

Malawi Immigration Law Audit

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CHREAA

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Plain language glossary of terms and abbreviations:

Asylum seeker	A person who has crossed an international border and who is looking for safety from persecution, war or serious harm.
CHREAA	Centre for Human Rights Education, Advice and Assistance.
Common law	Law which is developed from court cases rather than from written laws of parliament.
CRC	United Nations Convention on the Rights of the Child.
Dependant	Someone who relies on another person for financial support and care. E.g. a young child is the dependant of their father and mother.
Deport / deportation	Refers to the involuntary removal of a person from a country usually by a state party for various reasons including immigration or criminal grounds.
Documented migrant	A migrant who entered Malawi lawfully and who lawfully remains in the country e.g. with a work permit or tourist visa.
Economic migrant	A person who has left their home to settle in another country with the main aim of improving their life. The term usually excludes asylum seekers. This can be a documented or an undocumented person.
Migrant	A person who moves from one place to another usually crossing international borders.
MSF	Médecins Sans Frontières (Doctors without Borders).
Prohibited migrant	A person declared undesirable under the Immigration Act of Malawi.
Refugee	A person who is fleeing their country because they fear persecution or harm.
SALC	Southern Africa Litigation Centre.
Smuggling	Helping a person to enter or leave a country illegally for money or other forms of benefit.
Statute / Statutory	A law passed by Parliament. Also: an “Act” or “legislation.”
Stateless person	Someone who is not considered a citizen of any country.
Trafficking / Human trafficking	Recruiting, transporting, transferring, harbouring or receiving someone, by means of the threat or use of force or other forms of coercion, force, or abuse of power, for the purpose of exploiting the person. Exploitation includes sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.
Unaccompanied minors	A child who enters a country in the absence of a parent or guardian.
Undocumented migrant	A migrant who does not have legal status to be lawfully present in a country. This includes migrants who do not have valid identity

	documents, passports and visas.
UNCAT	United Nations Convention Against Torture.

Introduction

The Prison Inspectorate, the Centre for Human Rights Education, Advice and Assistance (CHREAA), Médecins Sans Frontières (MSF), and the Southern Africa Litigation Centre (SALC) hosted a High Level Round Table meeting on Thursday, 17 September 2015, on policy development for migration regulation in Malawi.

The meeting was called in response to the increase in migrant flows to Malawi and increases in migrant detention in criminal prison facilities. The aim of the meeting was to provide policy makers with an opportunity to meet to develop an understanding of policy alternatives across government functions and in consultation with international experts and regional counterparts. At that meeting, participants requested an audit of laws and policies in Malawi that have a bearing on migration management before new laws and policies are considered to deal with the problems concerned.

This report aims to provide a guide to both Malawi's existing immigration laws and regulations in relation to issues raised by increases in migrant flow, arrest and detention in Malawi. The audit is structured to address the following questions:

- Who can be detained?
- What are the obligations when detaining migrants?
- What must be done with child migrants?
- What are the obligations to ensure migrants' access to justice?
- How should migrants be screened?
- What alternatives to detention does the law provide?

The report concludes with recommendations for action within the legal framework.

Who can be detained under Malawi's immigration laws?

Prohibited immigrants

Prohibited Immigrants are defined by section 4 of the Immigration Act 1964 to include:

- Any person who the Minister determines is undesirable for economic reasons or because of their "standards or habits of life";
- Any person who cannot read or write a language, as prescribed in Regulations;
- Any person who is likely to become a public charge due to infirmity of mind, or because they cannot support themselves or their dependents;
- Any person with a disability, including both epilepsy and mental health problems, unless security is given by a person who is with them;
- Any person suffering from a disease prescribed in the Regulations;

- Any person who has been convicted of an offence prescribed in the Regulations;
- Any sex worker (“prostitute”), homosexual person, person who has profited from sex work (“prostitution”) or homosexuality, or person who has procured men or women for “immoral purposes”;
- Any person who the Minister determines to be an undesirable inhabitant of Malawi or undesirable visitor, because of official or diplomatic information;
- Any person deported or ordered to leave Malawi;
- The wife, children (under 18), or any other dependants of a prohibited immigrant.¹

In addition, section 5 of the Immigration Act means that anyone entering Malawi without a valid passport or identity document is a prohibited immigrant unless they can otherwise prove they are a Malawi citizen.

While the Immigration Act states that “the following persons *shall* be prohibited immigrants and their entry into or presence within Malawi *shall* be unlawful,”² there is in fact a wide discretion provided by section 6. This section gives the Minister discretion to exempt any person from most of the classes of prohibited immigrant status and to direct immigration officials to issue temporary travel permits.³

Recommendation 1: The Minister should consider exercising the power under section 6 of the Act to exempt certain categories of migrants from “prohibited immigrant” status, and direct officials to issue these migrants with temporary travel permits

Power to detain

The power to remove and detain prohibited immigrants is found in section 10 and section 15 of the Immigration Act. Section 10 provides that detention is only an option “if any prohibited immigrant refuses to obey the directions of an immigration officer to leave Malawi.”⁴

Recommendation 2: Under section 10 of the Immigration Act, detention can only be used if a prohibited migrant refuses to obey orders to leave Malawi. It is recommended that all prohibited migrants must be given a reasonable opportunity to leave Malawi voluntarily before a decision is made to detain them.

If this condition is satisfied then section 15(1) provides that prohibited migrants can be detained at the nearest convenient prison “or such other place of custody as may be authorized by the Minister.” It is therefore permitted that prohibited adult migrants be detained

¹ Immigration Act 1964 [Chap1503], section 4.

² Section 4.

³ The Minister can exempt the following migrants from “prohibited migrant” status:

- (a) Persons who are considered undesirable for economic reasons or due to their habits of life.
- (b) In adequately educated migrants.
- (c) Migrants likely to become a public charge due to physical or mental infirmity.
- (d) Intellectually or mentally disabled persons.
- (f) Convicted criminals.

⁴Section 10(1).

in criminal detention facilities but the Minister may authorise any “other place of custody” to detain prohibited migrants.

Recommendation 3: Considering the severe overcrowding in criminal detention facilities and the vulnerability of migrants to inhospitable conditions in prisons, the Minister should identify alternative places of custody and authorise these to detain prohibited migrants.

Length of detention

A prohibited migrant may be detained “pending the completion of arrangements for their removal from Malawi.”⁵ In terms of the Immigration Regulations, prohibited migrants may not be held in detention for “any longer period than is necessary for ... the completion by an immigration officer of arrangements for the removal of such person from Malawi at the first reasonable opportunity.”⁶

There is no finite period of time stipulated in the Act for how long prohibited migrants can be detained pending their removal. But the length of time they can be detained is not discretionary and not indefinite. Prohibited migrants may only be detained for as long as is “necessary” to complete the arrangements for the removal and this must be done “at the first reasonable opportunity.” **Any unnecessary or unreasonable delays** or missed opportunities for a prohibited migrant’s removal from Malawi will therefore render their detention unlawful.

Recommendation 4: It is unlawful to detain prohibited migrants for any period longer than necessary to arrange for their removal, which must be done at the first reasonable opportunity.

Treated as awaiting trial prisoners

Section 15(3) of the Immigration Act provides that prohibited migrants must be treated as persons awaiting trial (or remand detainees) if they are being detained under immigration powers while waiting to be deported or removed from Malawi.⁷ Persons who are serving

⁵ Section 15(1) of the Immigration Act.

⁶ Regulation 14(3) of the Immigration Regulations. It is noted that section 14 refers to warrants of detention in terms of sections 14 and 16 of the Act. The reference to section 16 is presumed to be mistaken as this provision does not indicate any powers to detain but deals with exclusions from exemption from prohibited migrant status. Regulation 14 is therefore presumed to apply to the detention of suspected prohibited migrants in terms of section 14 of the Act and the detention of prohibited migrants in terms of section 15 of the Act.

⁷ Section 15 of the Immigration Act provides:

Detention of prohibited immigrant pending deportation

“(1) Any prohibited immigrant who has been ordered to leave Malawi may be detained in the nearest convenient prison or such other place of custody as may be authorized by the Minister as a place of custody for the purposes of this section pending the completion of arrangements for his removal from Malawi.

(2) The officer in charge of any prison or such other place of custody as may be authorized by the Minister as a place of custody for the purposes of this section shall receive into custody any prohibited immigrant or suspected prohibited immigrant when required in writing by an immigration officer so to do.

(3) Any person so detained **and not serving a sentence of imprisonment** shall be treated as a person awaiting trial.”

Emphasis added.

sentences in relation to migration offences should be held with other convicted inmates, and not with persons awaiting trial.

Costs of removal

Section 10(2)(a) makes prohibited immigrants responsible for paying for their own removal from Malawi. Section 10(1) signposts to section 15 (detention) and provides that section 15 shall apply **only** if a person is ordered to leave Malawi and fails to do so.

In practice those in detention under these provisions find themselves in legal limbo. They are detained pending removal from Malawi, which they are expected to self-fund. Because they do not have any means to fund this removal they are, in effect, subjected to indefinite detention. The practical effect of the indefinite detention is that they are unable to work to fund their exit from Malawi nor are they able to liaise with family/community members/NGOs who could assist them to depart.

A proper reading of section 15 could solve this problem. The text of section 15(1) provides:

“Any prohibited immigrant who has been ordered to leave Malawi may be detained in the nearest convenient prison or such other place of custody as may be authorized by the Minister as a place of custody for the purposes of this section pending the completion of arrangements for his removal from Malawi.”

This section should be read to authorise detention only where there is a realistic prospect of effecting a removal, that is, where the completion of arrangements for the migrants to leave Malawi is foreseeable and being pursued with due diligence.

This interpretation is supported both by the Constitution and international case law. First, section 18 of the Constitution provides that every person has a right to liberty.⁸ This is reinforced by section 19, which provides for the inviolable protection for human dignity.⁹ The indefinite detention of immigrants with no foreseeable removal is not a proportionate interference with either of these rights.

Second, international comparative case law reinforces this interpretation. In *R v Governor of Durham Prison, Ex parte Singh*, the High Court of England and Wales found that the immigration provisions contained within the UK Immigration Act 1971, which are similar to those in section 15 of Malawi's Immigration Act, were to be applied in accordance with the following principles:

- (i) the power may only be used for the purpose of detaining the individual concerned pending his removal from the country;
- (ii) the power is limited to a period that is reasonably necessary for that purpose; and
- (iii) the Secretary of State [Minister] must exercise all reasonable expedition to ensure that steps are taken to secure the person's removal within a reasonable time. The Secretary of State should not exercise the power at all if it appears to him that he is not going to be

⁸ Constitution of Malawi, section 18.

⁹ Section 19.

able, within a reasonable time, to operate the machinery provided under the Act for the removal of the person who is to be deported.¹⁰

Recommendation 5: Detention should only be legally used where there is a real prospect of removing the person being detained from Malawi within a reasonable timeframe.

Written notice of grounds for arrest, detention or denial of entry

If a person is prescribed by the Minister as a prohibited immigrant and arrested, detained or denied entry into Malawi, section 8(1) of the Immigration Act requires that they must be provided with a written notice stating the grounds for this decision, unless they fall into one of the exceptions discussed below.

While there is no explicit provision in the Immigration Act¹¹ that specifies in what language the notice must be written, a constitutionally-compliant interpretation of the provision requires, however, that the notice is served in a language that the migrant understands. This is because the Constitution of Malawi provides for:

- the prohibition on discrimination based on language;¹²
- the right to equality before the law;¹³
- the right to an effective legal remedy;¹⁴
- the right to be informed of the reason for one's detention in a language one understands;¹⁵
- the right to procedurally fair administrative action which includes the right to be furnished with reasons where an administrative decision affects ones freedoms, legitimate expectations or interests;¹⁶
- respect for the inviolable dignity of all persons¹⁷.

Therefore, there is a strong case that the provision of notice in a language immigrants cannot understand is unconstitutional.

Recommendation 6: In fulfilling constitutional obligations, and to ensure that the legal purpose of serving the section 8(1) notice on the migrant is achieved, the notices should include translations in a language which the migrant understands.

¹⁰ Summary of findings from: <http://www.refworld.org/docid/3ae6b6ce1c.html>

¹¹ It is noted that the section 8(1) notice is prescribed under Regulation 17(1) the Immigration Regulations to comply with Form 7, which is in English. This would not preclude, however, that translated versions of the notice be distribute, particularly if this required in terms of superior law, such as the Constitution.

¹² Section 20.

¹³ Section 19.

¹⁴ Section 41.

¹⁵ Section 42(1)(a).

¹⁶ Section 43.

¹⁷ Section 19(1) and (2).

Appeal

In order to appeal against their arrest, detention or denial of entry into Malawi, a person with prohibited immigrant status must file their Notice of Appeal at the nearest Magistrates Court within three days of receiving their written notice.¹⁸

In order for their constitutional right to have access to a court to be given effect,¹⁹ it is crucial that the right to file an appeal is facilitated by the immigration authorities. Migrants who are in detention, with no knowledge of the Malawi legal system, language skills, or access to legal or community support cannot be presumed to be able to have an effective opportunity to exercise their right of appeal without the right being facilitated. Immigration Regulation 17(2) requires immigration officers to inform the migrant verbally or in writing of his right of appeal and to supply that person with a notice of appeal in Form 8 of the Regulations should they choose to appeal the decision. For reasons described above, this should be in a language the migrant understands. Additional measures may include arranging for notice and grounds of appeal, or through providing access to legal assistance.

Recommendation 7: Immigration officials should take steps to ensure that prohibited migrants are able to effectively exercise their right of appeal in terms of section 8(2) of the Immigration Act, including through compliance with Regulation 17(2) of the Immigration Regulations, in a language the migrant understands.

Suspected Prohibited Immigrants

Section 14 of the Immigration Act provides for the power to detain persons who are suspected of being Prohibited Immigrants. The period of detention must be reasonable and cannot be more than 14 days. This power can only be exercised for the purpose of investigating the detained person's identity or whether they have a criminal record. The power is discretionary and *may* be exercised by an immigration officer.²⁰

¹⁸ Immigration Act, section 8(2). The exception to this rule under section 9(1) applies where prohibited immigrant status is based upon being “undesirable” for economic reasons or due to diplomatic or official information. In the former it would appear there is no mechanism for appeal whatsoever. In the latter a request for reconsideration can only be made in writing to the Minister within 24 hours (section 9(2)). In neither of these two cases is the prohibited immigrant entitled to notice of the grounds for the decision that they hold that status (section 9(5)).

¹⁹ Constitution of Malawi at section 41 provides:

- “(1) Every person shall have a right to recognition as a person before the law.
- (2) Every person shall have the right of access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.
- (3) Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.”

See also section 42(1)(e) which provides:

“Every person who is detained, including every sentenced prisoner, shall have the right ... to challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law”.

²⁰ Section 14(1) of the Immigration Act.

Suspected prohibited migrants *may* be detained at the nearest convenient prison or gaol unless the migrant or their sureties enter into an agreement for a sum of money to be deposited to act as a form of bail to ensure the migrant reports back to the immigration officer.²¹ The reasoning above which applied to section 15 is equally applicable here. Detention is discretionary and should only be used where necessary. As shall be discussed below, there are alternatives to detention which should be considered on a case by case basis.

Recommendation 8: A suspected prohibited immigrant can only be detained for a maximum of 14 days. Authorities must be made aware of this provision. The discretion to detain should be exercised under the presumption that detention is undesirable.

Immigration offenders

Persons convicted of migration-related offences and sentenced to imprisonment are to be detained as ordinary convicted inmates.²² After completion of any prison sentence, a prohibited migrant or person suspected of being a prohibited immigrant must then be handed over to the custody of an immigration officer.²³ They may then be dealt with in terms of the provision of the Immigration Act relating to prohibited immigrants and suspected prohibited immigrants as explained above.

Criminal offences under the Act allow for sentences ranging from three to 12 months' imprisonment, including with the imposition of hard labour. Section 37(d) of the Immigration Act, creates an offence for violating any provision of the Act where there is no penalty prescribed, punishable by a fine of MWK 500 or to imprisonment for 12 months. Read with section 5 of the Act, any person who cannot produce a valid identity document within Malawi may be liable to a 12 month sentence of imprisonment if prosecution is pursued.

It is important to note that under the Immigration Act, the burden of proving a person is a citizen of Malawi or that they have not entered or remained in Malawi in contravention of the Immigration Act lies upon the migrant.²⁴ Thus, while usually the State is obliged to prove a criminal offence beyond reasonable doubt, in these cases, the onus of proof is reversed and the migrant must prove the lawfulness of their presence. The constitutionality of the reversal of the onus of proof is questionable in the light of the right to be presumed innocent.²⁵

²¹ Section 14(2) of the Immigration Act provides:

“Such person may during such period be detained in the nearest convenient prison or gaol unless he or such sureties as may be approved by the Chief Immigration Officer enter into a recognizance for an amount so approved and deposits such sum, if any, as may be fixed by the Chief Immigration Officer to satisfy any judgment which may be given on the recognizance.

The conditions of the recognizance shall be that such person shall appear within such period and before such person as may be prescribed in the recognizance and shall report himself to an immigration officer at such times as may be fixed in the recognizance, and the recognizance may contain such other conditions, in relation to such appearance and reporting, as the Chief Immigration Officer deems fit to impose.”

²² See the interpretation of section 15(3) of the Immigration Act above.

²³ Regulation 15 of the Immigration Regulations.

²⁴ See section 30 of the Immigration Act

²⁵ Section 42(2)(f)(iii) of the Constitution.

Recommendation 9: Prosecutorial discretion to charge persons for migration-related offences should be cautiously exercised with necessary provision made for accused migrants to mount an effective defence. Sentencing guidelines may also assist in ensuring excessive sentences are not imposed that are disproportionate to the offences.²⁶

Malawi's legal obligations to those in detention

There are extensive legal obligations both in domestic and international law that are binding on Malawi where it is holding a person in detention. This section does not provide a comprehensive examination of the rights of those in detention. A basic summary is provided to demonstrate some of the policy considerations that will need to be made if Malawi were to continue to elect to arrest or detain immigrants. The likely inability of government to adequately fulfil these obligations should strongly incentivise meaningful consideration of alternative policies to detention in dealing with migrants.

Obligations under the Prison Act

Regulation 14(2) of the Immigration Regulations provides:

“Upon receipt of a warrant of detention issued by an immigration officer, the gaoler or officer in charge of the prison or other place of detention to whom the warrant is addressed shall accept custody of the person against whom the warrant is issued.”

Section 2 of the Immigration Act defines “prisons” in reference to the Prisons Act.²⁷ In addition, the Prisons Act and Regulations make direct reference to those detained for immigration purposes.²⁸ As a result it is clear that the requirements of the Prisons Act are to apply to the treatment of those detained under immigration powers.

The Prisons Act places the responsibility for the condition of detainees on the shoulders of the prison authorities. There is no provision for differential treatment of detainees based on their status as migrant detainees or otherwise, except to the extent that migrant detainees not serving a criminal conviction enjoy the privileges of awaiting-trial prisoners. “Prisoner” is defined under section 2 of the

²⁶ There has been much effort in other areas to advocate for sentencing guidelines in Malawi:

<http://mwnation.com/sentencing-is-not-exact-science/> and http://www.lawcom.mw/index.php?option=com_content&view=article&id=40:development-of-legislation-on-sentencing-guidelines&catid=2&Itemid=101

²⁷ Prisons Act 1956 [Chap0902].

²⁸ See for example section 59(1) of the Prisons Act:

“No person shall be admitted into a prison unless accompanied by—

...

(c) a written requisition of an immigration officer issued in terms of the Immigration Act”.

The Prisons Regulations in Regulation 2 further include in the definition of “civil prisoner” as:

“any person detained in a prison in terms of section 16 (1) of the Immigration Act, and any other person detained in a prison who is not serving a sentence of imprisonment or who is not an untried prisoner”.

Prisons Act as “**any person**, whether convicted or not, under detention in any prison.”²⁹ Section 14 further provides:

“Every officer in-charge shall supervise and control all matters in connection with the prison to which he is appointed and shall be responsible to the Commissioner for the conduct and treatment of prison officers and prisoners under his control and for the due observance by prison officers and prisoners of this Act.:

Section 15 then provides a duty on prison officers generally to act in accordance with the Prisons Act.

As a result it is clear that the officer in charge³⁰ of a prison has a statutory duty of care and must ensure adequate treatment of the prisoners under his or her control, including migrant detainees.

Recommendation 10: The officer in charge of each prison has a statutory responsibility to guarantee the proper treatment of prisoners in accordance with the Prisons Act. Officers in charge must be made aware of this obligation and that they are personally legally culpable.

Health entitlements of prisoners

The Prisons Act sets out in depth the healthcare requirements of those in detention. As well as being the responsibility of the officer in charge, these are also the responsibility of the medical officer of the prison,³¹ a healthcare professional with statutory duties. The Prisons Act and Prisons Regulations require the healthcare professional to:

- Examine and treat all detainees who complain of illness and treat all sick patients.³²
- Where practicable, examine each prisoner as they are admitted, discharged³³, or transferred from the prison.³⁴
- Notify the officer in charge of cases of serious illness or contagion and where necessary provide written recommendations as to treatment.³⁵ Where the medical officer is of the opinion that the life of a prisoner is endangered, a sick prisoner is unlikely to survive their sentence, or the mental health of a prisoner is likely to be impaired then the medical officer is to prepare a report in writing for the officer in charge, who must then submit it to the commissioner for transmission to the Minister.³⁶

²⁹ Emphasis added.

³⁰ Section 2 of the Prisons Act defines “officer in charge” as the “person appointed to be in charge of a prison under section 9” of the Act.

³¹ Section 26 of the Prisons Act.

³² Prison Regulations, regulation 33(a).

³³ Prison Act, section 27.

³⁴ Prison Regulations, r.65.

³⁵ Regulation 33(c)-(d).

³⁶ Regulation 35.

- Conduct an inspection of all parts of the prison at least weekly, including sanitation, washing and cooking areas, in order to check for conditions which might be injurious or dangerous to the health of prisoners.³⁷ Any such dangers are to be reported immediately to the officer in charge.

The officer in charge is obliged to notify the medical officer of any ill prisoners,³⁸ and once the officer in charge has received a recommendation from the medical officer he or she must follow it, or provide written reasons to the Commissioner why it is not practicable or reasonable to do so.³⁹ Regulation 18(3) further provides:

“An officer in charge shall ensure that adequate arrangements are made for sick prisoners and for their safe custody and shall, so far as he is able in the circumstances, put into effect any written recommendation regarding the treatment, isolation or care of a sick prisoner made to him by the medical officer.”⁴⁰

In addition to the Prisons Act, under the common law⁴¹ there is a clear duty on the state broadly and on the prison authority specifically to provide adequate health care, which includes provision for transportation to hospital where medically necessary.

Because the officer in charge is responsible for the wellbeing of prisoners and no exceptions or exclusions are made for the treatment of migrant detainees, budgetary and resource allocations must be law be extended to include migrant detainees on the same basis as all other prisoners held in a particular facility.⁴²

³⁷ Regulation 31.

³⁸ Regulation 18.

³⁹ Regulation 19.

⁴⁰ Regulation 18(3).

⁴¹ See, for example, the case of *R (D) v Secretary of State for the Home Department and Another* [2005] 1 MHLR 17 where the High Court of England and Wales considered this duty:

“Once the prison service have reasonable grounds to believe that a prisoner requires treatment in a mental hospital in which he may be detained, the Home Secretary is under a duty expeditiously to take reasonable steps to obtain appropriate medical advice, and if that advice confirms the need for transfer to a hospital, to take reasonable steps within a reasonable time to effect that transfer ... The steps that are reasonable will depend on the circumstances, including the apparent risk to the health of the prisoner if no transfer is effected.”

The application of these principles to migrant detainees was confirmed in *HA (Nigeria) v SSHD* [2012] EWHC 979; *R(S) v SSHD* [2014] EWHC 50.

⁴² Section 73(1) of the Prisons Act provides:

“In the case of the serious illness of a prisoner, the officer in charge, on the advice of the medical officer, may make an order for the removal of such prisoner to a hospital. In cases of emergency, or in the absence of the medical officer, such removal may be ordered by the officer in charge.”

Prison Regulation 18(3) provides:

“An officer in charge shall ensure that adequate arrangements are made for sick prisoners and for their safe custody and shall, so far as he is able in the circumstances, put into effect any written recommendation regarding the treatment, isolation or care of a sick prisoner made to him by the medical officer.”

Recommendation 11: Officers in charge must be made aware that they are obliged to put into effect written recommendations from health officers and are responsible for ensuring adequate arrangements are made (practicably and financially) for sick prisoners, including their transfer to medical facilities when advised to be necessary by medical officers.

Welfare entitlements of prisoners

The Prisons Act and Regulations also contain prescriptions as to the food, clothing and bedding detainees must receive. Prison Regulation 54 dictates the food rations to be provided to detainees. Regulation 55 provides a power to the officer in charge to vary these food prescriptions. In *Masangano v The Attorney General and Others* the High Court in Malawi noted that the minimum diet contained in schedule three had outlived its time and should be amended to raise these minimum standards.⁴³ It also expressed concern about the practice of prison's providing the whole of a day's food ration in one single serving.

Similarly, schedule four and five contain clothing and bedding prescriptions respectively. Again, regulation 55 provides the officer in charge with the power to vary these prescriptions.

If there were ever any ambiguity as to the binding nature of these regulations, it has been resolved by the High Court:

“The law as is put in the Prison Regulations is not a mere aspiration which has to be progressively attained, nor is it the ideal that the law represents. It is in fact the minimum requirement.”⁴⁴

These prescriptions will apply to all prisoners who have been sentenced following a criminal trial. As described above, the Prisons Act makes no provision for the differential treatment of migration detainees.

It is noted, however, that prohibited immigrants are considered “civil prisoners” under the Prison Act, which affords them a number of privileges. These include the right to be brought their own food from outside the prison,⁴⁵ the right to wear their own clothes⁴⁶ and the right not to have to exercise in the company of other categories of prisoner.⁴⁷ If a prohibited immigrant is unable to afford their own food or clothing this shall be provided at the public expense, as with all other prisoners.⁴⁸ As such, the schedules provide a *minimum* standard for the welfare and food to be supplied to all prisoners, irrespective of their status.

⁴³ *Masangano v The Attorney General and Others*, Lilongwe District Registry, Constitutional Case No. 15 of 2007, pg 57. See also: *Republic v Mphembedzu* [2011] MWHC 12, p 45.

⁴⁴ *Masangano* judgment at p 49.

⁴⁵ Prison Regulations 81.

⁴⁶ Regulation 85.

⁴⁷ Regulation 86.

⁴⁸ As above r.81(3)

Finally, the Prisons Act and Regulations dictate a number of other miscellaneous welfare matters, such as that prisons must be kept clean with cells cleaned at least weekly⁴⁹ and that prisoners are to be allowed access to at least one hour of outdoor recreation daily.⁵⁰ The right to exercise has been affirmed by the High Court of Malawi.⁵¹

Recommendation 12: The right of migrant detainees to access food, clothing, bedding and other welfare necessities on the same terms as other prisoners must be respected and protected.

Obligation not to subject detainees to torture and inhuman and degrading treatment

At the most basic level, the state is responsible for ensuring that conditions do not amount to torture, or inhumane and degrading treatment. This is required both by the Constitution of Malawi and international law. The prohibition against torture, inhumane and degrading treatment or punishment is what is known in international law as an “*erga omnes*” obligation. This means that infringing this right can never be justified for any reason, including insufficient resources and negligence.

Section 19 of the Constitution of Malawi requires respect for human dignity and personal freedom. Section 19(1) states that the dignity of all persons shall be inviolable. Section 19(3) requires that “no person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.”

The requirements under international law are similarly stated.⁵²

In *Masangano v the Attorney General and others*, the High Court of Malawi held that prison conditions in Malawi as they were in 2007 constituted inhuman and degrading treatment as a result of overcrowding.⁵³ The Court acknowledged that poor diet could also constitute a

⁴⁹ *Prison Regulations*, r.14

⁵⁰ See Regulation 72 as the bare minimum.

⁵¹ *Masangano v The Attorney General and Others*, pg 58.

⁵² Article 16 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment compels parties to:

“[U]ndertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...”.

Malawi is a state party to the Convention. *UN Treaty Collection*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (Accessed 20/01/2016).

See also Article 7 of the International Covenant on Civil and Political Rights 1966, *UN Treaty Collection*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (Accessed: 28/01/2016); and Article 5 of the African Charter on Human and Peoples’ Rights. *Ratification Table: African Charter on Human and Peoples’ Rights*, <http://www.achpr.org/instruments/achpr/ratification/> (Accessed 28/01/2016).

⁵³ *Masangano v The Attorney General and Others*, pg54:

“[W]e hold the view that packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment and therefore unconstitutional. Accordingly we direct the Respondents to comply with this

ground for finding inhuman and degrading treatment if it fell below the standards stipulated in Malawi's Prison Act.⁵⁴

In the event that overcrowding persists in Malawi's prisons, or insufficient food is being provided to migrants in detention, Malawi will be in contravention of international and domestic law.

Recommendation 13: The severity of a breach of the prohibition on torture and inhuman and degrading treatment cannot be overstated. If overcrowding persists to the extent noted in *Masangano v The Attorney General and Others* then incarceration of immigrants cannot be justified in any circumstances.

General obligations under international law

The United Nations Standard Minimum Rules for the Treatment of Prisoners provides guidance on the global minimum standards for the treatment of persons in detention. Detained persons are entitled to:

- Water and toiletries necessary for their health and cleanliness;⁵⁵
- Clean clothes sufficient to keep him in good health;⁵⁶
- A separate bed and clean bedding;⁵⁷
- Sufficient food served at usual hours;⁵⁸
- Drinking water whenever needed;⁵⁹
- At least an hour exercise time in open air each day;⁶⁰
- A medical officer available with knowledge of psychiatry;⁶¹
- The services of a dentist;⁶²
- The option of being transferred to a hospital if necessary;⁶³
- A medical officer monitoring the health of all detainees;⁶⁴ and
- A library.⁶⁵

judgment within a period of eighteen months by taking concrete steps in reducing prison overcrowding by half, thereafter periodically reducing the remainder to eliminate overcrowding and by improving the ventilation in our prisons and, further, by improving prison conditions generally. Parliament through the Prisons Act and Prison Regulations set minimum standards on the treatment of prisoners in Malawi, which standards are in tandem with international minimum standards in the area."

⁵⁴ The Court referred to the decision in *Linton v Jamaica* UNHCR Communication No. 258/1987, 22nd October, 1992.

⁵⁵ *Standard Minimum Rules for the Treatment of Prisoners* 1955, para 15.

⁵⁶ Para 17.

⁵⁷ Para 19.

⁵⁸ Para 20.

⁵⁹ Para 20(2).

⁶⁰ Para 21.

⁶¹ Para 22(1).

⁶² Para 22(3).

⁶³ Para 22(2).

⁶⁴ Para 24.

The Southern African Development Community (SADC) *Minimum Standards for HIV and AIDS, TB, Hepatitis B and C, and Sexually Transmitted Infections Prevention, Treatment, Care and Support in Prisons in the SADC Region* also provides guidance on the minimum healthcare provisions which should be provided to those in prison. These include:

- Member States should ensure that their justice systems are adequately capacitated and equipped to reduce pre-trial detention times. Member States should also ensure that strategies to reduce prison populations (such as non-custodial sentencing) are developed and implemented.⁶⁶
- A comprehensive health assessment must be conducted for all persons admitted to prison and other places of detention to provide a baseline of their general health status and particularly in relation to HIV and AIDS, TB, Hepatitis B and C and STIs.⁶⁷
- All prisoners who already are on treatment or who have been identified as requiring treatment for communicable and other diseases should be offered such treatment.⁶⁸
- Treatment for all communicable diseases must be offered to all prisoners regardless of their nationality and in accordance with national guidelines.⁶⁹
- Member States must ensure that prevention, treatment, care and support services are available to prisoners and detainees for the duration of their imprisonment or detention.⁷⁰
- Member States must ensure that prison authorities are adequately trained to manage special groups, which includes children in conflict with the law and non-national prisoners. These groups require special arrangements over and above those needed for interacting with the general prison population.⁷¹
- Prison authorities should ensure that juveniles are separated from older prisoners.⁷²
- Member States' Ministers of Home Affairs and Justice, in collaboration with their Ministers of Health, will oversee and monitor the implementation of the regional Minimum Standards.⁷³

While these are “soft law” provisions (that is to say not directly binding as legal entitlements for prisoners) they nevertheless stipulate international and regional consensus and give meaning to the broader human rights entitlements of detainees.

⁶⁵ Para 40.

⁶⁶ SADC, *The Minimum Standards for HIV and AIDS, TB, Hepatitis B and C, and Sexually Transmitted Infections Prevention, Treatment, Care and Support in Prisons in the SADC Region* (2015). Standard 7.13

⁶⁷ At 7.2.1.

⁶⁸ At 7.2.1.

⁶⁹ At 7.2.2.

⁷⁰ At 7.3

⁷¹ At 7.5

⁷² At 7.5.2

⁷³ At 8.2

How should migrant children be treated?

Section 2 of the Child Care, Protection and Justice Act 22 of 2010 in section 2 defines “child” as a person below the age of 16 years. If the age of the person is unknown, the Act’s definition of “child” includes those who appear to be below 16 years. In *State and the Second Grade Magistrate Court (Thyolo) and Malawi Prison Service Ex parte Stanford Kashuga*,⁷⁴ the High Court stated that for all criminal matters under the Child Care Protection and Justice Act, a child ought to be a person under 18 years of age. The definition of “child” under the Act does not distinguish between citizen and migrant children. All migrant children in the jurisdiction of Malawi should therefore enjoy the protections under the Act unless explicitly excluded by the Act.

Section 140 of the Child Care, Protection and Justice Act states that no child shall be imprisoned for any offence.⁷⁵ Only for the commission of select offences listed in the Act’s Sixth Schedule may children be detained in reformatory centres as ordered by a Court.⁷⁶ No immigration offences are listed in the Sixth Schedule. In the absence of a lawful Court order to transfer a child to a reformatory centre for detention, those centres are not lawful places of detention for children.⁷⁷

A child is defined as a person under 18 years of age by Article 1 of the United Nations Convention on the Rights of the Child, (CRC) to which Malawi is a state party.⁷⁸ Section 23(1) of the Malawi Constitution and article 3(1) of the CRC guarantee that in all actions concerning children, the best interest of the child shall be a primary consideration. The Third Schedule to the Child Care, Protection and Justice Act sets out Guiding Principles in Matters Concerning Children. It emphasises that the welfare of a child shall be *the* paramount consideration in decisions by any persons concerning children.⁷⁹ Article 37(b) of the CRC further forbids unlawful and arbitrary detention of children. The United Nations International Working Group on Arbitrary Detention has gone further to prohibit the detention of unaccompanied minors.⁸⁰

The detention of immigrant children does not comply with these provisions. In order to provide adequate support to child migrants, appropriate screening must be put in place to ensure that child migrants are identified and removed from adult detention facilities.

Recommendation 14: Child migrants should not be detained.

⁷⁴ Misc Civil Cause Number 129 of 2012.

⁷⁵ A number of restrictions are placed on the detention of a child before a criminal finding is made against the child under section 95 of the Act.

⁷⁶ Section 141(1).

⁷⁷ Section 169.

⁷⁸ An exception exists for countries where a child reaches the age of majority at a younger age.

Convention of the Rights of the Child 1989, Art. 1

⁷⁹ See (1).

⁸⁰ Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, UN CHR, 55th session, UN Doc E/CN.4/1999/63/Add.3 (18 December 1998) para 37.

All children have the right to legal representation under the Child Care, Protection and Justice Act.⁸¹ Children subject to criminal and other proceedings under the Act are entitled to State-funded legal representation if a child is remanded in detention, if an order involving a residential requirement is likely to be made, or if it is in the best interests of the child in the opinion of the inquiry magistrate.⁸² Pleas may not be taken from children charged with criminal offences if a legal representative has not been appointed.⁸³

In addition to these protections the Constitution of Malawi states that a person under 18 accused of a crime is entitled:

- to be imprisoned only as a last resort;
- only to be imprisoned for the shortest period of time consistent with justice and protection of the public;
- to be separated from adults when imprisoned, unless it is in the child's best interest not to do so;
- to maintain contact with his or her family through correspondence and visits;
- to be treated in a manner consistent with the promotion of his or her sense of dignity and worth;
- to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role;
- to be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards.⁸⁴

The CRC further requires that children charged with criminal offences have a right not to be separated from their parents,⁸⁵ and have the right to maintain contact with their families.⁸⁶ With the exception of their parents they are to be separated from the remainder of the detained adult population.⁸⁷

The Child Care, Protection and Justice Act identifies, amongst others, children with no parents or guardians and abandoned children as children in need of care and protection.⁸⁸ This definition further includes children who are at risk of physical or emotional injury and neglect through a lack of adequate care, food, clothing, shelter, education and healthcare.⁸⁹ Unaccompanied migrant children and children under the age of 16 who have been detained (including those under 18 detained under criminal sanction) will fall within the definition of children in need of care and protection.

⁸¹ Section 126(1). See also article 37(d) of the CRC.

⁸² Section 127.

⁸³ Section 127(3),

⁸⁴ Section 42(g) of the Constitution.

⁸⁵ Article 9(1)

⁸⁶ Article 37(c)

⁸⁷ Article 37(c).

⁸⁸ Section 23(e).

⁸⁹ *Child Care, Protection and Justice Act*, section 23.

Where a child is in need of care and protection, a police officer, social welfare officer, a chief or any member of the community can either take the child into their own temporary custody or to a place of safety.⁹⁰ If the child is taken to a place of safety, then within 48 hours the child must be brought before a Child Justice Court or a Magistrates Court for a determination of whether they are in need of care or protection.⁹¹ If it is held that they are in need of protection, the court can order that they be returned to their parents, that they be placed in the custody of a fit and proper person, or that they be placed under the supervision of either a welfare protection officer or another suitable person.

In addition, section 99 of the Act mandates that a Preliminary Inquiry be held by an inquiry magistrate for any child suspected of having committed an offence before a plea is entered. The purpose of the inquiry includes ensuring that appropriate decisions are made as to the placement and welfare of the child and that sufficient information is obtained to ensure appropriate decisions are made. Because this provision is mandatory, in the absence of a Preliminary Inquiry, cases prosecuted against children are vulnerable to being declared a nullity and of no legal basis.

In addition to these protections, children in need of care and protection are entitled to medical attention at the public expense.⁹²

Recommendation 15: Unaccompanied minors are children in need of care and protection under the Child Care, Protection and Justice Act and should be treated accordingly. They are entitled to safe accommodation and medical treatment funded by the state. Strict compliance with preliminary inquiries must be adhered to if criminal charges are pursued.

There are no provisions for a child to be detained in prison for immigration purposes. On the contrary, there is a positive obligation on any medical officer, parent, social care provider or member of the community who believes on reasonable grounds a child is “physically, psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused” to immediately inform a social welfare officer or police officer.⁹³ Failure to do so would make that person criminally liable.⁹⁴ Given the conditions within immigration detention in Malawi, those aware of children within that form of custody are under a duty to report this to a social welfare officer or police officer.⁹⁵ By way of example, a prison medical officer who fails to do so would be

⁹⁰ Section 24.

⁹¹ Section 25.

⁹² Sections 26-31 of the Child Care, Protection and Justice Act.

⁹³ Sections 33-36.

⁹⁴ Sections 33-36.

⁹⁵ For evidence of the negative effect on Children of immigration detention see L Lorek, A., Ehntholt, K., Nesbitt, A., Wey, E., Githinji, C., Rossor, E., et al. (2009). The mental and physical health difficulties of children held within a British immigration detention centre: A pilot study. *Child Abuse & Neglect*, 33(9), 573; Mares, S., & Jureidini, J. (2004). Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues. *Australian and New Zealand Journal of Public Health*, 28(6), 520–526; Steel, Z., Momartin, S., Bateman, C., Hafshejani, A., Silove, D. M., Everson, N., et al. (2004). Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia. *Australian and New Zealand Journal of Public Health*, 28(6), 527–536; Steel, Z., & Newman, L. (2008). The Child Asylum Seeker: Psychological and Developmental Impact of Immigration Detention. *Child and Adolescent Psychiatric Clinics of North America*, 17(3), 665–683.

liable to a fine of MWK 20,000 and to a term of imprisonment of six months.⁹⁶

An immigration official would be bound to inform a welfare officer or police officer where they encounter a child psychologically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed.

In addition, section 70 of the Child Care, Protection and Justice Act creates a general duty on local authorities to safeguard and promote the wellbeing of children, and a specific duty on local authorities to “inspect structures, places and activities that impose potential or actual harm to children.”⁹⁷

Migrants who are under the age of 18 and detained in adult prisons are at risk of harm, and so a duty to inspect must arise if children remain in prison custody. Instead of being housed in detention facilities, the Child Care, Protection and Justice Act places an obligation on local government authorities to provide for these children to be accommodated in specialist facilities:

“A local government authority shall provide accommodation for children within its area of jurisdiction who appear to the authority to be in the need of accommodation as a result of their being lost or abandoned or seeking refuge.”⁹⁸

Section 157 of the Act obliges the Minister to establish Safety Homes for children. This mandatory power must be exercised to ensure that sufficient places of safety are made available to house child migrants.

Recommendation 16: Local government authorities must provide child migrants, and in particular unaccompanied minors, with accommodation, outside of juvenile or adult detention facilities. The Minister must fulfil the obligation to establish Safety Homes for children in need of care and protection.

The Child Care, Protection and Justice Act also contains measures for the protection of children who are victims of trafficking, with social welfare officers being empowered to take suspected child victims of trafficking to a place of safety.⁹⁹

Recommendation 17: Child trafficking victims must be identified and connected to social welfare officers to be ensured their enjoyment of protections under the Child Care, Protection and Justice Act.

⁹⁶ Child Care, Protection and Justice Act, section 33.

⁹⁷ Section 70(e).

⁹⁸ Section 73(2) defines child trafficking as “the recruitment, transaction, transfer, harbouring or receipt of a child for the purposes of exploitation.”

⁹⁹ Sections 79 and 84.

Access to Justice

It is important that those who have to navigate Malawi's immigration system have access to legal advice and to a court in front of which they can bring their case.

Article 14 of the International Covenant on Civil and Political Rights guarantees the right to a fair trial.¹⁰⁰ Similarly, article 7 of the African Charter on Human and Peoples' Rights guarantees a person's access to court and to have their case fairly heard.¹⁰¹ Integral to these rights is access to legal representation.

Section 41 of the Malawi Constitution guarantees the right to access to courts to settle legal issues and the right to an effective remedy for acts violating constitutional rights. Section 42 goes on to state:

- “(1) Every person who is detained, including every sentenced prisoner, shall have the right—
- (a) to be informed of the reason for his or her detention promptly, and in a language which he or she understands;
 - (b) to be held under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State;
 - (c) to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State;
 - ...
 - (e) to challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law; and
 - (f) to be released if such detention is unlawful.”

In *Republic v Jackson* the High Court of Malawi held that the convictions of two immigrants were sound, despite the fact that they had not been provided legal advice in accordance with the Constitution.¹⁰² It is not apparent that the judgment was appealed. It can be argued strongly that this decision could have been overturned on principle on appeal: the principles of natural justice that found the right to a fair trial and the particular vulnerabilities of migrant detainees (especially those who do not speak the local language) require state assistance for the right to legal representation to be realised.

The Court's reasoning was based on the fact that the defendants would have pleaded guilty anyway. In the facts of that specific case, the lack of legal representation would have had no bearing on the outcome of the trial. In *Jackson* both the defendants were Nigerian nationals and so it can be assumed that they spoke English. The same cannot be said of the vast majority of the

¹⁰⁰ *International Covenant on Civil and Political Rights*, Article 14.

¹⁰¹ *African Charter on Human and Peoples' Rights 1981*. See also Article 14 of the Refugee Convention.

¹⁰² [2003] MWHC 111.

Ethiopian nationals who are detained in Malawi, which strengthens the need for representation and distinguishes their cases from that in *Jackson*.

Recommendation 18: In accordance with the Malawian Constitution those in detention should be afforded the means to challenge their detention in the courts, which should include state-funded legal representation and effective and independent translation.

Part 5 of The Child Care, Protection and Justice Act provides a child's right to legal representation. Section 126(1) does not qualify that "a child has the right to legal representation." Section 126(4) provides that:

"Where a legal representative for a child is appointed in accordance with subsection (2), liability for payment of fees for the legal representation rests on the parents, guardian, or the appropriate adult or where the interests of justice so require, on the State."

Section 127 then provides the conditions for this right to come into effect, these include where it is in the "best interest of the child"¹⁰³ that the state pay for a child's representation. It will almost always be in the best interests of detained child migrants and migrant children whose immigration status is under determination or who are subject to removal from Malawi to be legally represented.

Recommendation 19: Children should be afforded legal representation at the public expense in all immigration matters.

How should those entering Malawi be screened?

The government of Malawi has international and domestic legal obligations to safeguard the rights of different migrant groups. This requires migrants to be processed properly to determine if they are a member of a group that needs protection.

Refugees

The 1951 *Convention Relating to the Status of Refugees* defines a refugee as a person who—

"owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out- side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."¹⁰⁴

Malawi's Refugee Act of 1989 echoes this definition and widens it slightly to also include persons

¹⁰³ *Child Care, Protection and Justice Act*, s.127

¹⁰⁴ *Convention Relating to the Status of Refugees 1951*, Art.1

who–

“owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

Applying both international and domestic law Malawi is under an obligation to support refugees legally resident in Malawi.¹⁰⁵ Holding such a person in detention is incompatible with these obligations. It is crucial that an adequate system of migrant screening is applied at borders and by migration officials so that those with grounds to claim asylum are provided with the necessary protection.

Recommendation 20: Asylum seekers and refugees should not be detained in prisons. Migration officials must be equipped to identify asylum seekers. It should not be assumed that those seeking refugee status will be aware of their entitlement to that status. Basic immigration information should be provided to all immigrants.

Children

As discussed above, there are specific legal requirements when dealing with children. As a result it is important that a proper age assessment is conducted on those who could be children.

Under the *Child Care, Protection and Justice Act* a child is defined as a person under the age of 16 and, in criminal matters, includes persons under 18 years. However before an age determination has been conducted a person who appears below that age should be considered to be a child.¹⁰⁶

Part IV of that Act provides for an age determination process for potential children. That part provides that age determinations are to be conducted by probation officers, who are to be guided by the evidence available to them, which may include birth certificates, previous determinations, and examinations by medical practitioners and statements by the potential child.¹⁰⁷

Until a proper age determination process has taken place, migration officials should treat migrants who appear to be under 16 (and for criminal matters under 18) as children. Probation officers charged with determining a person’s age should be made aware of particular information that may be relevant to this process. This will include, for example, that the Ethiopian calendar is seven to eight years behind the Gregorian calendar. For example, a person born in 1995 in terms of the Ethiopian calendar will therefore be only 14 years of age

¹⁰⁵ See for example Refugee Convention: Article 21 (housing), Article 22 (education), Article 23 (public education), Article 26 (free movement), Article 27 (identity documents)

¹⁰⁶ *Child Care, Protection and Justice Act*, s.2

¹⁰⁷ *Child Care, Protection and Justice Act*, s.123(3)

in the Gregorian year 2016.

Under the Child Care, Protection and Justice Act, no power exercised under the Act will be deemed illegal if it subsequently emerges afterwards that a mistake was made regarding the person's age.¹⁰⁸ The Courts are also empowered to extend the application of the Act to persons under 21 years of age.¹⁰⁹ Migration officials should therefore err on the side of caution in treating youthful migrants as children as there is no lawful sanction if they presume the person is a child and it later emerges to be incorrect.

Recommendation 21: Immigration Officials who are presented with young immigrants who could be under 16 (and for criminal matters under 18) should treat them as children until an age determination process has taken place in terms of the Child Care, Protection and Justice Act. Age determination can be conducted by other means under the Act if the migrant is undocumented, such as a medical examination or statement from the potential child.

Victims of torture

As described above, the state has certain legal obligations in relation to victims of torture and inhuman and degrading treatment.

Article 14 of the UNCAT provides that “each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” The United Nations Committee against Torture has interpreted Article 14 so as to require a holistic approach, including access to legal, social and psychological support.¹¹⁰ It is stated by the Committee that:

“States parties shall ensure that effective rehabilitation services and programmes are established in the State, taking into account victims culture, personality, history and background and are accessible to all victims without discrimination and regardless of the victim's identity or status within a marginalized or vulnerable group as illustrated in paragraph 32 including asylum seekers and refugees.”¹¹¹

Victims of torture have acute needs distinct from the general migrant population. Malawi is under an obligation to attempt to meet these needs and so to screen the population of migrants for victims of torture.

Recommendation 22: Immigration officials need to be aware of their obligations under the Convention against Torture. Active steps need to be taken to identify potential victims of torture and to provide them with adequate protection.

¹⁰⁸ Section 182.

¹⁰⁹ Section 183.

¹¹⁰ Committee against Torture, General Comment Number 3, *Implementation of article 14 by States parties*, http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf (Accessed 9th December 2015)

¹¹¹ As above.

Victims of trafficking

Malawi has signed the *Protocol against the Smuggling of Migrants by Land, Sea and Air*¹¹² and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*.¹¹³ Both Protocols contain measures to safeguard victims of trafficking.

Article 16 of the *Protocol against the Smuggling of Migrants by Land, Sea and Air* creates an obligation on states to “afford appropriate assistance” to victims of trafficking.¹¹⁴ Article 6 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* provides that “each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking...”.¹¹⁵ It specifies that this includes the requirement to consider appropriate housing, counselling, medical support, environmental conditions and training.

In order to fulfil these legal obligations, it is crucial that victims of trafficking are identified and housed appropriately. Imprisonment does not constitute appropriate housing and support for victims of trafficking. This is well documented in international standards and policy. The US Department of State provides the following guidelines in their Trafficking in Persons Report:

“Shelter and temporary care: A government should ensure that victims have access to primary health care, counselling, and shelter. Such provisions should allow victims to recount their trafficking experiences to trained social counsellors and law enforcement at a pace with minimal pressure. Shelter and assistance can be provided in cooperation with NGOs.

Part of the host government’s responsibility includes funding and referral to any NGOs

¹¹² *United Nations Treaty Collection*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-b&chapter=18&lang=en (Accessed 23/01/2016)

¹¹³ *United Nations Treaty Collection*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en (Accessed 23/01/2016)

¹¹⁴ *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 2000, Art.16. The Protocol defines “human trafficking” as:

- “(a) ...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal, manipulation or implantation of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in sub-paragraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in sub-paragraph (a) of this article;
- (d) “Child” shall mean any person under eighteen years of age.”

¹¹⁵ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 2000, Art.6

that provide shelter and assistance. To the best extent possible, trafficking victims should not be held in immigration detention centres or other detention facilities.

...

Repatriation: Source and destination countries share responsibility in ensuring the safe, humane, and, to the extent possible, voluntary repatriation/ reintegration of victims. At a minimum, destination countries should contact a competent governmental body, NGO, or international organization in the relevant source country to ensure that trafficked persons who return to their country of origin are provided with assistance and support necessary to their well-being. Trafficking victims should not be subjected to deportations or forced returns without safeguards or other measures to reduce the risk of hardship, retribution, or re-trafficking.”¹¹⁶

In the United Kingdom, the government recently settled a High Court case, conceding that it is against their policy for victims of trafficking to be detained.¹¹⁷

Recommendation 23: Immigration officials need to be aware of their obligations to victims of trafficking. Active steps need to be taken to identify and provide appropriate protection to victims of trafficking.

What are the alternatives to detention currently available under the law?

The Immigration Act and its Regulations provide for a number of alternatives to the detention of immigrants. As has been highlighted above, detention is, according to the Immigration Act, a measure which is only to be used where an immigrant has been asked to leave Malawi and has not done so.¹¹⁸ Even then the decision to detain is discretionary.

Allow immigrants to pass through Malawi by issuing temporary permits

Section 17(1) provides that certain categories of Prohibited Immigrants can be issued with temporary permits in order to travel through Malawi or reside in Malawi temporarily. The permit can be subject to conditions as the Minister dictates. That the section expressly refers to the power to grant the permit to a prohibited immigrant means that these permits can be granted to undocumented migrants and persons who do not have a valid passport or identify document.

Assuming it is the case that the majority of immigrants who are currently detained are travelling through Malawi and do not wish to settle there, section 17(1) would allow for a policy alternative to detention. Conditions imposed on temporary permits could include a requirement to leave Malawi after a specified period of time.

¹¹⁶ US Department of State, *Trafficking in Persons Report*, (Washington DC, 2009) p 29-30 (Available at <http://www.state.gov/j/tip/rls/tiprpt/2009/>).

¹¹⁷ The consent order settling the case is not public, however was reported widely: <http://www.theguardian.com/politics/2015/jul/20/theresa-may-unlawfully-detained-potential-trafficking-victims-court-rules>.

¹¹⁸ *Immigration Act*, section 10.

Exempt persons from prohibited immigrant status

Certain categories of person can be exempted from prohibited immigrant status by the Minister utilising section 6 of the Immigration Act. Section 6(b) determines that the Minister can direct an immigration official to issue any such person with a temporary permit, as discussed above.

Just as section 6 provides for exemption from prohibited immigrant status, section 23 provides the Minister to exempt a person from the requirement to hold a permit (to be discussed below). In doing so the Minister is permitted to attach conditions to a person's stay in Malawi.

Allow immigrants to pass through Malawi under statutory permit exemptions

Section 21 of the Immigration Act provides a general requirement for a person who does not have citizenship in Malawi to hold one of a number of immigration permits. However, an exception is created in section 21(2)(d) for persons who pass "through Malawi in direct transit to a destination outside Malawi if the period of transit does not exceed seven days." Persons whose transit through Malawi will not last a total of seven days need not even be issued with an immigration or temporary permit.

Any person who contravenes section 21 by disobeying the general requirement of possessing a visa *may* be treated as a prohibited immigrant. However, the power to treat them as a prohibited immigrant is discretionary. An alternative to treating such a person as a prohibited immigrant is provided in section 21(4) which allows for such a person to be ordered to leave Malawi within a period of 14 days. In whose hands this discretion is placed is not specified by the Immigration Act, and so it can be assumed to be at the discretion of individual immigration officers, subject to immigration policy set by the government.

It is noted that this policy option is complicated by section 29(1) of the Act which provides the police with the power to require a permit to be shown by an immigrant.

Create new regulations for immigrants

The Immigration Act gives broad powers to the Minister to create permits by regulation. As well as section 40(2)(e) providing the Minister with the general power to create new permits, section 40(2)(f) provides a specific power by which the Minister can use regulations to set "the conditions under which Prohibited Immigrants may be allowed to pass through Malawi while journeying or being conveyed to a place outside Malawi."

To the extent that the above alternatives to detention are insufficient, the Minister can therefore use section 40 to create new alternatives and permits by way of regulation.

Allow refugees to pass through Malawi under the Refugee Act exemption

Section 10(3) of the Refugee Act 1989 allows a person to be permitted entry into Malawi where they apply to do so to travel to another country for the purposes of seeking asylum there. The Refugee Committee of Malawi is empowered to place such conditions on their entry as it sees fit. This

Committee is established by the Refugee Act to determine applications for refugee status. Section 10(3) provides no requirements for the potential asylum seeker to hold any form of documentation, and so this section should be read broadly to include undocumented migrants and persons without a valid passport or identity document.

Recommendation 24: Immigration policy makers should consider the wide array of discretionary powers at their disposal. There is ample discretion not to detain immigrants and to allow migrants (including those without documentation) to pass lawfully through Malawi. It can be argued that the exercise of these more humane and less resource intensive alternatives are supported by Malawi's human rights obligations.

Recommendations

Recommendation 1: The Minister should consider exercising the powers under section 6 of the Act to exempt certain categories of migrants from “prohibited immigrant” status, and direct officials to issue these migrants with temporary travel permits.

Recommendation 2: Under section 10 of the Immigration Act, detention can only be used if a prohibited migrant refuses to obey orders to leave Malawi. It is recommended that all prohibited migrants must be given a reasonable opportunity to leave Malawi voluntarily before a decision is made to detain them.

Recommendation 3: Considering the severe overcrowding in criminal detention facilities and the vulnerability of migrants to inhospitable conditions in prisons, the Minister should identify alternative places of custody and authorise these to detain prohibited migrants.

Recommendation 4: It is unlawful to detain prohibited migrants for any period longer than necessary to arrange for their removal, which must be done at the first reasonable opportunity.

Recommendation 5: Detention should only be legally used where there is a real prospect of removing the person being detained from Malawi within a reasonable timeframe.

Recommendation 6: In fulfilling constitutional obligations, and to ensure that the legal purpose of serving the section 8(1) notice on the migrant is achieved, the notices should include translations in a language which the migrant understands.

Recommendation 7: Immigration officials should take steps to ensure that prohibited migrants are able to effectively exercise their right of appeal in terms of section 8(2) of the Immigration Act, including through compliance with Regulation 17(2) of the Immigration Regulations, in a language the migrant understands.

Recommendation 8: A suspected prohibited immigrant can only be detained for a maximum of 14 days. Authorities must be made aware of this provision. The discretion to detain should be exercised under the presumption that detention is undesirable.

Recommendation 9: The prosecutorial discretion to charge persons with migration-related offences should be cautiously exercised with necessary provision made for accused migrants to mount an effective defence. Sentencing guidelines may also assist in ensuring excessive sentences are not imposed that are disproportionate to the offences.

Recommendation 10: The officer in charge of each prison has a statutory responsibility to guarantee the proper treatment of prisoners in accordance with the Prisons Act. Officers in charge must be made aware of this obligation and that they are personally legally culpable.

Recommendation 11: Officers in charge must be made aware that they are obliged to put into effect written recommendations from health officers and are responsible for ensuring adequate arrangements are made (practicably and financially) for sick prisoners, including their transfer to medical facilities when advised to be necessary by medical officers.

Recommendation 12: The right of migrant detainees to access food, clothing, bedding and other welfare necessities on the same terms as other prisoners must be respected and protected.

Recommendation 13: The severity of a breach of the prohibition on torture and inhuman and degrading treatment cannot be overstated. If overcrowding persists to the extent noted in *Masangano v The Attorney General and Others* then incarceration of immigrants cannot be justified

in any circumstances.

Recommendation 14: Child migrants should not be detained.

Recommendation 15: Unaccompanied minors are children in need of care and protection under the Child Care, Protection and Justice Act. They are entitled to safe accommodation and medical treatment funded by the state. Strict compliance with preliminary inquiries must be adhered to if criminal charges are pursued.

Recommendation 16: Local government authorities must provide child migrants, and in particular unaccompanied minors, with accommodation, outside of juvenile or adult detention facilities. The Minister must fulfil the obligation to establish Safety Homes for children in need of care and protection.

Recommendation 17: Child trafficking victims must be identified and connected to social welfare officers to be ensured their enjoyment of protections under the Child Care, Protection and Justice Act.

Recommendation 18: In accordance with the Malawian Constitution those in detention should be afforded the means to challenge their detention in the courts, which should include state-funded legal representation and effective and independent translation.

Recommendation 19: Children should be afforded legal representation at the public expense in all immigration matters.

Recommendation 20: Asylum seekers and refugees should not be detained in prisons. Migration officials must be equipped to identify asylum seekers. It should not be assumed that those seeking refugee status will be aware of their entitlement to that status. Basic immigration information should be provided to all immigrants.

Recommendation 21: Immigration Officials who are presented with young immigrants who could be under 16 (and for criminal matters under 18) should treat them as children until an age determination process has taken place in terms of the Child Care, Protection and Justice Act. Age determination can be conducted by other means under the Act if the migrant is undocumented, such as a medical examination or statement from the potential child.

Recommendation 22: Immigration officials need to be aware of their obligations under the Convention against Torture. Active steps need to be taken to identify potential victims of torture and to provide them with adequate protection.

Recommendation 23: Immigration officials need to be aware of their obligations to victims of trafficking. Active steps need to be taken to identify and provide appropriate protection to victims of trafficking.

Recommendation 24: Immigration policy makers should consider the wide array of discretionary powers at their disposal. There is ample discretion not to detain immigrants and to allow migrants (including those without documentation) to pass lawfully through Malawi. It can be argued that the exercise of these more humane and less resource intensive alternatives are supported by Malawi's human rights obligations.