

In December 2015, the Greek Council for Refugees released a policy brief on the “Implementation of Alternatives to Administrative Detention in Greece”. This policy brief aims at promoting the use of alternatives to administrative detention of third-country nationals in Greece. It is based on a comprehensive and balanced selection of a growing number of international sources, on data provided by the Greek authorities, on the exchange of relevant experience and knowledge with various bodies and civil society organisations, on the examination of examples of Good Practice which could be included in a strategy for the effective implementation of alternatives to detention as well as on the years of experience of the Legal Department of the Greek Council for Refugees in representing detained individuals in need of international protection before Court.

The Greek Council for Refugees hereby attempts to present a comprehensive and sufficiently operational proposal concerning the implementation of alternatives to detention in Greece.

Under this proposal the Greek Council for Refugees, *inter alia*, notes that:

- Asylum and migration policies **should be based on empirical evidence rather than on unproven assumptions about likely migrant behaviour**. As the UN Special Rapporteur on the human rights of migrants emphasizes, *“there is no empirical evidence that detention deters irregular migration or discourages persons from seeking asylum. Despite increasingly tough detention policies being introduced over the past 20 years in countries around the world, the number of irregular arrivals has not decreased¹”*. This conclusion was also confirmed in the case of Greece, where, for instance, the hypothesis of Greek authorities that the tightening of immigration detention policy (2012-2014) would enhance the effectiveness of the system to return irregular migrants and deter

¹ UN General Assembly, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 2 April 2012, A/HRC/20/24

irregular arrivals was not proven by empirical evidence. On the other hand, **empirical evidence suggests that alternatives to detention guarantee individuals' well-being and better respect the human rights, ensure greater compliance with immigration processes** (including asylum and return procedures) **and are less costly than detention.**

- The legal obligation to consider alternatives to detention before resorting to detention **arises out of national and international legislation.** In this respect, the implementation of alternatives to detention is not at the discretion of the national authorities but is an obligation that is binding upon the State under international law and treaties. **The said obligation concerns all third-country nationals,** who might be detained, and not only those belonging to vulnerable groups.
- Before any decision to detain or to impose alternatives to detention is taken by the Authorities, an **individual assessment** of each case must be carried out. Such an assessment must take into account the individual's particular circumstances (e.g. vulnerabilities or health conditions etc.).
- **Successful alternatives rely on a range of standards, which ensure respect for human rights and dignity.** Treating people with dignity has also proven to be the single most important factor that fosters trust in the asylum and migration management system. Given that a number of these standards are also positive obligations of the Greek State (e.g. first reception arrangements, housing for asylum seekers etc.), national authorities need to focus on developing a coherent plan for the effective implementation of alternatives to detention.
- **Given that alternatives to detention may affect the right to personal liberty, decisions to apply them must be subject to certain safeguards to prevent their application in an arbitrary manner.** Among other things, alternative measures should be tailored to

individual circumstances and must be aimed at and necessary to fulfil a legitimate objective, as well as being proportionate to that objective. A national practice systematically imposing an alternative to detention would suggest that the system is arbitrary.

- Bearing in mind that in all actions undertaken by authorities, concerning vulnerable groups of third-country nationals and especially **unaccompanied minors and families with minor children**, the best interests of the child shall be a primary consideration and that detention is never in the best interests of the child, the Greek Council for Refugees calls on the relevant authorities to take immediate steps to protect children. These include the prohibition of detention of unaccompanied children (one-third of the EU Member States has already abolished detention of unaccompanied minors) and of families with minor children, as well as the provision of transit accommodation for unaccompanied children and actions to reinforce the capacities of reception facilities.
- As to the **asylum seekers**, evidence provided by the Asylum Service in Greece indicates very **high compliance rates to the obligations** imposed on them through the asylum process and in particular the obligation of regular reporting to the Regional Asylum Office (for card renewals, interviews etc.). According to the evidence, in 2015, despite the identified shortcomings in the reception conditions of asylum seekers and the special circumstances formed concerning the secondary movement to an EU country, 80 % of the asylum seekers in Greece fully complied with the obligations imposed on them through the asylum process, regardless of whether they were detained or not when they applied for asylum. **Policy makers should bear in mind this evidence for the design of targeted asylum policies aiming at limiting and ending unnecessary immigration detention.**

UPDATE (September 2016):

Implementation and Impact of the EU–Turkey Agreement on the practices of Greek Authorities

The EU–Turkey Agreement is considered to raise several serious human rights issues². As from its entry into force, dramatic changes in law and practice occurred and the effective access to a proper asylum procedure was hampered. Issues relating to the implementation of the Agreement include, *inter alia*, the systematic detention of newcomers without exception in the so-called “hotspots”, even those belonging to vulnerable groups (e.g. unaccompanied minors, families with minor children, sick persons etc.). In view of the above, the United Nations High Commissioner for Refugees, redefined its role by suspending some of [its] activities “in line with [its] policy on opposing mandatory detention”³. Likewise, many aid agencies began pulling out of the so-called “hotspots”⁴ pointing out that “they have been transformed into *pre-removal centres which do not offer sufficient guarantees about respect for fundamental human rights*”⁵.

The assumption underlying the deal is that the readmission process to Turkey would be rapid, while, to this end, Greece adapted its legislation to provide a legal framework for ensuring fast-track procedures for the examination of asylum applications lodged in the “hotspots” and the implementation of the “safe third country” principle. The UN Special Rapporteur on the human rights of migrants noted recently that the fast-track procedure does not provide adequate safeguards⁶. In practice,

² See, for instance: Council of Europe, Parliamentary Assembly, Resolution 2109 (2016), The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22738&lang=en>

³ UNHCR, “UNHCR redefines role in Greece as EU-Turkey deal comes into effect”, 22/3/2016, <https://www.unhcr.gr/nea/artikel/58bffa521feb53a829ef6a90c35809f9/i-ya-epanaprosdior.html?L=0>.

⁴ Ekathimerini.com, “Idomeni in tense state as NGO withdrawal continues”, 23.3.2016, <http://www.ekathimerini.com/207280/article/ekathimerini/news/idomeni-in-tense-state-as-ngo-withdrawal-continues>.

⁵ Doctors Without Borders (MSF), “9 answers on the withdrawal of MSF from hotspots”, 08/04/2016, <https://www.msf.gr/magazine/9-apantiseis-gia-tin-apophorisi-ton-giatron-horis-synora-apo-ta-hotspot>.

⁶ United Nations, Human Rights, Office of the High Commissioner, UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece, 17.5.2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19972&LangID=E#sthash.UtAn6Vjd.dpuf>.

this assumption was proven wrong as it was not close enough to the reality of the Greek asylum system. The Greek asylum system lacks the capacity to ensure timely registration of asylum applications and as a result thousands of migrants are detained in the “hotspots”, exceeding by far the reception capacity of these centres. Furthermore, along with the mandatory detention, restrictions on the movement of people on the islands have been imposed. As of 20 March 2016, more than 10,000 newcomers⁷ are detained on the Aegean islands, while authorities have started transferring refugees and migrants to the mainland⁸ in order to “ease congestion in camps on the country’s eastern Aegean islands”.

We consider that the EU–Turkey Agreement raises several issues relating to the detention of third-country nationals and the implementation of alternatives to detention, in particular the following:

1. Automatic and mandatory detention is incompatible with the legally binding national and international instruments⁹. Besides the problematic practical implementation of the agreement, according to national legislation, new arrivals are subject to a three day restriction on freedom of movement within the premises of the Centres during the reception and identification procedure;¹⁰ such a provision is not in line with national and international safeguards.

2. The restriction on freedom of movement on the Aegean islands constitutes a *de facto* deprivation of liberty. In order to decide whether a measure constitutes deprivation of liberty or restriction upon liberty, the “concrete situation” and “a whole range of criteria such as the type, duration, effects and manner of implementation of the measure” must be taken into account¹¹. Given that alternatives to detention may affect

⁷ UNCHR, Regional Bureau Europe, Weekly Report September 7, 2016, <http://data.unhcr.org/mediterranean/>.

⁸ Ministry of Interior, 1870 / 05.08.2016, Parliamentary Control, <http://www.hellenicparliament.gr/UserFiles/67715b2c-ec81-4f0c-ad6a-476a34d732bd/9680122.pdf>.

⁹ See L. 3907/2011, Article 9 of the International Covenant on Civil and Political Rights, etc.

¹⁰ Article 14 L. 4375/2016.

¹¹ See, for instance: ECtHR, *Guzzardi v Italy*, Appeal n. 7367/76, 06/11/1980, par. 92-93.

the right to personal liberty, alternative measures should be tailored to individual circumstances and must be aimed at and necessary to fulfil a legitimate objective, as well as being proportionate to that objective. A national practice systematically imposing an alternative to detention “would suggest that the system is arbitrary and not tailored to individual circumstances ¹²”.

3. Given that according to the Greek legal framework, an asylum seeker is “the alien or stateless person who declares orally or in writing before any Greek authority [...], that he/she requests asylum or subsidiary protection or who in any other way asks not to be deported”¹³ and that almost all of the third-country nationals remaining on the Greek islands have expressed their intention to apply for international protection, these individuals shall be considered asylum seekers. Despite the weakness of the Greek asylum system to timely register asylum applications, which *per se* may be incompatible with the States' existing obligations to protect human rights, Greek Authorities have a positive obligation, arising under national and EU law, to provide accommodation and decent material conditions to asylum-seekers. Thus, failing to ensure reception conditions for these persons, constitutes *per se* a violation of the relevant legal framework. It should also be recalled that, Greece has been found guilty by the European Court of Human Rights in relation to applicants' living conditions in Greece ¹⁴.

4. Given that 38% of people who arrived to Greece in the first eight months of 2016 are children¹⁵, an approach that addresses child protection more holistically must put in place so as to compensate for the identified shortcomings in Greece. Such an approach must take into

¹² UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, <http://www.refworld.org/docid/503489533b8.html>, . 43.

¹³ Article 34(5), L. 4375/2016.

¹⁴ See, for instance: ECtHR - M.S.S. v Belgium and Greece [GC], Application No. 30696/09

¹⁵ UNHCR, Mapping of Unaccompanied Children (UAC): UNHCR Intervention as of 23 August 2016, <http://data.unhcr.org/mediterranean/>.

account that “detention can never ever be in the best interest of a child. Even under the guise of “protective custody”, it is utterly unacceptable for children to be administratively detained¹⁶”. Authorities should always bear in mind that children should not, as a general rule, be detained and they also need to make efforts to strengthen the child protection system.

The decision to detain all new arrivals coming under the terms of the EU-Turkey Agreement as of 20 March 2016, followed by the restriction on freedom of movement of refugees and migrants on islands in the Aegean Sea, are measures introduced in order to tackle the dramatic situation that was created after the entry into force of the Agreement.

In light of the above, the national practice of detaining/restricting the freedom of movement of newcomers on the Aegean islands for an indefinite period of time, is an example suggesting that the implementation of the EU-Turkey Agreement may commit Member States to serious human rights violations and that -at best -the practices adopted by the Greek Authorities may be incompatible with basic rules of humanitarian law and the country's international obligations.

¹⁶ United Nations, Human Rights, Office of the High Commissioner, UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece, 17.5.2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19972&LangID=E#sthash.UtAn6Vjd.dpuf>.