses, of over 400,000 euros. Moreover, a former trade school at Marsa has been recently converted into an open centre, accommodating circa 250 persons. Yet despite this, it is noted that with the ever increasing number of arrivals even these places are fast becoming insufficient.
- Training of those who are employed in such centres is being delivered through a Twinning Project with Greece and also through foreign experts.
- Another amendment to policies has been made in that Maltese citizenship is being awarded to those having a refugee status (not temporary protection) and having resided in Malta for more than 10 years.

- Other possible measures to redress the imbalance between the influx of arrivals and the possibilities available under the domestic infrastructure are also being sought with the Government seeking an EU policy on the issue and aid from other EU member states. Few States have responded to this with for example the Netherlands entering into an agreement with Malta to take an established number of refugees within their country.

Positive aspects

The year 2005, as has been stated above, has been marked by a continuing effort on the part of the authorities to deal with the problem of illegal migration into Malta, and, in particular, by a determination to better the conditions of refugees and other illegal immigrants.

Reasons for concern

The growing presence of illegal immigrants in Malta and the strain this has caused on the infrastructure and the economy has created an undesirable reaction among a sector of the Maltese population stirring xenophobic tendencies and creating the breeding ground for extreme movements. This is a cause also for concern.

Legislative initiatives, national case law and practices of national authorities

There has been no development in the legal framework related to this issue. In practice the possibility of ill-treatment in centres of detention for foreigners is being addressed through the delivery of adequate training for the employees who work within these centres.

Protection of the child against ill-treatments

Legislative initiatives, national case law and practices of national authorities

There have been no developments in this area since the previous report for 2004. Although a Children's Commissioner was appointed last year under the Commissioner for Children Act, Malta remains without a Children's Act.

Article 5. Prohibition of slavery and forced labor

Fight against the prostitution of others

Legislative initiatives, national case law and practices of national authorities

There has been no development in the legislative framework on this issue. Case law is developed in the field of criminal proceedings where on a regular basis persons are brought before the court accused of loitering for the purposes of prostitution or of living off the gain of prostitution.

Trafficking in human beings

Legislative initiatives, national case law and practices of national authorities

The same legal framework is still applicable to the trafficking in human beings. There have been a few cases before the criminal courts on accusations of trafficking for sexual exploitation. A practice that is being followed is by making the basis for acquiring visas more restrictive and more cautious.

Exploitation of undocumented workers

Legislative initiatives, national case law and practices of national authorities

The position in relation to undocumented workers remains the same as that obtaining in 2004.

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security

Pre-trial detention.

Legislative initiatives, national case law and practices of national authorities

This continues to be possible and the obtaining position has already been clearly defined in previous reports. Pre-trial detention is always of an exceptional nature and is always subject to judicial control. The Maltese Constitutional Court has concluded on a number of occasions that where pre trial detention is mandatory and the law does not allow the possibility of bail, then that would be in breach of the fundamental human rights of the individual as protected under the Convention. There were no new cases on this score during 2005.

Deprivation of liberty for juvenile offenders

The obtaining position continues to be as reported in the 2004 report. No further developments have taken place in this area.

Deprivation of liberty for foreigners

The matter has already been fully dealt with in the report for 2004. There have been no developments worthy of note for 2005.

Article 7. Respect for private and family life

Private life

Criminal investigations and the use of special or particular methods of inquiry or research

Legislative initiatives, national case law and practices of national authorities

There have been no particular developments in this field throughout 2005. In relation to developments in methods of inquiry or research and in the security control of candidates to sensitive jobs, no legislative proposals or development have taken place within the regulatory framework in the period under scrutiny, 2004. These issues remain, as already reported, to be regulated by the Security Services Act³ as enacted in 1996 and subsequently amended in 1997. Under this Act, no interception or entry on or interference with property is allowed except that carried out under a warrant issued by the designated Minister. Although the law regulates framework within which the security services are to function it does not specify the methods that may be used for inquiry or research. Consequently, decisions related to the method of interception, the use of undercover officers and informers remain within the discretion of the Security Services as supervised by its Head.

³ Cap 391 of the Laws of Malta.

Voluntary termination of pregnancy*Legislative initiatives, national case law and practices of national authorities*

The position of the law in this area continues to be intransigent. The voluntary termination of pregnancy remains a criminal act. Under Maltese law particular value is put on any human existence. It is true that the unborn fetus is not considered to be a person at Maltese law, still any abortion will be considered criminal. Indeed. If anything, the position has hardened by suggestions being made to entrench within the Constitution the prohibition of abortion. This suggestion now appears to have been quietly dropped, but it is clearly indicative of the sentiments the problem of abortion raises in Malta.

*Family life*Protection of family life*International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up*

Family life is protected under Maltese law. There is no possibility of divorce provided for but only personal separation or annulment of a marriage. Divorce granted by a foreign court was only recognized in Malta where either of the parties to the divorce was either a national or domiciliary of the State of the Court from whom the divorce has been obtained. This position now appears to have changed as a result of the Brussels II Regulation in respect of divorce, annulment, personal separation and custody judgement; this regulation is now applicable in Malta. As a result the recognized basis for jurisdiction over divorce cases is much wider, and a divorce obtained abroad in a member State of the Union on the basis of that jurisdiction will be recognized as a valid divorce in Malta.

Indeed the problem of divorce and marriage breakdown is always becoming a more serious social problem, and although there is no possibility of divorce at present there have been rumblings from disaffected quarters proposing to introduce same. At present the political situation in Malta seems to be solidly against the introduction of divorce.

Removal of child from the family*Legislative initiatives, national case law and practices of national authorities*

The removal of a child from the family can take place only in the most exceptional of circumstances and only for the welfare of the child. Such removal is always subject to review by the Courts of Law. Such situations often arise in cases of personal separation where there is litigation between the parents. In those case the child usually gets entrusted to one parent with rights of access to the other. Only exceptionally is access to a child by a parent or his relatives banned and this for serious considerations effecting the welfare of the child. In the report for the year 2004 I referred to the case *Joseph Schembri vs Registratur tal-Qorti Superjuri and others*⁴ where the question of access by a grandfather to his grandchild was being debated. Since then the First Hall of the Civil Court has decided the matter and has ruled that there is no fundamental right to such access. It is unfortunate that no appeal has been entered as one would wonder whether indeed such right of access is not part and parcel to the right to a family life.

⁴ Decided by the Constitutional Court in parte on the 18th February, 2004.

Reasons for concern

The state of the law in Malta is such as to ensure both that only in the most exceptional of circumstances will parents be deprived of their children, and that where this happens they will have access to a Court of law to test the validity and legality of the decision taken.

Right to family reunification*Legislative initiatives, national case law and practices of national authorities*

The position in Maltese law is that Maltese nationals and other persons having the right to reside in Malta have the right to bring to live with them their respective spouses and minor children. This is the same position as obtained in 2004 and there have been no developments in this field.

Private – and family life in the context of the expulsion of foreigners*Legislative initiatives, national case law and practices of national authorities*

The position continues to be as it obtained in 2004. One particular point of note which may cause some concern is the present position of the law to avoid the entry into marriage of convenience. It is now a matter of Maltese law that foreigners who marry Maltese citizens or residents enjoy the right to take up Maltese citizenship only if they have lived with that person after marriage for a period of five years. If the marriage breaks up before that date, or the Maltese resident spouse dies before the expiry of five years, then the foreign spouse will find himself without any right to continue living in the country. This may be a source of real hardship, especially in situations where the initial marriage was in every sense of the word a real union, and not one simply entered into for the convenience of obtaining a Maltese residence.

Article 8. Protection of personal dataIndependent control authority*Legislative initiatives, national case law and practices of national authorities*

Maltese law sets up the Data Protection Commissioner. This was provided for by the Data Protection Act⁵ enacted into Maltese law by Act XXVI of 2001. The Data Protection Commissioner is appointed to his office by the Prime Minister after consultation with the Leader of the Opposition⁶. In the exercise of his functions he shall act independently and shall not be subject to the control of any other person or authority⁷. He holds office for five year terms subject to reappointment. In order to be removed from office there must be an address of the House of Representatives praying for his removal on the grounds of proved inability to perform the functions of his office or proved misbehaviour; this address must be supported by two thirds of the members of the House. This is meant to ensure his absolute independence from the government authorities in the carrying out of his duties. The functions of his office are defined in Section 40 of the Act; these are the following:

⁵ Chapter 440 of the Laws of Malta

⁶ Section 36 of Chapter 440 of the Laws of Malta

⁷ Section 37 of Chapter 440 of the Laws of Malta

“(a) to create and maintain a public register of all processing operations according to notifications submitted to him as specified in this Act;

(b) to exercise control and, either of his own motion or at the request of a data subject, verify whether the processing is carried on in accordance with the provisions of this Act or regulations made thereunder;

(c) to instruct the processor and controller to take such measures as may be necessary to ensure that the processing is in accordance with this Act or regulations made thereunder;

(d) to receive reports and claims from data subjects or associations representing them on violations of this Act or regulations made thereunder, to take such remedial action as he deems necessary or as may be prescribed under this Act, and to inform such data subjects or associations of the outcome;

(e) to issue such directions as may be required of him for the purposes of this Act;

(f) to institute civil legal proceedings in cases where the provisions of this Act have been or are about to be violated and to refer to the competent public authority any criminal offence encountered in the course of or by reason of his functions;

(g) to encourage the drawing up of suitable codes of conduct by the various sectors affected by the provisions of this Act and to ascertain that the provisions of such codes are in accordance with the provisions of this Act and for such purpose the Commissioner may seek the views of data subjects or their representatives;

(h) to take such measures as may be necessary so as to bring to the knowledge of the general public the provisions of this Act and for such purpose to give advice to any person where it is required;

(i) to order the blocking, erasure or destruction of data, to impose a temporary or definitive ban on processing, or to warn or admonish the controller;

(j) to advise the Government on any legislative measures that are required to be taken to enable him carry out his functions appropriately;

(k) to draw up annual reports of his activities at regular intervals, at least once a year, which reports shall be made public;

(l) at the request of a data subject to verify that the processing of the personal data described in article 23 of this Act is compliant with the provisions of this Act or of any law as specified in subarticle (1) of the said article 23 and in such a case the data subject shall be informed accordingly; and

(m) to collaborate with supervisory authorities of other countries to the extent necessary for the performance of his duties, in particular by exchanging all useful information, in accordance with any convention to which Malta is a party or other any international obligation of Malta.”

Positive aspects

The development of the institution of Data Protection Commissioner has been a positive step in Maltese law and the office appears to be functioning well in order to safeguard the privacy rights of individuals.

Protection of personal data

Legislative initiatives, national case law and practices of national authorities

This has already been the subject of the 2004 report and there has not been any change in the obtaining position. The position obtaining is as follows: Personal data is defined by the Data Protection Act as being either ordinary personal data or sensitive personal data. The level of protection given by law to sensitive personal data is much higher than in the case of ordinary data. Still the basic principle in relation to all data remains that it may not be used, processed or availed of for any purpose except that in relation to which it was originally collected and with the consent and knowledge of the data subject. The controller of personal data at the request of the data subject shall provide to the data subject, without excessive delay and without

expense, written information as to whether personal data concerning the data subject is processed.⁸ The controller shall be liable at the request of the data subject to immediately rectify, block or erase such personal data that has not been processed in accordance with the Act.

Protection of the private life of workers

Legislative initiatives, national case law and practices of national authorities

The matter in relation to the private life of the worker is also protected as an employer would be considered as holding personal data, and possibly sensitive personal data, in relation to his employee. Information regarding the employee is therefore covered and protected under the Data Protection Act.

Article 9. Right to marry and right to found a family

Marriage and control of marriages suspect of being simulated

Legislative initiatives, national case law and practices of national authorities

Measures of control in respect of marriages suspect of being simulated have been implemented in two different laws – the Marriage Act, Chapter 255 of the Laws of Malta, and the Maltese Citizenship Act, Chapter 188 of the Laws of Malta.

The control exercised under the Marriage Act is on a dual basis. A procedure requiring the publication of marriage banns is established and in principle this procedure is necessary for the validity of the marriage. Section 7 of the Marriage Act establishes that:

“7. (1) The celebration of marriage must be preceded by the publication of banns of matrimony.

(2) Banns of matrimony shall state the name, surname, place of birth and residence of each of the persons to be married, the place where they intend to contract marriage and, unless the Registrar in the case of natural filiation or other circumstances deems proper to act otherwise, the name of the father and the name and surname of the mother of each of the persons to be married.

(3) The publication of the banns consists in the posting up of the banns in a place at the Marriage Registry accessible to the public and reserved for that purpose and in keeping the banns so posted up for a period of not less than eight consecutive days excluding Saturdays, Sundays and other public holidays. The banns shall also be posted up at the place where official acts are usually posted up in the town, village or parish in Malta in which each of the persons to be married resides.”

A more direct measure of control against simulated marriages is provided for in Section 38 of the Marriage Act which establishes a criminal offence carrying a punishment of a maximum of two years imprisonment. Section 38 establishes that:

38. (1) Any person who contracts a marriage with the sole purpose of obtaining -
 (a) Maltese citizenship; or (b) freedom of movement in Malta; or (c) a work or residence permit in Malta; or (d) the right to enter Malta; or (e) the right to obtain medical care in Malta,

⁸ Sec. 21 of Cap 440 of the Laws of Malta.

shall be guilty of an offence and shall on conviction be liable to imprisonment for a term not exceeding two years”.

Once a person is found guilty of such an offence any right or benefit which he/she would have obtained on the basis of the marriage may be rescinded or annulled by the public authority from which it was obtained. Thereby leading to a situation whereby the person concerned may lose citizenship and the ensuing rights. This may create difficulties with the right to family life, if one could speak of family life in such a situation, where children are born out of this simulated union.

The law goes further by providing for the same punishment for that spouse who contracts a marriage with another person knowing that the sole purpose of such other person in contracting that marriage is one of the purposes established in the law.

Another measure of control has been put into place under the Maltese Citizenship Act whereby Section 6 states that:

“6. (1) Any person who on or after the appointed day marries a person who is or becomes a citizen of Malta shall be entitled, upon making application in such manner as may be prescribed and upon taking the oath of allegiance, to be registered as a citizen of Malta.

(2) No person shall be entitled to be registered as a citizen of Malta in virtue of this article unless:

(a) the Minister is satisfied that the grant of citizenship to such person is not contrary to the public interest; and

(b) on the date of the application such person was still married to a citizen of Malta or is the widow or widower of a person who was a citizen of Malta at the time of his or her death:

Provided that no person shall be entitled to be so registered unless such person on the date of the application, is still married to that citizen of Malta and had been so married for at least five years and on that date had been living with that citizen or, if on that date had been de jure or de facto separated, had lived with such citizen of Malta for at least five years after the celebration of the marriage, or is the widow or widower of such citizen and at the time of his or her death had been married to that person for at least five years and was still living with him or her or who would, but for the death of that person, have been so married on the date of the application or, if on the date of death of such citizen had been de jure or de facto separated from such citizen, had lived with such citizen of Malta for at least five years after the celebration of the marriage.”

While the control exercised through the Marriage Act is one of deterrence with the establishment of a criminal offence for both parties, the control exercised through the Maltese Citizenship Act is one based on the duration of the relationship. Under section 6 of the latter Act citizenship is only given upon proof that the marriage has lasted for five years and is not obtained immediately upon marriage as was the previous situation. As, however, has been commented earlier in this report, this may be the source of hardship and is not necessarily fair. In the case of a genuine union, the spouse may find himself/herself in the lurch if the through no fault of that spouse’s the marriage breaks down or the other spouse dies; in such an event the surviving spouse may find herself without any right to continued residence in the country where she had made her home. A more serious problem may arise as the foreign spouse is to a certain extent put at the mercy of the Maltese resident spouse, and this may be undesirable.

Legal recognition of same-sex partnerships and recognition of the right to marry for transsexuals

Legislative initiatives, national case law and practices of national authorities

Same-sex partnerships are not recognized in Maltese law as a marriage. A marriage is defined as a union between a male and a female, and this is seen as a matter of public policy. For further details on this point I refer to a previous report prepared by me on this issue. The position has not changed at all since that report. It must also be pointed out that any arrangements entered into between consenting adults is perfectly legitimate, but it is not and does not bring about the consequences of a marriage. It is also to be made quite clear that homosexuality is not criminal under Maltese law and the private arrangements individuals may see fit to enter into is, from the point of view of Maltese law, their own private affair

Article 10. Freedom of thought, conscience and religion

Incentives and reasonable accommodations provided in order to ensure the freedom of religion, including the right to conscientious objection

The position remains as it was for 2004 without any considerable change worthy of note.

Legislative initiatives, national case law and practices of national authorities

The State of Malta recognizes as a fundamental value the freedom of religion to everybody. The State also recognizes in the Constitution the Roman Catholic Religion to be the religion of the state of Malta. Malta is not therefore totally a lay country as the Constitution itself proclaims the adherence of Malta to the Catholic faith. At the same time the Constitution recognizes the freedom of every individual to practise his own religion as a fundamental right. In State schools any person objecting to tuition in a particular religion will be provided with tuition in alternative subjects. The position in Malta is complex due to the fact that the population is overwhelmingly catholic. On the other hand, this has perhaps the positive aspect, that other religions are not perceived as a threat and there is a considerable attitude of tolerance to the practice by individuals of their own religious convictions or absence of any religious conviction.

The authorities attempt as far as possible to provide reasonable accommodation to ensure that every individual is at liberty to practice his own religion. As a matter of law, as freedom of religion and conscience are recognized as fundamental rights of the individual, the State is under a duty to ensure that individuals are at liberty to practice their religion effectively without any hindrance or discrimination.

On the point of conscientious objection I have already pointed out the obtaining position in Malta in a previous report. The right to conscientious objection is generally recognized provided this does not involve a violation of the criminal law or a violation of the fundamental rights of others. The question of conscientious objection always remains in that unclear borderline area which lies between the privacy of the individual and his religious and other beliefs, which the law not only allows but also protects, and the need to regulate society in line with decisions and choices democratically made.

Article 11. Freedom of expression and of information

Freedom of expression and of information

Freedom of expression and information is protected under the Constitution of Malta and also through enactment into Maltese law of the European Convention on Human Rights and Fundamental Freedoms. Moreover the legal system protects the position of the media in society and the pluralistic nature of those media. The Press Act regulates press freedom and in substance protects the rights of individuals to publish. The Broadcasting Act has created a situation where pluralism in broadcasting prevails in the country. Of particular note is the Broadcasting Authority which is set up under the Constitution as an independent authority whose task and function is to oversee broadcasting standards as well as fair access to the broadcasting media to all political and social forces operating within the country. The Broadcasting Authority is composed of a Chairman who is appointed by the Prime Minister after consultation with the Leader of the Opposition. Four other members sit on the authority and it is the practice in Malta that two of these members are appointed at the choice of the Prime Minister while the other two are appointed at the choice of the Leader of the Opposition. The situation is therefore a balanced situation especially in view of the fact that the popular vote is usually evenly divided between the party in government and the party in opposition with other parties scoring only very small percentages of the total popular vote.

Media pluralism and fair treatment of the information by the media

Pluralism in the media is safeguarded through the Broadcasting Act. This ensures that a number of broadcasting stations compete in the Maltese environment providing an effective situation of pluralism. It is relevant to point out that the two major political parties in Malta own independent broadcasting stations, while there is a public broadcasting station which is owned through a public company by the State. There are also other radio and television broadcasting stations which are owned by different groupings or societies. This effectively creates a plurality situation in access to broadcasting. On the other hand the fact that two of the principal broadcasting stations are owned by the two larger political parties may give rise to some concern regarding the representation on the media of non-main stream views. It is proper to point out, in this context, that there is the state broadcasting station which is overseen by the Broadcasting Authority. This may serve to provide a wider access to the media than would otherwise be available if all the media was solely in control of the two main political groupings.

A further point to be made regards fair treatment of information. There is an obligation under the Broadcasting Act to treat news and other information in a fair and balanced manner. The Press Act also gives protection to individuals who may feel to have been unfairly treated. The issue has been raised in libel suits whether the prosecution of libel suits may give rise to a violation of the right of freedom of expression. It is on the other hand acknowledged that it is the right of every individual to protect his own individual reputation and the area of his privacy. The courts in Malta have been prepared to apply in a rather generous manner the principle of fair comment in relation to libel suits especially where public figures are concerned.

Legislative initiatives, national case law and practices of national authorities

In connection with this freedom and in particular with the position of the media under the Broadcasting Act there is one particular case to report on which has been decided in the First Hall of the Civil Court and is presently pending before the Constitutional Court for a decision. This touches upon the right of political parties and other organizations to insert political advertisements on television. The regulatory framework of the Broadcasting Act does not allow this saving such situations where the Broadcasting Authority itself makes a scheme for

such advertisements and only within the framework of such schemes. This is meant to ensure reasonable access to all parties and organizations on the media. In the case presently under consideration before the Constitutional Court, the General Workers Union had wanted to advertise a meeting which it was organizing for its members with obvious political overtones. The Authority did not allow such advertisement and this was held by the Civil Court to violate the freedom of expression of the Union. The matter is now pending before the Constitutional Court.

Secrecy of journalistic sources

The secrecy of journalistic sources is protected under the Press Act⁹. Section 46 of the Press Act provides:

“No court shall require any person mentioned in article 23 to disclose, nor shall such person be guilty of contempt of court for refusing to disclose, the source of information contained in a newspaper or broadcast for which he is responsible unless it is established to the satisfaction of the court that such disclosure is necessary in the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime or for the protection of the interests of justice:

“Provided that the court shall not order such disclosure unless it is also satisfied that in the particular circumstances of the case the need for investigation by the court outweighs the need of the media to protect its sources, due regard being taken of the importance of the role of the media in a democratic society.”

It is to be noted that it is ultimately up to the Court to decide whether it will allow the journalist in question to retain the information available to him secret. In doing this it balances the interests of the media in retaining sources of information secret with the interests of justice in every individual case. The law attempts to strike a fair balance between the several interests involved, leaving it ultimately in the hands of the Court to make the appropriate decision in the light of those interests.

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

The position since the report for the year 2004 has remained unchanged. Freedom of peaceful assembly is protected both under the Constitution, through the application of the European Convention on Human Rights and Fundamental Freedoms and under the ordinary law. There have been no problems in Malta during 2005 in relation to freedom of assembly. No demonstrations have been prohibited and no political bodies have been dissolved by the Government or had their freedom of political debate restricted in any manner whatsoever. There have been no cases of persons being penalized or discriminated against as a result to their belonging to trade unions. Indeed the Employment and Industrial Relations Act¹⁰ specifically forbids any discrimination or penalization on the grounds that a person belongs to a trade union or to any particular trade union.

Legislative initiatives, national case law and practices of national authorities

While there is no development in the legislative framework it is important to note that during 2005 two different organisations have been formed. The first being Moviment Laburista

⁹ Cap. 248 of the Laws of Malta.

¹⁰ Cap 452 of the Laws of Malta.

Popolari (MLP) (freely translated into Popular Labour Movement) which is a movement started by persons who were already involved with the Malta Labour Party. The first official appearance of such a movement was made in the public feast of the Sette Giugno, a feast to commemorate incidents of war, with the President of the Movement attending the official events. Despite this there does not seem to have been any other public appearances made by the Movement Laburista Popolari following this event. In an interview that was published in one of the local newspapers the leader of such a movement has alleged that the aim of the movement was for some of the members of parliament with the Malta Labour Party to join their movement. Dr Mallia, in this article is quoted as having alleged that she and her colleagues had received threats and pressure from the party concerned and that this had stopped such Members of Parliament from changing party. However from the allegations made and since this is a faction from a previously established political party, it seems that such allegations are being made at the already established political party itself rather than at third parties.

A second movement named Alleanza Nazzjonali Repubblika (ANR) (freely translated into National Republican Alliance) was also established. According to its Statute ANR is not a political party but only a movement aimed at bringing about political pressure to push for the implementation of their aims. The aims of such an alliance include the aim the defence and promotion of the identity, integrity and interests of the Maltese nation; this being done through the promotion of their ideals which include the safeguard of those characteristics which truly make the Maltese Nation including all the traditions and culture.

It is in this context important to reproduce a few comments found on the alliance's website at www.anrmlta.info since the reproduction of such comments will of itself show the difficulties that policies being followed by the alliance may bring.

Thus for example, the mentioned website includes the following :

“ANR believes that any provisions in the law concerning so called 'hate crime' or rather the criminalisation of thought have nothing to do with hate, but all to do with control, censorship, suppression of dissent and ultimately the destruction of equal justice. The road to hell is paved with good intentions, but here, given the lessons which we should have learnt from the experience of other countries, we are certain that the intentions are what they have always been in the left. Hate.

We have added the following articles on 'Hate Crime' in the hope that they might open a few eyes.

"The continuing effort to expand laws against hate crimes is not, I think, good for either the police or the country. To begin with, the effect is to create political crimes. Political view now begins to define the crime. This is an excellent way to undermine respect for the law, the courts, and the police. I think we all understand that these laws are not aimed at hate, but at particular kinds of hate found disagreeable by particular political groups, chiefly on the left. We are seeing the continuation, by means of the criminal-justice system, of the Balkanization of the society that has long been otherwise advanced. It is most curious. We talk about how we believe in equality before the law, and that advantage should not be distributed according to race, creed, color, sex, or national origin. In fact we are on the way to making everything whatsoever depend on these things.”

The right to freedom of peaceful assembly and access to the media has not been in anyway restricted for either of these two movements. The latter, that is ANR, has in fact held a demonstration in the capital city which was aimed at the “development” of a different policy in relation to immigrants. Besides this, representatives of ANR have also appeared on TV on the 29th November 2005 in one of the popular debate shows that is shown on national

television. At the same it is interesting to note that another activity was planned by ANR for the 9th December 2005 however as is stated on their website the use of the private premises that were originally booked was withdrawn.

While the right to freedom of assembly is guaranteed in the domestic laws, it may start to give rise for concern on the relationship between this right and the prohibition of discrimination and racism.

Freedom of association

There is full freedom in Malta to associate. There is no ban or proscription on any civic association. No particular developments of note have taken place during 2005 effecting this right. On a marginal note one may mention that the government has prepared a white paper and also a draft bill in connection with the regulation of voluntary organizations. The purpose, however, of such regulation is not to limit the freedom to associate but to regulate the functioning of such associations with a view to the safeguard of the public against dishonest dealing.

Article 13. Freedom of the arts and sciences

Freedom of the arts

The position remains unchanged since 2004. Although this right is not recognised in the Constitution or in the European Convention Act as a separate and distinct freedom, it has always been interpreted to fall within the ambit of freedom of thought and expression. The arts, scientific research and academic freedom are not in any way hindered and their exercise is not regulated. On the contrary these are encouraged through the concerned Ministries and through the system of education. In particular the Ministry for Youths and the Arts, and bodies such as the Council of the Society of Arts, Manufacturers and Commerce, the Malta Council for Culture and the Arts, and the Malta Council for Science all seek to promote the arts, scientific research and academic freedom.

Articles 8 and 19 of the Constitution must also be referred to since in the declaration of principles it states that the state shall promote the development of culture and scientific and technical research, while it should provide for the protection and development of artisan trades. these provisions of the constitution are however non-justiciable

Freedom of research and academic freedom

There is both freedom of research and academic freedom. The University of Malta is an autonomous institution under the Education Act and its academic staff enjoys a large measure of freedom in the research activities it chooses to undertake. Of particular note is the setting up within the University framework of research ethics committees to ensure that research carried out conforms to a minimal ethical standard. Also of note is the fact that the public authorities have been engaged in a review of obtaining tertiary educational structures within the framework of which most of the research in Malta is carried out. In this connection ideas have been mooted in connection with the setting up of further regulatory bodies, such as a National Commission for Higher Education. This is threading on particularly delicate ground as it is important that the autonomy of the educational institutions, especially in connection with their research activity, be fully safeguarded.

Article 14. Right to education

Access to education

The right to an education while non-justiciable under Maltese law is declared as a principle to be abided by in the Constitution of Malta. Furthermore the Education Act¹¹ expressly provides: ‘it is the duty of the state – (a) to promote education and instruction; (b) to ensure the existence of a system of schools and institutions accessible to all Maltese citizens catering for the full development of the whole personality including the ability of every person to work; and (c) to provide for such schools and institutions where these do not exist.’

The State has ratified article 2 of the first protocol to the ECHR into its law. It is also pertinent to point out that all Education in State schools and at University is under the Education Act stipulated to be free of any charge in respect of tuition fees.

The establishment of other educational institutes is allowed under national law and a license is given provided the applicant is ‘the catholic church or any other voluntary society, religious or otherwise, of a non-profit making character, and the school conforms with the national minimum conditions...’ and where the minister deems it to be in the general interest.

Legal Notice 251 of 2004 establishes the 1st may 2004 as the date of commencement of the migrant workers (child education) regulations, 2002. These regulations extend the state’s duties to providing free tuition to children of migrant workers in state schools. In particular it provides that the state must take measures to ‘*facilitate their initial reception in the educational environment and the school system of Malta as the host state, including, in particular, the teaching, as adapted to the specific needs of such children, of any of the official languages Malta*’ and that the state should promote ‘*the teaching of both the mother tongue and the culture of the country of origin of such children in cooperation with such country of origin.*’ These regulations will protect the children of all migrant workers, even if self-employed, however the extent of these regulations are limited in that they only apply to citizens of states with whom an agreement to this effect has actually been made. On the other hand asylum seekers have a right to be provided with a state education.¹²

In general the right to pursue further education is unhindered and students wanting to undertake post-secondary education are free to choose whatever topics they prefer. However Legal Notice 36 of 2004 (Regulations for the Selection of Applicants for Admission to the Bachelor of Dental Surgery - B.Ch.D. - Degree Course, 2004) limits the stated course’s intake to 6 students a year.

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

This is the position as reported for the 2004 Report. The provision of free education continues to be an important social welfare goal. However where tertiary education is involved there is considerable pressure as the situation is not necessarily easily sustainable. A process of review of present policies seems to be on going in public debate though as yet this has only resulted in the trimming down of some of the fringe benefits enjoyed by students in tertiary education.

¹¹ Chapter 327 of the Laws of Malta

¹² Chap 420 section 11

Vocational training

The Government drive to improve vocational training has continued. The Malta Centre for Arts, Science and Technology principally caters for such training and a lot of effort continues to be invested by the Government in the promotion of this institution.

Article 15. Freedom to choose an occupation and right to engage in work

The right to engage in work and the right for nationals from other member States to seek an employment, to establish themselves or to provide services

Since 2003, no major changes have been made to the freedom to choose an occupation and right to engage work, however foreign workers are further protected by the coming into force of legislation and regulations ensuring the recognition of professional education and training undergone in other EU member states.

The prohibition of any form of discrimination in access to employment

Legislative initiatives, national case law and practices of national authorities

In seeking to eradicate discrimination in access to employment a number of agencies have been set up. Two agencies that focus on discrimination on the basis of sex and discrimination on the basis of disability are to be mentioned. The National Commission for Equality between Men and Women focuses on the eradication of discrimination on the basis of sex, while the National Commission for Persons with a Disability focuses on discrimination on the basis of sex.

While the legal framework within which these agencies work have remained the same as noted in previous reports, it may be noted that a number of campaigns are run by these agencies in this field. Both agencies receive complaints and have established a procedure under which such complaints are proceeded with. Where possible both agencies have acted as mediators between the employee and the employer in finding a solution to difficulties that have arisen. At the same time, these agencies continuously monitor the methods of engagement of employees seeking the cancellation of any discriminatory calls and procedures that are used.

Under the Constitution there is also constituted the Employment Commission¹³ whose main task is to safeguard against political discrimination in employment, whether public or private.

Access to employment for asylum seekers

Asylum seekers require the express consent of the Minister responsible for immigration in order to seek any form of employment or carry out any business.

Access to employment in public administrations

The public administration constitutes one of the largest employers in Maltese society. The Constitution, while prohibiting discrimination expressly allows the public sector to take account of a person's citizenship when processing an application for employment in the public administration. However with Malta's entry into the EU this restriction has been restricted so that all qualifying EU citizens may be employed in the public administration.

¹³ Section 120 of the Constitution

Article 16. Freedom to conduct a businessFreedom to conduct a business

The position from 2004 remains largely unchanged.

The principle that the State of Malta should encourage private economic enterprise is enshrined in the declaration of principles found in the Maltese Constitution. With Malta's entry into the EU this freedom to conduct business has been extended to all EU companies. However the conduct of business remains subject to compliance with National Legislation such as the Companies Act¹⁴, the Business Promotion Act and the Competition Act.

The freedom to conduct business is not unlimited, and remains subject to restrictions imposed as a result of social constraints. Thus for example the number of pharmacies and petrol stations is restricted to maintain a specific ratio between potential customers and the business. However it should be noted that these restrictions are imposed without any distinction being made as to the nationality of the company.

On the other hand the Business Promotion Act does provide for specific benefits to be provided to small enterprises that have been constituted under Maltese Law, though the effect of this derogation is muted since foreign citizens can also establish a company under Maltese Law. Furthermore the provision of operating aid under this act is allowed by under a derogation from the *acquis* set to expire by the end of 2008.

Imposition of certain standards, for instance standards restricting the awardance of public contracts (ethical, social, environmental criteria)

With entry to the EU, Malta's public procurement act has been updated to be fully in line with EU regulations. Except where the value of the procurement is minimal, contracts will generally be awarded by a tendering procedure. No discrimination is allowed on the basis of nationality of the company in this procedure, however even under EU law the call for tender might specifically require that specific ethical, social and environmental criteria be met in the performance of the contract by companies submitting their proposals. Though in general the focus of the award of tenders tends to be on the economical value.

The Public Contracts Regulations¹⁵ further requires that, in accordance to EU regulations, tenders valued above the EU thresholds are given the required EU notice.

Article 17. Right to propertyThe right to property and the restrictions to this right

As has been noted in previous reports the right to property in Malta is protected both under the Constitution of Malta as well as through the application and incorporation into Maltese law of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The main restriction to the right to property as well as the source of continuing problems and litigation is the fact that the laws providing for expropriation of property before the Malta Independence Constitution came into effect in 1964 are saved under the Constitution, while the protection which the Convention provides is sometimes of limited value. Some progress has been made in the area of the requisitioning powers of the Government as well as in so far as concerns the compensation for expropriated property. This

¹⁴ Chapter 386 of the Laws of Malta

¹⁵ 174.04

has already been noted in the report for the year 2004. It was also there noted that the case of delay in the payment of compensation due therefore effects mainly expropriations which have taken place in the past and not those which may be occurring now. This still remains the case and only some small headway has been made in doing away with the considerable backlog of cases awaiting the determination and payment of compensation. In order to tackle the backlog legislation is pending in the Maltese Parliament which is intended to alleviate this problem.

A further continuing problem is that presented by the rent laws. The rent of urban dwellings is pegged at 1914 levels increased by forty percent. This, naturally, often entails a serious hardship to the owner. In 1995 laws were enacted decontrolling all new lettings but leaving under control all leases concluded prior to 1975. This still remains the position to date. The Government has appointed a Commission to report on a revision of the rent laws. It is pertinent however to point out that this is not the first time that reform of the rent laws has been broached but with little result. The report of the Commission has as yet not been concluded.

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

There have been two cases which can be reported on in front of the European Court of Human Rights in Strasbourg dealing with the violation of the right to property in Malta during 2005. One of these cases has already been decided, while in the other case the Court has invited the parties to make submissions on the merits.

The first case¹⁶ dealt with an interference with the right of property arising through the planning laws of Malta. The Court found that the interference with the right to property, the control of property built without the necessary planning permission, did not amount to a violation of this fundamental right as it was not disproportionate when keeping in mind the public interest protected. In actual fact there is also a further pending case¹⁷ in Strasbourg which has been declared admissible touching on the question of interference with the right to property as a result of the action taken by the planning authorities in relation to development permits issued by the competent authorities, however no decision has yet been reached on the matter and therefore I will refrain from commenting further on the matter in this report.

The other case arose out of proceedings related to the requisitioning of property under the Housing Act¹⁸. Again this case is still pending in front of the Strasbourg Court. In this particular case applicant had brought an action in the First Hall of the Civil Court complaining that the taking of his property through a requisition order had been in violation of his right to the enjoyment of his property as protected under article 1 of the first protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is pertinent in this context to outline briefly the requisitioning powers of the Government in Malta; under 1948 legislation the Government had the power to requisition property either to provide living accommodation or in the public interest paying a rent to the owner in compensation for the taking. The law governing this power was of a temporary nature initially subject to annual renewal. In 1989 the law was amended¹⁹ to allow requisitioning of property only where this was necessary to provide dwelling accommodation. In 1995 the law²⁰ was further amended by removing the power of the Director of Social Housing from requisitioning property but maintaining in force the law in so far as property which had been requisitioned before the coming into force of this amendment. This has actually created an unfair burden

¹⁶ *Begnino Saliba vs. Malta* decided by the European Court in Strasbourg on

¹⁷ *Sammut vs Malta*

¹⁸ *Ghigo vs Malta*, still pending in front of the European Court in Strasbourg.

¹⁹ Act XXXVII of 1989 incorporated in Chapter 125 of the Laws of Malta.

²⁰ Act III of 1995 incorporated in Chapter 125 of the Laws of Malta.

on those landowners whose property was requisitioned; another point to be made is that requisitions were initially meant to be of a temporary character but there have been cases where property has continued to be requisitioned for decades. The complaint made by applicant in the case brought before the Maltese Courts was that the taking implied a disproportionate interference with his property as the rent received by him in compensation was far below that which he could have hoped to get had he leased the property on the open market. The Constitutional Court, on appeal from the judgement of the First Hall of the Civil Court, found that there was no disproportionate interference and that therefore in that instant case there was no violation of article 1 of the first protocol of the Convention. The matter is now before the Strasbourg authorities for decision.

Legislative initiatives, national case law and practices of national authorities

In connection with the position of the right of property as far as national case law is concerned it is to be noted that cases during 2005 have mainly centred round the problem of public interest in the taking of property, the question of the fairness and propriety of the compensation awarded to the individual concerned, and the reasonableness of the time factor involved in determining and awarding compensation. These issues have figured both in relation to requisition orders above referred to and to outright expropriations of property. In relation to outright expropriations the delay in dealing with the payment of compensation for past expropriations is considerable and is liable to raise concern. A number of cases filed or pending in Court are precisely in connection with such issues.

In one particular case²¹ the Constitutional Court enunciated clearly the principles applicable to expropriations in order that they may be held not to violate the fundamental rights of the individual. The Court listed the following: 1. the public interest in the expropriation must be subject to verification by the judicial organs of the State, 2. it is the duty of the State to show that the expropriation is made in the public interest, 3. the public interest may never be an interest that is essentially of a private character, and 4. there must be a degree of proportionality between the interest expropriated and the public interest served by the expropriation. In this case the government had attempted to show that the land in question was required to build a cistern in connection with the water control in the area; the Court was however not convinced that this was truly so, as the evidenced before it pointed out to the expropriation having been effected to serve the interest of neighbouring tenements privately owned. The Court declared the expropriation in question to be violative of the fundamental rights of the owners as safeguarded under article 1 of the First Protocol above mentioned and held it to be void.

Another case, *Edwards vs Direttur ghall-Akkomodazzjoni Socjali*²², dealt with the validity of a requisition order. The requisition order, it was held by the Court, had been issued to provide dwelling accommodation to third parties. According to the Court it could not be said that there had been a disproportionate burden put on the shoulders of the owner as far as that particular requisition was concerned. Still another case touching the validity of requisition orders was *Anna Fleri Soler et vs Direttur ghall-Akkomodazzjoni Socjali et*, and again the Court held that there was no violation of article one by the requisition. In particular the First Hall of the Civil Court noted, and the Constitutional Court essentially confirmed, that the requisition satisfied both the requirement of the existence of a public interest behind the taking as well as the requirement of proportionality as the owner was in receipt of an annual rent in compensation for the taking. The Government had requisitioned the property and was using as office space for government departments; the fact that the property was not being used to provide dwelling accommodation did not make it so that the requisition was not

²¹ *Tarcisio Borg vs Segretarju Parlamentari ghall-Ambjent* decided by the Constitutional Court on the 28th of January, 2005

²² Decided by the Constitutional Court on the 25th February 2005.

necessary or required for a public purpose, nor did the taking amount to an expropriation. The fact rent was paid for the taking made the taking in the public interest a proportionate measure to the private interest effected thereby. It is important to point out, however, and the Constitutional Court explicitly states it in its judgement, that the applicants in that case had not complained or brought any evidence to show that the rent which was being received by them was not fair and just in the circumstances. The main problem, to my mind, presented by requisition orders, is that from temporary measures they have nearly become a permanent taking of the property concerned as in some instances these have been kept in force for several decades. The other problem is the measure of compensation offered in the form of rent which in no manner compares with the obtaining rental market in Malta; the disproportion in these cases may easily be that the rent receivable from government would represent a mere five per cent or less of the actual market rental value; this disproportion will necessarily have to be addressed at some point.

Article 18. Right to asylum

Asylum proceedings

With respect to the right to asylum Malta recognizes the right to seek asylum and regulates it in the Refugees Act. The asylum seeker may apply for asylum and his application will be reviewed by independent authorities with the possibility of an appeal to the Refugees Appeals Board. It is equally possible for a person to apply for a refugee status and to appeal from any decision in that respect to the same Board. The matter has already been amply considered in the report for 2004 and there have been no relevant changes in the area of asylum proceedings in 2005.

Recognition of the status of refugee

The status of refugee is recognized under Maltese law under the Refugees Act. The law provides both a procedure to seek refugee status as well as the possibility of appeal and review by the Refugees Appeals Board.

Article 19. Protection in the event of removal, expulsion or extradition

Collective expulsions

By an amendment to the European Convention Act Malta has enacted into Maltese law article 4 to the Fourth Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This provides that the collective expulsion of aliens is prohibited. Indeed each and every case of each individual prohibited immigrant must be considered separately and individually.

Legislative initiatives, national case law and practices of national authorities

Although the legal framework relating to asylum seeking and refugee status have as explained in Article 4 been somewhat amended, these amendments do not relate to any changes that directly effect the criteria of recognition of refugee status. Furthermore comments on developments made under Article 4 and which are based on the CPT's report and the Government's reply to the mentioned report have been presented under that Article. Some of the comments therein noted relate to the asylum proceedings and also to the position of unaccompanied minors.

So as not to repeat the same comments, while reference is being made to the full comments under Article 4, it is here being highlighted that the bodies entrusted with delivering decisions on asylum and refugee status have been strengthened in that more personnel has been engaged with such bodies to ensure a faster system of redress. Legal aid is also being given to those seeking to appeal before the Appeals Committee from the decision of the Commissioner.

On the other hand, in relation to children, these are being considered to be vulnerable and it is sought that they are placed within the care of childrens' institutions as soon as they have received a health screening.

The situation of irregular immigrants has given rise to tensions in several different spheres within the Maltese society with protests being held both by the immigrants and also by members of the civil society. A group has been specifically formed to lobby against the acceptance of irregular immigrants and against the giving of rights to such immigrants. This group has in fact held public demonstrations to raise its concerns on this issue. At the same time public demonstrations have also been held by those NGOs who support the rights of immigrants and who fervently lobby for standards and the effective implementation of the rights of these persons. The situation has brought about a situation which has heightened the sensitivity of the issues involved and flavoured these issues with discrimination and racism bringing about a divide within the Maltese society itself. A need to educate and to promote non discrimination and prohibition of racism has in fact been felt by NGOs and other actors in society who are campaigning for these issues.

While the situation of irregular immigrants remains a difficult one, with any developments being carried out by the Government to be overwhelmed by the ever increasing influx of arrivals, this has brought about a discriminatory approach to be taken by a fraction of the society. This is being addressed through a number of campaigns.

Subsidiary protection and prohibition of removals of foreigners to countries where they face a real and serious risk of being killed or being subjected to torture or to other cruel, inhuman and degrading treatments

Under the Refugees Act it is prohibited to remove or return a prohibited immigrant to a country which is not a safe country. In terms of the Act "a safe country of origin" means a country of which an applicant is a national or citizen or, if he is not a national or citizen thereof, in

which he has a right of residence and which, in general terms, is considered as presenting no serious risk of persecution on the basis that a person seeking asylum will be treated in accordance with the following principles in that country:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular group or political opinion; and
 (b) the principle of non-*refoulement* in accordance with the Convention is respected; and
 (c) the prohibition on removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected; and

(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Convention;

while a "safe third country" means a country of which the applicant is not a national or citizen and where -

(a) the life or freedom of the applicant would not be threatened within the meaning of Article 33 of the Convention; and

(b) the applicant had resided for a meaningful period of time prior to his entry into Malta; and
 (c) the applicant would not be exposed to torture or inhuman or degrading treatment, and would be treated in accordance with basic human rights standards; and

- (d) the applicant had either already been granted protection or has had an opportunity, at the border or within the territory of that country, to make contact with that country's authorities in order to seek their protection, before applying for asylum in Malta, or where there is clear evidence of his admissibility to that country; and
- (e) the applicant is afforded effective protection against *refoulement* within the meaning of the Convention.

Legal remedies and procedural guarantees regarding the removal of foreigners

Again there have been no particular developments since 2004. The position in 2004 was that by the same amendment to the European Convention Act above mentioned Malta has also incorporated into its law Article 1 of the Seventh Protocol to the Convention. This provides procedural safeguards relating to the expulsion of aliens. His rights are that any decision in respect of his expulsion must be reached in accordance with the law, must allow him to submit his reasons against expulsion, must provide for review of his case, and must provide for legal representation. The Refugees Act and the Immigration Act provides for all this, allowing to the alien the possibility of appeals in front of duly constituted tribunals, and in the end also allowing him, in the appropriate circumstances, to bring a case for a human rights remedy if he feels that his fundamental human rights have in any manner been breached or violated.

CHAPTER III. EQUALITY

Article 20. Equality before the law

Equality before the law

The rule of law remains the founding principle underlying the whole Maltese Constitution. This implies in no uncertain terms equality before the law. This has been a continuing feature of the Constitution since, and even before, Malta obtained independence. The principle of equality before the law is therefore a constitutional principle within the national order as part of the democratic principles upon which the State is organized. As such it is recognized and protected under the Constitution in Section 45. It is also recognized through the enactment into Maltese law of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. But more than that, it is applied in the daily working of the courts and of the Maltese legal system.

Article 21. Non-discrimination

These matters have been fully reported upon in the report for 2003. There has, during 2004 and 2005, been no development in Malta which in any manner changes the situation from that obtaining in respect of discrimination.

Protection against discrimination

There has been no legislation in this respect during 2005. There have continued to be in public debates an exhibition on the part of certain fringe political movements xenophobic tendencies exhibited. 2005 saw further manifestations of these tendencies and the organization of political movements in relation to same. These are, however, not mainstream politics and it is doubtful how effective a role they would play in the scenario of a national election.

Fight against incitement to racial, ethnic, national or religious discrimination

In connection with the position in relation to incitement to racial hatred or discrimination I would refer to my report on violent radicalization. The position at law is clearly that such manifestations, with due respect to freedom of expression, are prohibited as they violate the fundamental rights of others. The main problem which has instigated the development of fringe elements advocating racial policies has been the arrival over the last few years in Malta of several waves of illegal immigrants which have stretched the resources of Malta to deal with them. However such manifestations have not reached main stream politics and the principal political actors remain committed to a policy of non-discrimination.

Remedies available to the victims of discrimination

Victims of discrimination would have remedies both under the ordinary law as well as under the Constitution. The particular remedy available would depend on the area in which the discrimination is perpetrated. In general and failing a specific remedy, the individual suffering the remedy would have a right to a full remedy and compensation through a human rights action in front of the First Hall of the Civil Court, subject to an appeal to the Constitutional Court.

Protection of Gypsies / Roms

There are no gypsies/Roms in Malta.

Article 22. Cultural, religious and linguistic diversity

Protection of religious minorities

There is no special protection of religious minorities in Malta. Everybody is free to practice his own religion and to adhere to his own beliefs. Although the religion of the vast majority is Catholic, all other denominations and faiths have an equal right at law to practice their faith.

Protection of linguistic minorities

There are no linguistic minorities in Malta.

Article 23. Equality between man and women

Gender discrimination in work and employment

Discrimination on the basis of gender is prohibited both under the Constitution and under ordinary law. Women in Malta have come to actively participate in the social and political life of the country. At University the majority of students continue to be female, and they are equally well represented across the whole spectrum of available courses. A Commissioner to ensure Gender Equality has been appointed by the Government, and the task of the Commissioner is to see that equal opportunity is available to all, irrespective of gender. Women continue to be represented on most levels of Government, including the House of Representatives and the Cabinet. Suggestions to reserve quotas for female candidates however have not been accepted, but the fact that suggestions in this direction have been made is significant.

Remedies available to the victim of gender discrimination

Victims of gender discrimination can resort to a number of remedies available under Maltese law. They can apply to the Commissioner responsible for these matters, or they can apply to the Ombudsman or they could even bring a human rights action in front of the First Hall of the Civil Court. In cases of employment specific remedies are available to the discriminated employee under the Employment and Industrial Relations Act.

Participation of women in political life

There is no prohibition on women to participate in the political life of the state. They are represented in the whole spectrum of government, ranging from political parties, local councils, parliament, and government. It is still true that a smaller number of women actively participate in the political life of the country than men, and that in parliament women are under represented as a ratio between voters split on a gender basis and the gender of the representatives in parliament. This is however not necessarily significant and is understandable when one reflects that it is only over the last thirty years that gender equality has been achieved.

Article 24. The rights of the childPossibility for the child to be heard, to act and to be represented in judicial proceedings

The position continues to be as that obtaining in 2004. It is not possible, in the system of law in Malta, for the child to act in judicial proceedings without being represented. It is still possible however for the Court to hear the child directly, if it should so deem necessary, as well as take his evidence either directly or through duly appointed experts.

Article 25. The rights of the elderlyParticipation of the elderly to the public, social and cultural life

There are no specific laws regulating the rights of the elderly. However the Ministry of Social Policy carries out a number of services for the elderly. These services are enshrined by a miscellany of regulations and laws and include an age allowance, an age pension, a carer's pension, a contributory retirement pension, the operation of day centres and old people's homes, the provision of medical and health services, the provision of house help services and of meals and also the provision of financial assistance for adaptation works in their homes.

Once retired from employment, all elderly persons have a right to receive a retirement pension based on the social security payments effected during their working life. An elderly person may remain in part-time employment without risk to his pension provided that he does not work for a longer period than the amount stipulated by law.

The possibility for the elderly to stay in their usual life environment

Again no legislative initiatives, however a number of services are provided by the ministry and various social organisations, such as meal-on-wheels service providing elderly people with an inability to cook with a hot meal against the payment of a minimal fee; a special card providing for discounts and other benefits such as the ability to avoid queues in health centres; as well as both a Handyman and a Home Care Help service which aim at allowing an elderly person to live as independently as possible through the provision of various basic and essential services.

Article 26. Integration of persons with disabilities

The *Equal Opportunities (Persons With Disability) Act*,²³ prohibits the discrimination against persons with a disability not only in the work place but in all aspects of social life, securing that in all matters, and so far as reasonable, persons should be treated equally regardless of whether they suffer a disability or not. This Act was already examined in the 2003 report and no amendments have been made to it in the past year.

²³ The Equal Opportunities (Persons With Disability) Act 2000, The Laws of Malta Chap 413.

CHAPTER IV. SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

Workers' information on the economic and financial situation of the undertaking

Legislative initiatives, national case law and practices of national authorities

The Employee Involvement (European Company) Regulations (Legal Notice 452 of 2004) was enacted on 22nd October 2004 to give effect to the EC's Council Directive 2001/86/EC of the 8th October 2001 with the aim of allowing employee involvement in the case of European Companies (SE). At the same time The European Works Council Regulations, 2004 (Legal Notice 324 of 2004), implementing the EC Council Directive 94/95/EC, improves the employees' rights to information and consultation through the establishment of a European Works Council. However both these two regulations are limited in their effect since they only regulate European size companies and not strictly local firms.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Since 2003, legislative reforms have been introduced in the sense of providing workers with greater access to information and consultation with regards to issues of Health & Safety on the workplace. The General Provisions for Health and Safety at Work Places Regulations (Legal Notice 36 of 2003) requires the employer to provide information to each worker both individually as well as through a Workers' Health and Safety Representative. Such a representative is to be appointed in all companies of sufficient size. The term 'sufficient' has been left undefined allowing each company to determine itself whether such a representative is required or not in the circumstances.

No other amendments have been introduced that materially affect the exercise of this right.

Article 28. Right of collective bargaining and action

Social dialogue

Legislative initiatives, national case law and practices of national authorities

The creation of the Malta Council for Economic and Social Development (MCESD) grouping all major trade unions, employer unions and other social bodies together. It is composed of 9 members appointed from the different bodies : 2 from the government, 3 from the Trade unions (one each from the 3 major Trade Unions) and 4 from the Employers and Industry (again one from each organisation. This is a consultative body that can only make representations if there is unanimity amongst its members, which has tended to stunt its functioning. It has been recently proposed that decisions should be taken on the basis of majority voting and not unanimity, though this proposal hasn't been accepted by all members.

Furthermore recently a number of unions have recently complained that having each member of the body nominated by a different organisation has effectively left them without any representation. The complaining unions are in the main a pack of small unions, who desiring to retain independence have recently formed their own umbrella group.

It should also be noted that recent cases have shown that the conglomeration of various trade unions, with differing interests, into one body tends to weaken the workers power since conflict of interests prevent them from taking a united stand and leads to infighting within the union.

The right of collective actions (right to strike) and the freedom of the enterprise or the right to property and the issue of the intervention of the judiciary into collective actions

There have been no material developments in the relevant year.

Article 29. Right of access to placement services

Access to placement services

Legislative initiatives, national case law and practices of national authorities

Although in the past year, the number of vacancies notified to the ETC (Employment & Training Commission) dropped by 10%, actual placements only decreased by 2.5%, this has been taken as a reflection of the ongoing changes and evolution of the ETC's placement system.

Placement schemes provided by the ETC have included programmes whereby the ETC would underwrite some or all of the employer's costs in employing a person from certain disadvantaged groups, with the aim that after the trial period expires the employer will be willing to retain the employee.

The ETC has also worked to strengthen its training programmes to improve employability, and the availability of its services. Given the current economic situation, the ETC has also aimed at providing programmes to retrain employees from winding down industries. However it has also taken an approach of investigating individuals suffering from long-term unemployment to establish whether this has arisen out of genuine problems or is merely a result of abuse.

Article 30. Protection in the event of unjustified dismissal

Article 31. Fair and just working conditions

Health and safety at work

Legislative initiatives, national case law and practices of national authorities

The Government has adopted a vast number of regulations in line with EC legislation, greatly improving the employees' right to a safe environment, and also enhancing the employees' right to be informed as to the risks they undertake and the safety procedures available.

Sexual and moral harassment at work*Legislative initiatives, national case law and practices of national authorities*

The Government has identified²⁴ an increase in reported cases of sexual harassment. It has recently issued guidelines dealing with the topic for public service employees.

Working time*Legislative initiatives, national case law and practices of national authorities*

Although most collective agreements specify an average working time of 40 hours a week, EU law have introduced the possibility of raising this to 48 hours a week with the employee having a right to opt-out expressly. Although changes have been proposed by the European Parliament, the consensus amongst maltese employee and employer bodies seems to be in favour of maintaining the present system.

Malta has the highest number of public holidays and bank holidays within the EU (14 days). For this reason, *The National Holidays and other Public Holidays Act* (Chap 256) has been recently amended which reduces the workers' entitlement to holidays. In the sense that it has done away with the previous practice of giving the workers an extra day of paid leave for every national and public holiday that occurs on a Saturday or Sunday.

Article 32. Prohibition of child labour and protection of young people at workProtection of minors at work and monitoring of the protection*Legislative initiatives, national case law and practices of national authorities*

There have been no material developments in the relevant year. The Office of Commissioner for Children has now been operating for almost two years, and therefore still in its infancy, however only only isolated cases of child labour have been reported.

Article 33. Family and professional lifeParental leaves and initiatives to facilitate the conciliation of family and professional life*Legislative initiatives, national case law and practices of national authorities*

The Department for Women in Society has published a report on the Impact Of Parental Leave, Career Break And Responsibility Leave In The Maltese Public Sector which shows that 98.4% of persons taking parental leave and career breaks are female, the government, however, appears determined to tackle this issue. The survey shows that parental leave would increase in popularity amongst men, if they were given some form of remuneration for the period spent in leave. On the basis of the report, the National Council of Women has made a number of proposals as to how the current system should be updated, but as yet there have been no legislative developments.

Tax Credit (Women Returning to Employment) Rules, 2005 (Legal Notice 110 of 2005) is a recent government initiative with the aim of providing incentives to women who have been

²⁴ Report in terms of Article 21 of the European Social Charter submitted by GOVERNMENT OF MALTA (for the period ending 31st December 2004), 2005

out of employment for a period of more than 5 years, to recommence working. The incentive works by creating a tax credit to be set-off with the tax on the gains from employment. These rules come into force as from the year of assessment 2006, it is thus too early to determine its effect.

Article 34. Social security and social assistance

Social assistance and fight against social exclusion

Legislative initiatives, national case law and practices of national authorities

As with many other developed countries, a current preoccupation of the government is maintaining a pension system, and various discussions have been undertaken with a view of reforming the present system.

November saw the issuing of a white paper on reforming the pension system²⁵ which also recommends a number of reforms in the eligibility to and benefits provided under the current social security system.

The Equal Treatment In Occupational Social Security Schemes Regulations (Legal Notice 317 of 2005) ‘give effect to the relevant provisions of Council Directive 86/378/EEC, as amended by Council Directive 96/97/EC, on the implementation of the principle of equal treatment for men and women in occupational social security schemes.’

Social assistance for undocumented foreigners and asylum seekers

Legislative initiatives, national case law and practices of national authorities

Malta has been deluged by a flood of asylum seekers and other irregular immigrants, stretching its resources to cope with them to the limits. However after various protests and complaints both locally and from international organisations, it is slowly improving its services with the aim of ensuring certain minimum standards towards these immigrants.

Article 35. Health care

Article 36. Access to services of general economic interest

Access to services of general economic interest in the economy of networks: transports, posts and telecommunications, water-gas-electricity

Legislative initiatives, national case law and practices of national authorities

The government has continued its practice of divesting itself from commercial assets by privatising most economic enterprises. In all cases where it has done so and there was a need for a guaranteed service, such services have been maintained through the entering of public service agreements.

At the same time, the current economic situation has meant that the price for access to water, electricity and motor fuel has increased greatly. Purchasing fuel from the international markets has meant that over the space of a couple of years, electricity bills have almost doubled – an increase arising both from a surcharge, as well as an increase in the cost of fuel.

²⁵ White Paper: Pensions: Adequate & Sustainable November 2004

Water bills are also charged a surcharge. Undoubtedly the disadvantaged sectors of society have been the hardest hit by these price increases.

Article 37. Environmental protection

Right to a healthy environment

Legislative initiatives, national case law and practices of national authorities

This year has seen the government taking a stronger stance towards protecting the environment: It has introduced an eco-tax on various products made of non-biodegradable materials: such as plastic bags, white goods, and computers; this tax is applied in a manner similar to VAT. The Transport Directorate has also introduced a novel system of detecting vehicles producing excessive emissions – people are able to report a car via an sms, cars receiving a certain number of reports will then be summoned for tests. The government has furthermore also introduced a number of litter offences and has modified the local warden system to ensure effective enforcement. From the start of next year, these offences can, in certain cases, lead to hefty fines. Furthermore it has also been previously stated that the government has introduced a surcharge on the use of water, electricity and fuel discouraging waste. Although the fiscal incentives must have surely helped convince the government to introduce these measures, the fact remains that they will surely have a beneficial effect on what one of the most densely populated countries in Europe.

Furthermore the Government has also closed down the main rubbish dumping site, which had reached mountainous proportions, and opened an engineered landfill at Zwejra. It has also cleaned up a number of illegal dumps. The difficulty faced by the Government is that space is at a premium, and finding suitable areas for certain specific purposes has been hard. The classic case is the amount of protests the Government faces in trying to locate a suitable spot for building a waste incinerator. Furthermore the continued construction of ever more residential houses means that the problem only increases with time.

Article 38. Consumer protection

Protection of the consumer in contract law and information of the consumer

Legislative initiatives, national case law and practices of national authorities

In line with EC legislation, Malta has introduced Consumer Credit Regulations (Legal Notice 84 of 2005) these regulations establish the consumer's right to be fully informed as to the credit conditions, as well as minimum conditions and also the consumer's right to oppose a claim to repay a credit loan on the basis of defects in the product.

CHAPTER V. CITIZENS' RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

Right to vote and to stand as a candidate at elections to the European Parliament

Legislative initiatives, national case law and practices of national authorities

The position in relation to elections and participation in the political life in Malta has already been fully reported upon for the year 2004. There have been no changes whatsoever in 2005.

Article 40. Right to vote and to stand as a candidate at municipal elections

Participation of foreigners in public life at local level

The position in relation to elections and participation in the political life in Malta has already been fully reported upon for the year 2004. There have been no changes whatsoever in 2005.

Article 41. Right to good administration

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 42. Right of access to documents

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 43. Ombudsman

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union..

Article 44. Right to petition

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 45. Freedom of movement and of residence

Right to social assistance for the persons who have exercised their freedom of movement

Citizens of the EU who are in Malta as residents after having exercised their freedom of movement have access to social assistance like other residents.

Prohibition to enter certain zones or portions of the national territory during particular events

Legislative initiatives, national case law and practices of national authorities

There are no prohibited zones of the national territory.

Article 46. Diplomatic and consular protection

CHAPTER VI. JUSTICE

Article 47. Right to an effective remedy and to a fair trial

Access to a court and, in particular, the right to legal aid / judicial assistance

Legislative initiatives, national case law and practices of national authorities

The position has been fully commented upon in the report for 2003. The position remains unchanged.

Interim judicial protection

Legislative initiatives, national case law and practices of national authorities

It is possible for an aggrieved individual to apply for the issue of a prohibitory injunction in order to protect himself against the action of the State, where it is feared such action will irremediably prejudice his rights.

Independence and impartiality

Legislative initiatives, national case law and practices of national authorities

This has been reported upon in the report for 2003. During 2004 I reported that the European Court of Human Rights has held in the case of the San Leonardo Band Club that where a person applies for a retrial it is a violation of that person's right to an impartial hearing if the retrial is heard in front of the same judges who had awarded the original judgement against which the complaint is made. It is appropriate to mention that after the Strasbourg decision the case was brought again before the Constitutional Court on an application by the complainants. The Court, on the basis of the Strasbourg judgement, ordered the retrial of the appeal in front of a Court composed of different judges. The case was retried and again decided against the San Leonardo Band club during 2005.

Reasonable delay in judicial proceedings

Legislative initiatives, national case law and practices of national authorities

This remains a problem under the Maltese system of law. There have been a number of cases where the Constitutional Court has held that there was an unreasonable delay in the decision of the case. The matter has already been commented upon at length for the year 2003.

Right to the enforcement of judicial decisions

Legislative initiatives, national case law and practices of national authorities

There are the usual procedures in place to allow a person to enforce a decision obtained from the Courts.

Article 48. Presumption of innocence and right of defence

Presumption of innocence

Legislative initiatives, national case law and practices of national authorities

This has already been commented upon at some length in previous reports. During 2005 a important judgement was delivered by the Constitutional Court²⁶ touching the nature and the application of the presumption of innocence. The Court found for the accused stating that the law imposed a disproportionate burden of proof on her. In the instant case the law in relation to drug importation had been changed in a manner as not to permit the accused by way of defence to show that he did not know that what was being imported were drugs if he believed the importation to be illegal anyway. The Court had this in particular to say:

“The expressions “it shall not be a defence to such charge” and “or of any other law” in subsection (2) of Section 26 have the cumulative effect that, in the example given, the accused has to be treated by the court as if he “knowingly” imported into Malta the amount of drug found in the cassette, irrespective of what the accused actually believed to be in the cassette. This clearly places the accused at a great, indeed disproportionate, disadvantage *vis-à-vis* the prosecution, a disadvantage that he has absolutely no chance of redressing whatever the evidence he adduces with regard to the formal element of the offence. Such an imbalance strikes against the very foundations of the fairness of any criminal trial. The situation would, of course, be different if the accused knew, or reasonably suspected, that he was carrying some form of prohibited drug, even though not necessarily the drug or type of drug actually found in his possession – the presumption of knowledge in this case, even if irrebuttable, would be perfectly reasonable (this, indeed, appears to be the position in England under Section 28(3)(a)(b) of the Misuse of Drugs Act, 1971 36). Although the Legislature has every right to pass the laws it thinks fit and although there is a general presumption that Parliament legislates in conformity with the provisions of the Constitution and of the European Convention, in a state governed by the Rule of Law it is ultimately always the task of the courts – in our case of this Court – to review such laws and to determine finally whether or no Parliament’s approach is in conformity with the Constitution and/or the European Convention.”

Reasons for concern

The judgement above shows that there is no reason for concern on this issue and that the Court is prepared to control the situation in appropriate circumstances.

The right to freely choose one’s defence counsel and the right to an interpreter

Legislative initiatives, national case law and practices of national authorities

This has already been commented upon in previous reports.

²⁶Repubblika Ta' Malta vs Gregory Robert Eyre & Susan Jayne Molyneaux decided by the Constitutional Court on the 1st April, 2005.

Article 49. Principles of legality and proportionality of criminal offences and penalties

Legality of criminal offences and penalties

Legislative initiatives, national case law and practices of national authorities

This has already been commented upon in previous reports and there were no developments that had to be reported in 2005.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

Right not to be tried or punished twice

Legislative initiatives, national case law and practices of national authorities

On this issue, which has already been fully reported upon for 2004 and 2003, there is a Constitutional Court judgement to be signalled out. The Court held that where a person serving a prison sentence is disciplined for attempting to escape prison he may not then be brought also before the criminal courts accused of the crime of attempting to abscond from prison as this would expose him to a double jeopardy in violation of his fundamental rights²⁷.

²⁷ II-Pulizija vs Anthony Zammit decided by the Constitutional Court on the 10th of January 2005.