

SUBSIDIARY LEGISLATION 217.12

COMMON STANDARDS AND PROCEDURES FOR RETURNING ILLEGALLY STAYING THIRD-COUNTRY NATIONALS REGULATIONS

11th March, 2011

*LEGAL NOTICE 81 of 2011, as amended by Legal Notice 15 of 2014,
410 of 2020 and 43 of 2021.*

PART I

Preliminary

1. (1) The title of these regulations is the Common Standards and Procedures for returning Illegally Staying Third-Country Nationals Regulations.

Citation and
purpose.
Amended by:
L.N. 15 of 2014;
L.N. 43 of 2021.

(2) These regulations transpose Directive 2008/115/EC of the European Parliament and of the Council of 16th December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations and the principle of non-refoulement.

(3) These regulations set out common standards and procedures for returning illegally staying third-country nationals.

(4) These regulations shall not apply to persons who are the subject of extradition procedures.

2. In these regulations -

"Act" means the Immigration Act;

"application for asylum" means an application made by a third-country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken by the Commissioner or the Refugee Appeals Board;

"the Board" means the Immigration Appeals Board as established by article 25A of the Act;

"competent authority" means that authority designated as such by the Minister for any purpose of these regulations;

"country of origin" means the country or countries of nationality or, for stateless persons, of former habitual residence;

"entry ban" means an administrative or judicial decision or act prohibiting entry into and stay in the territory of the European Union or the Schengen Associated Countries for a specified period, accompanying a return decision;

"illegal stay" means the presence in Malta of a third-country national who does not fulfil or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions of entry, stay or residence in Malta;

Interpretation.
Amended by:
L.N. 15 of 2014;
L.N. 410 of 2020.
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"international protection" means refugee status or subsidiary protection;

"Member State" means any one of the Member States of the European Union;

"order to return" means an order issued by the Principal Immigration Officer declaring the stay of a third country national to be illegal and imposing an obligation to return to another Member State in which the third country national is authorised to stay.

"removal order" means an order enforcing the return decision;

"return" means the process of a third-country national going back, whether in voluntary compliance with an obligation to return or enforced to his country of origin; or a country of transit in accordance with Community or bilateral re-admission agreements or other arrangements; or another third country, to which the third-country national concerned voluntarily decides to return and in which he will be accepted;

"return decision" means a decision issued by the Principal Immigration Officer, stating or declaring the stay of a third country national to be illegal and imposing or stating an obligation to return;

"risk of absconding" means the existence of reasons to believe, on the basis of the following criteria, that a third country national who is the subject of return procedures may abscond, when he -

- (i) has no permanent address;
- (ii) has no, or not enough, resources which are sufficient to maintain himself;
- (iii) is considered to be a threat to public policy, public health or national security;
- (iv) has not complied with any of the provisions of the Immigration Act and subsidiary legislation made thereunder;
- (v) has applied for a residence permit more than once and such application has been refused;
- (vi) has failed to cooperate with the Principal Immigration Officer in establishing his identity and nationality;
- (vii) has fraudulently provided false identification details or false details regarding his arrival in Malta;
- (viii) has destroyed or otherwise disposed of his identification documents;
- (ix) is found to be in possession of fraudulent identification documents:

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Provided that save as provided in article 25A(6) of the Act, in the event of an appeal the third country national in question shall be detained for the duration of the appeal proceedings.

"third-country national" means any person who is not a national of the European Union within the meaning of Article 17(1) of the

EC Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code;

"unaccompanied minor" means a person below the age of eighteen years who arrives in Malta unaccompanied by an adult responsible for him whether by law or by custom;

"vulnerable persons" means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence; and

"voluntary departure" means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.

PART II

Termination of Illegal Stay

3. (1) Without prejudice to the provisions of sub-regulations (2), (3) and (4), the Principal Immigration Officer shall issue a return decision to any third country national staying illegally in Malta.

Return decision.
Amended by:
L.N. 15 of 2014;
L.N. 410 of 2020.

(2) The Principal Immigration Officer shall require a third country national staying illegally in Malta under any of the provisions of article 5 of the Act and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State, to go to the territory of that other Member State immediately:

Provided that, the third country national shall be issued with an order to return, whereupon he may be detained subject to an assessment of the risk of absconding, until such time as his transfer is effected. All procedural rights in relation to return as provided in these regulations shall apply *mutatis mutandis*:

Provided further that the Principal Immigration Officer shall issue a return decision if the third-country national does not comply with the above-mentioned requirement or his immediate departure is justified on grounds of public policy or national security, subject to the provisions of sub-regulations (3), (4), and (7).

(3) The Principal Immigration Officer may refrain from issuing a return decision to a third-country national staying illegally in Malta if the third-country national concerned is taken back by another Member State under a bilateral agreement or arrangement existing on the date of the entry into force of these regulations:

Provided, however, the Principal Immigration Officer may decide to take back into Malta a third-country national staying illegally in another Member State, in which case after taking back the third-country national concerned, the Principal Immigration Officer shall apply the provisions of sub-regulation (2).

(4) Without prejudice to sub-regulation (5), where a third-country national staying illegally in Malta is the subject of a pending procedure for renewing his residence permit or other

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authorisation offering a right to stay, the Principal Immigration Officer shall consider refraining from issuing a return decision, until the pending procedure is finished:

Provided that the third-country national, while awaiting the permit, shall notify the competent authority of his presence in Malta and the competent authority shall acknowledge such notification.

(5) Nothing in this regulation shall be construed as preventing the Principal Immigration Officer from ending a legal stay and issuing a return decision and, or a decision on a removal and, or entry ban in a single administrative decision.

(6) A return decision accompanied by a removal order shall be executed on the third-country national leaving the Schengen area from Malta if he fails or ceases to comply with any of the conditions, including an implied condition, under which he was granted leave to land or to land and remain in Malta or was granted a residence permit.

(7) The Principal Immigration Officer shall not issue a return decision where a third-country national staying illegally in Malta is granted a residence permit or a right to stay on compassionate or humanitarian grounds:

Provided that where a return decision has already been issued, it shall be withdrawn or suspended for compassionate or humanitarian reasons and subject to the renewal of the above-mentioned residence permit or right to stay.

(8) The Principal Immigration Officer shall provide, upon request, a written or oral translation of the main elements of a return decision and information on the legal remedies in a language the third-country national may reasonably be supposed to understand.

Voluntary
departure.
Amended by:
L.N. 15 of 2014.

4. (1) A return decision shall not affect the obligation of any person who does not fulfil or no longer fulfils the conditions of entry, residence or free movement to leave Malta voluntarily without delay.

(2) The Principal Immigration Officer shall inform the third-country national in the return decision that he may submit an application to be granted an appropriate period for voluntary departure, and such period shall be not less than seven days and not more than thirty days, and this without prejudice to the possibility for the third-country national to leave earlier:

Provided that the Principal Immigration Officer shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case such as health reasons, the length of stay, the existence of children attending school and the existence of other family and social links.

(3) The Principal Immigration Officer may impose for the duration of the period for voluntary departure certain obligations he deems necessary to avoid the risk of absconding.

(4) The Principal Immigration Officer may refuse to grant a period for voluntary departure or may grant a period shorter than seven days where:

- (a) there is a risk of absconding; or
- (b) the application for legal stay is considered as manifestly unfounded or fraudulent; or
- (c) the person concerned is considered to be a threat to public policy, public security or national security.

5. (1) The Principal Immigration Officer shall take all necessary measures to enforce the return decision and issue a removal order if -

Removal.
Amended by:
L.N. 15 of 2014.

- (a) no period for voluntary departure has been granted in accordance with regulation 4(4); or
- (b) the obligation to return has not been complied with within the period for voluntary departure granted in accordance with regulation 4:

Provided that where it is necessary for the Principal Immigration Officer to confirm the identity of the third-country national concerned, to obtain the necessary documents, or it is possible to return the third-country national concerned he shall place in custody the third-country national who does not return within the period granted to him in the return decision.

(2) If the third-country national has been granted a period for voluntary departure in accordance with regulation 4, the Principal Immigration Officer may enforce the return decision only after the period has expired, unless a risk as referred to in regulation 4(4) arises during that period.

(3) The Principal Immigration Officer shall ensure that the coercive measures used as a last resort to carry out the removal of a third-country national who resists removal are:

- (a) proportionate and do not exceed reasonable force; and
- (b) executed taking into account the fundamental rights; and
- (c) carried out with due respect for the dignity and physical integrity of the third-country national.

(4) The Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC shall be considered in the case of removals by air.

(5) The Minister responsible for immigration may, by Order, provide for an effective monitoring system for forced return.

6. (1) The Principal Immigration Officer shall not effect removal where:

Postponement of
removal.
Amended by:
L.N. 15 of 2014.

- (a) it violates the principle of non-*refoulement*; or
- (b) an appeal has been filed with the Board in accordance with the provisions of article 25A(7) of the Act and a

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decision thereon is pending:

Provided that the Principal Immigration Officer may postpone removal for an appropriate period taking into account the specific circumstances of the case, in particular the third-country national's physical state or mental capacity, or technical reasons.

(2) Where a removal is postponed temporarily in accordance with the provisions of sub-regulations (1)(a) and (b) the Principal Immigration Officer may impose, on the third-country national for the duration of the period for voluntary departure, obligations aimed at avoiding the risk of absconding.

Entry ban.
Amended by:
L.N. 15 of 2014.

7. (1) The Principal Immigration Officer shall issue a return decision accompanied by an entry ban where:

- (a) no period for voluntary departure is granted; or
- (b) the obligation to return is not complied with within the period for voluntary departure granted in accordance with regulation 4; or
- (c) there is a serious threat to public policy, public security or national security; or
- (d) the Principal Immigration Officer may deem necessary in the circumstances.

(2) Return decisions may be accompanied by an entry ban in other cases including those mentioned in regulation 3(5).

(3) An entry ban shall be executed on the third country national leaving the Schengen area from Malta and information on such entry ban shall be provided to him in a language that he may reasonably be supposed to understand.

(4) The length of the entry ban shall be determined subject to all relevant circumstances of the case concerned and shall not exceed five years:

Provided that such entry ban may exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

(5) The Principal Immigration Officer shall consider withdrawing or suspending an entry ban issued in accordance with sub-regulation (2) where the third-country national can demonstrate that he has left Malta in full compliance with a return decision.

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(6) Without prejudice to sub-regulation (1)(b) the Principal Immigration Officer shall not issue an entry ban on a third-country national who is a victim of trafficking of human beings and is granted a residence permit in accordance with the provisions of the Permission to Reside for Victims of Trafficking or Illegal Immigration Regulations who cooperate with the Maltese authorities, except where the entry ban is justified on grounds of public policy, public security or national security:

Provided that the Principal Immigration Officer may refrain

from issuing, withdrawing or suspending an entry ban in individual cases for humanitarian reasons or other reasons he may deem appropriate.

(7) Where the Maltese authorities are considering whether to grant a residence permit or other authorisation for a right to stay to a third-country national who is issued with an entry ban by another Member State, such Member State shall be first consulted and its interests shall be taken into account in accordance with Article 25 of the Convention implementing the Schengen Agreement.

(8) The provisions of sub-regulations (1) to (2) and (4) to (7) shall apply without prejudice to the right to international protection as defined in the Procedural Standards in Examining Applications for Refugee Status Regulations. S.L. 420.07.

8. (1) An unaccompanied minor, prior to a decision on the issue of a return decision, shall be allowed to apply for asylum and shall be assisted in terms of the Children and Young Persons (Care Order) Act. Return and removal of unaccompanied minors.

(2) An unaccompanied minor shall not be removed from Malta before the Principal Immigration Officer, in coordination with the relative diplomatic representation of the third-country in question, is satisfied that he will be returned to a member of his family, a nominated guardian or adequate reception facilities in the State of return. Amended by: L.N. 15 of 2014. Cap. 285.

PART III

Detention

9. (1) Detention shall take place in the place appointed for the purpose by the Minister by notice in the Gazette: Conditions of detention.

Provided that a third country national shall, as a general rule, not be detained in prison, and where, due to an exceptional necessity he is detained in prison, such third country national shall be detained separately from ordinary prisoners. Amended by: L.N. 15 of 2014.

(2) A third-country national in detention shall be allowed on request and subject to costs to be borne by him to establish in due time contact with legal representatives, without prejudice to the provisions of regulation 11(4), family members and competent consular authorities.

(3) Vulnerable persons shall be provided with emergency health care and essential treatment of illness.

(4) Subject to authorisation by the Principal Immigration Officer the competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities where third country nationals are kept in custody.

(5) A third-country national in detention shall be provided with information concerning the rules applied in the detention facility, his rights and obligations, and his entitlement under Maltese law to contact the organisations and bodies referred to in sub-regulation (4).

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Detention of
minors and
families.

10. (1) An unaccompanied minor and a family with minors shall only be detained as a measure of last resort and for the shortest period of time possible.

(2) Separate accommodation guaranteeing adequate privacy shall be provided to a family in detention pending removal.

(3) A minor in detention shall have access to leisure activities, including play and recreational activities appropriate to his age, and state education in Malta depending on the length of his stay.

(4) An unaccompanied minor shall as far as possible be provided with accommodation in an institution provided with personnel and facilities which takes into account the needs of a person of his age.

(5) The best interests of the child shall be a primary consideration in the detention of minors pending removal.

PART IV

Special Procedural Safeguards

Non-application of
Part IV of these
regulations.
Amended by:
L.N. 15 of 2014;
L.N. 410 of 2020.

11. (1) The provisions of Part IV, except for the provisions of regulation 5(b) and (d) and of subregulation (8), shall not apply to third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by sea or air of the external border of Malta and who have not subsequently obtained an authorisation or a right to stay in Malta.

Form.

(2) A return decision, an entry-ban decision and a removal order shall be issued in writing and shall contain reasons in fact and in law and information on legal remedies:

Provided that the reasons in fact may be given in a restrictive way where the withholding of information is regulated by law, in particular where the disclosure of information endangers national security, public policy, and the prevention, detection, investigation and prosecution of criminal offences.

(3) The Board shall review decisions related to return on application by the third-country national as referred to in subregulation (2), and may temporarily suspend their enforcement.

(4) For the purposes of sub-regulation (3) a legal adviser shall be allowed to assist the third-country national and free legal aid shall be provided to the third-country national, upon request, in accordance with national legislation. Where necessary, free linguistic assistance shall be provided:

Provided that free legal assistance shall only be provided where the review is likely to succeed.

Safeguards
pending return.

(5) The Principal Immigration Officer shall, except in the case of detention as provided in regulations 9 and 10, ensure that the following principles are taken into account as far as possible in relation to third country nationals during the period granted for voluntary departure in accordance with regulation 4 or the period

during which removal is postponed in accordance with regulation 6:

- (a) ensure as far as possible, that the third-country national remains in contact with members of his family if they are in Malta at the time;
- (b) ensure that as far as possible the third-country national is provided with emergency health care and essential treatment of illness;
- (c) ensure that as far as possible a minor has access to state education in Malta depending on the length of his stay; and
- (d) take account as far as possible of the special need of vulnerable persons,

and, where applicable, shall provide these third country nationals with a written confirmation that the period for voluntary departure has been extended in accordance with the proviso to regulation 4(2) or that the return decision will temporarily not be enforced.

(6) Where a third-country national is the subject of return procedures, unless other sufficient and less coercive measures are applicable, the Principal Immigration Officer may only keep him in detention in order to carry out the return and removal procedure, in particular where:

Detention for the purpose of removal.

- (a) there is a risk of absconding; or
- (b) the third-country national avoids or hinders the return or removal procedure:

Provided that the detention shall be for a short period and shall subsist as long as the removal procedure is in progress and is executed with due diligence:

Provided further that, save as provided in article 25A(6) of the Act, in the event of an appeal the third country national in question shall be detained for the duration of the appeal proceedings.

(7) Without prejudice to the provisions of sub-regulation (8), detention shall be a consequence of the removal order issued by the Principal Immigration Officer and the removal order shall contain reasons in fact and in law.

(8) Without prejudice to the provisions of article 25A of the Act, the third-country national subject to the provisions of sub-regulation (6) shall have his detention reviewed either on application or *ex officio* by the Principal Immigration Officer at reasonable intervals of time which, in any case, shall not exceed three months. In the case of detention periods of six months or more, the Principal Immigration Officer shall carry out such review and notify the Board which shall supervise and, where necessary, revise such review.

(9) Where the third-country national is entitled to institute proceedings as provided in sub-regulation (8) he shall immediately be informed about such proceedings.

(10) The third country-national shall be immediately released from detention where in the opinion of the Board such detention is

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not lawful.

(11) The third-country national concerned shall be released immediately if:

- (a) removal cannot take place due to legal or other considerations; or
- (b) the conditions referred to in sub-regulation (6) no longer subsist.

(12) Detention shall be maintained until the conditions laid down in sub-regulation (6) are fulfilled and it is necessary for removal to be carried out:

Provided, however, the period of detention may not exceed six months.

(13) The period of six months referred to in the preceding proviso may be extendable by a further twelve months where:

- (a) there is lack of cooperation by the third-country national; or
- (b) there are delays in obtaining the necessary documents from the third country in question.

(14) Where it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in sub-regulation (6) no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

Emergency
situations.

(15) Where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the Maltese detention facilities or on its administrative staff or on the Immigration Appeals Board, periods for judicial review longer than those provided for on application by the third-country national concerned may be allowed for as long as the exceptional situation persists.

(16) For the purposes of sub-regulation (6) if the detention period is extended, reviews longer than those provided for under the provisions of sub-regulation (8) shall be subject to the decision of the Principal Immigration Officer and the Immigration Appeals Board, and the provisions of regulations 9(1) and 10(2) shall apply.

PART V

General

Immigration
Appeals Board.

12. (1) The Board shall have the power to review decisions related to return and the possibility of temporarily suspending their enforcement:

Provided that where the third-country national is informed about the removal an order postponing such removal shall take place.

(2) The Board shall review any removal postponed for an appropriate period in accordance with regulation 6(2).

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