

Adaptable asylum systems in Portugal in the context of COVID-19

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COVID-19 has provided a new entry point for conversations about the adaptability of asylum systems. The swift, constructive approach taken by Portugal to ensure the rights of asylum seekers during the pandemic offers a protection model for others to consider.

COVID-19 poses a number of challenges to asylum systems. What happens when asylum systems are unable to operate in accordance with accepted processes and modalities? What if interviewers and decision-makers cannot meet asylum seekers or come to the office? How can asylum systems cope if compliance with established timelines is impossible, and there is no clear indication of when the situation will be 'back to normal', or how long the transition to a 'new normal' might last? What solutions can States identify and prioritise in order to safeguard the rights of asylum seekers and ensure that they are not penalised for a situation that is entirely beyond their (or anyone's) control while also ensuring that public health is protected? How can interim measures contribute to avoiding the

accumulation of backlogs at all stages of the refugee status determination (RSD) process?

The question of adaptability in the face of challenges such as these is raised in the Global Compact on Refugees and is an integral part of the vision for its Asylum Capacity Support Group¹. In the context of the COVID-19 pandemic, Portugal very quickly identified a novel approach to the challenges it faced. In late March 2020, the country's Council of Ministers issued Order No 3683-B/2020 to temporarily regularise the residency status of all foreign citizens who had filed a request of residence or asylum as of 18th March 2020, the day a national state of emergency was declared in Portugal.² The validity of this legal residency was initially until the end of June, and subsequently extended to the end of October

2020. The explanation given by the Ministry of Internal Affairs for this decision was that people should not be deprived of their rights to health and public services because their application could not be processed.³

Protection-oriented adaptation and challenges

While the Order does not grant residence permits to asylum seekers, they are treated as if they have a valid residence permit. This effectively avoids asylum seekers being negatively affected by reduced registration processing capacity during COVID-19. One week after the entry into force of the text, and following calls from civil society for greater clarity on beneficiaries' entitlements, it was announced that benefits would include social services and benefits linked to employment such as family allowances, child support and protection against unemployment. The Order also covered many issues within the asylum/RSD procedure, from the (re)scheduling of appointments to the suspension of deadlines.

Furthermore, ensuring access to health care for everyone during a pandemic, irrespective of legal status, is consistent with a rights-based approach and is also logical from a public health perspective. In human rights terms, individuals should be able to access potentially life-saving health care on an equal basis, particularly if the delay in their acquisition of legal status is caused by factors outside their control. At the same time, restricting access to health care not only puts individuals at risk but also threatens the health and safety of members of their community.

Persons with a claim of international protection needs who had entered the country but did not present an application before the cut-off date of 18th March could not benefit from the measure.⁴ Civil society organisations advocated for their inclusion but to no avail. Given the uncertainty surrounding the state of emergency, it would seem difficult – and unhelpful – to apply strict cut-off dates. Asylum seekers who presented their application within a reasonable amount of time following their arrival should not be penalised by the onset of the crisis in terms

of their access to the full set of rights due to asylum seekers under Portuguese law.

The country's decision to strengthen the status of asylum seekers and facilitate their access to services speaks to public health concerns but also resonates with the need for managing resources during these uncertain times. By ensuring access to legal employment, the State would allow some asylum seekers to become self-sufficient and would also be able to start taxing those who were working – a clear win-win situation.

A model for future adaptation

The steps taken by Portugal yielded concrete, measurable protection dividends. In a digital world and in the context of discussions about remote arrangements for conducting registration and RSD, Portugal's measures (and those undertaken by other countries, such as Ecuador, Peru, Sweden and Lithuania, to name but a few) contribute to the discussion on adapting the RSD and broader protection response from a grounded, non-technical perspective that emphasises the rights of asylum seekers and does not require significant up-front investment by States. Other States seeking to adapt their asylum procedures to meet the demands of a pressing crisis may wish to take note of some of the key aspects of Portugal's Order. In particular:

Prompt action: Passed just nine days after the declaration of the state of emergency relating to COVID-19, the Order swiftly clarified the residency status of asylum seekers and migrants who had applications in process. (Less clear details were later sorted out in the implementation phase.) Swift action ensured that confusion and uncertainty were minimised, while asylum seekers and migrants had access to medical and other services from the early stages of the crisis.

Emphasis on rights: Notwithstanding the cut-off date, the Order seems to have been designed to ensure that the fairness of the asylum system was preserved. Asylum seekers were effectively given the benefit of the doubt, regardless of the status of their claims or appeals.

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Group approach: The activation and scope of the Order were designed on the basis of an identified group of similarly situated persons, thereby allowing for a flexible and immediate response to a situation in which individual processing was impractical and ultimately impossible given the unusual circumstances. Beyond the application of the cut-off date to define the group, no further distinctions were made in terms of status.

Reinforcing the asylum procedure: Rather than create a new status or parallel structure, the Order leveraged existing systems to benefit a broader cross-section of the asylum-seeking population. This had the advantage of reducing the extent to which new definitions and rights had to be established, while promising to permit seamless transition back to the pre-existing system upon the eventual relaxation of emergency measures.

While this solution does not necessarily speak to all situations in which adaptability is required in processing asylum applications, it does offer a model for addressing certain types of challenges. It does so, moreover, in a manner that is accessible even to States that may not have the resources to dramatically increase staffing or deploy technology

to facilitate processing of cases. Finally, the Portuguese model demonstrates that solutions can be found within the existing asylum system, rather than requiring the development of new procedures or statuses.

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1. Global Compact on Refugees, para 62 www.unhcr.org/5c658aed4.pdf
2. Order No 3683-B/2020, 27 March 2020 bit.ly/2UtBPx8
3. Schengenvisa.info news 'Portugal Grants Migrants and Asylum Seekers Full Citizenship Rights During COVID-19 Outbreak', 2 April 2020 bit.ly/Portugal-grants-asylum-rights-2April2020
4. It should be noted, however, that non-citizens who are irregularly present in the country may access national health services if they can prove (with documentation issued by their local authorities) that they have been present in the area for 90 days. Order No. 25360/2001 (2nd series).