



# GREECE: EUROPE'S LABORATORY. AN IDEA FOR EUROPE

THE GREEK ASYLUM SYSTEM ONE YEAR AFTER  
THE EU-TURKEY STATEMENT



Here and below:  
Outside the Hotspot of Moria

All photos were taken  
in Lesbos on March 2017

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#### note to the readers

The present report is to be read being gender neutral. We thought is important to use language that includes both men and women. Because in english there isn't any way of using a singular pronoun to refer to someone without identifying the person's gender, please read he as she/he and him as her/him.

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Turkish mainland seen from the top of a mountain in Lesbos



Turkish boats' wrecks on the shore in Skala Sikimineas

# GREECE: EUROPE'S LABORATORY. AN IDEA FOR EUROPE

## THE GREEK ASYLUM SYSTEM ONE YEAR AFTER THE EU-TURKEY STATEMENT

A few months after the first research conducted in Greece by a group of lawyers and advocates coordinated by ASGI, from which the *"Observations in Greece. The right to asylum and its application following the EU-Turkey agreement"*<sup>1</sup> report was published, a secondary round of observations<sup>2</sup> were carried out from the 26th to the 30th of March 2017 and research was conducted in four different areas of the country (Athens and the islands of Lesbos, Chios and Samos)<sup>3</sup>.

During the monitoring, the registration and identification centres of Lesbos, Samos and Chios were visited, and it was possible to formally and informally interview various actors, institutional<sup>4</sup> and non<sup>5</sup>, who are variously involved in the functions of the Greek asylum system, as well as many asylum seekers.

The purpose of this secondary instance of observation and monitoring was to update the information collected last June, around an attempt to highlight how Greece can and should increasingly be considered **a laboratory for the experimentation and refinement of the latest European policies on the management of migration flows**. The purpose of which, becoming ever more explicit, is to dramatically reduce the number of arrivals in the European space. In this regard, the politics of bilateral agreements, the use of the *hotspot* method, the introduction of procedural mechanisms linked to concepts of "first asylum", "safe third country"<sup>6</sup> and "safe country of origin" in the asylum procedure, and the attribution of an increasingly central role to European agencies — are instruments which have, since March 2016, proved to be indispensable in causing a radical **decline in migratory flows** from Turkey toward Greece. These same apparatuses also play a central role in determining the prospects available for reforming the European asylum system and the outsourcing of border control and asylum procedures. It is for this reason that in this report several passages of the proposals currently being discussed in the European Parliament will be cited, regarding the main normative instruments on asylum.

## LESS ARRIVALS AND LESS TRANSIT

The publication of the EU/Turkey agreement/statement is part of a larger framework, in which member states and European institutions turn to the mechanism of bilateral agreements (in various forms) with third countries of origin and transit of migratory flows, with the stated objective – at least in the early phase – to «*save lives at sea*», «*combat human trafficking*» and «*eradicate the causes of migration*». In recent documents regarding

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1 Searchable and downloadable, in English and in Italian, at <https://pushandback.com/esperimento-grecia/>

2 Attendees: Loredana Leo, Giulia Crescini, Lucia Gennari, Salvatore Fachile, Francesco Ferri, Thomas Vladimir Santangelo, Claudia Paladini, Jennifer Locatelli, Angela Nittoli, Stefano Rubini, Islem Lamti, Paolo Sabbagh, Emanuele Petrella, Chiara Maiorano, Marina De Stradis, Georgia Adamis, Giulia Pelizzo, Marilù Porchia, Faizan Raheem Muhammad, Barbara Boni, Cristina Nazzaro, Abdallah Alagha, Selene Zaniboni, Claudia Monti, Rosangela Altamura, Maria Sole Luperto.

3 This trip was made possible through the support of Oxfam-Greece.

4 Hellenic Asylum Service, members of the Appeals Committees, UNHCR, IOM, EASO.

5 Associations and NGOs including MSF, European Lawyers in Lesbos, Aitima, METAdrasi, Greek Council for Refugees, Danish Council for Refugees, Advocates Abroad.

6 See Article 33, ff. directive 2013/32/EU, and Art. 36 of the Proposal for a Regulation procedure (COM (2016)467 final).

this<sup>7</sup>, the objective of European policies of cooperation with third countries is more explicitly aimed at the drastic reduction of arrivals in European territory, «*no matter how*». Indeed, the main consequence of the agreement/statement with Turkey is represented by the radical decrease in the number of incoming migrants on Greek shores, despite not yet having found a widespread application of the main and most innovative mechanisms it introduced (readmission of asylum seekers and the so-called mechanism of 1:1).

Since March 2016, and particularly in the following months, it was possible to observe a sharp decline in arrivals on the coasts of the Aegean Islands and a change in the prevailing nationalities, even though the number of re-admissions in Turkey were, all in all, not very high<sup>8</sup>.

**In 2016, over the course of the first three months, 152,617 people landed in Greece, between April and September there were 15,528** (according to IOM data)<sup>9</sup>, and today the average daily arrivals are slightly higher than 50 people<sup>10</sup>, when during the same period in 2016 there were about 1,700.

Even **the composition of these flows has changed, again according to IOM data**: if in 2016 the nationalities prevalent among the migrants landing in Greece were Syrian, Afghan, Iraqi, Pakistani and Iranian; in 2017, Afghanistan and Pakistan are no longer among the main nationalities present, leaving instead the spot to Algerian nationals, and those from the Democratic Republic of Congo and Kuwait. On the island of Lesbos, we met very few Syrian citizens who arrived recently and many African asylum seekers.

According to the data provided by the EU Commission in the latest report on the application of the EU-Turkey Statement of 2 March 2017, there are currently **14,010 migrants on the islands**<sup>11</sup> (which have a capacity of 7,450 accommodations) and, in general, **on Greek territory shall be considered that there are 62,000 asylum seekers (numbers calculated after the conclusion of pre-registration procedures)**.

In determining the decline in the number of arrivals in Greece, one contributing factor to consider is **the abrupt closure of the “Balkan route”**.

Reading the statistics published by IOM<sup>12</sup>, is possible to immediately notice the change. There is a sharp reduction (which in some countries is an actual zeroing out) of the number of people passing through Macedonia, Serbia, Hungary, Croatia and Slovenia.

This closure, as described by a variety of sources<sup>13</sup>, was also achieved thanks to **the widespread use of force and violence by the public security authorities from the various countries involved and the repeated violation of the fundamental rights of migrants in transit**.

## APPLICATION OF THE AGREEMENT/STATEMENT AND ASYLUM PROCEDURES

On several occasions, representatives of European institutions, and particularly those from the Commission,

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7 Declaration by the members of the European Council of Malta on 3 February 2017 <http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/>

8 According to IOM data updated on 3 April 2017, 943 people in Turkey would be reassumed: <https://data2.unhcr.org/en/documents/download/56357>

9 [http://migration.iom.int/docs/Q3\\_Flows\\_Compilation\\_Report.pdf](http://migration.iom.int/docs/Q3_Flows_Compilation_Report.pdf)

10 Data Observed by UNHCR, <https://data2.unhcr.org/en/documents/download/56356>

11 IOM data, [http://migration.iom.int/docs/Monthly\\_Flows\\_Compilation\\_No4\\_11\\_April\\_2017.pdf](http://migration.iom.int/docs/Monthly_Flows_Compilation_No4_11_April_2017.pdf); 12,953 according to UNHCR data updated on 9 May 2017 (<https://data2.unhcr.org/en/documents/download/56357>).

12 According to this data, at least 393,555 people crossed these countries in 2016. While partial data for 2017 indicates the passage of only 408 people, this number reflects only those tracked in Macedonia and Hungary ([http://migration.iom.int/docs/Q1\\_2017\\_statistical\\_Overview.pdf](http://migration.iom.int/docs/Q1_2017_statistical_Overview.pdf)).

13 “*A dangerous game*”, Belgrade Centre for Human Rights, Macedonian Young Lawyers Association, Oxfam and “*Sopralluogo Hungaria and Serbia*” by Annapaola Ammirati and Ilaria Sommaruga.

have expressed the need to promote the implementation of the EU-Turkey Statement considering the “low” number of re-admissions effectively carried out. Moreover, it does not seem that the mechanism of readmission to Turkey, which is based on the inadmissibility of the asylum request in Europe, has found concrete application.

The people who were in fact readmitted to Turkey were transferred on the basis of the existing readmission agreement between Greece and Turkey or through the most recent EU-Turkey agreement concerning the readmission of so-called economic migrants (people who did not apply for asylum or whose application was definitively rejected).

This situation was caused, not only due to the general delays of the proceedings but also because of the disposition of the Appeals Committees, which tended to accept most of the appeal decisions on the inadmissibility of asylum applications based on the consideration that Turkey could not be considered a safe third country or country of first asylum – not even for Syrian applicants, who, even formally, could access some form of temporary protection<sup>14</sup>.

It is believed that precisely because of this disposition, there was an intervention in June 2016 to reform the asylum law, which modified the composition of the Appeals Commissions<sup>15</sup>. It would seem that the new commissions have had, since the beginning of their tenure, a disposition to be more restrictive, but it should be emphasized that all decisions on eligibility of appeals are suspended pending a ruling by the Council of State<sup>16</sup>.

To ensure greater effectiveness of the agreement, the European Commission published in December 2016 a **Joint Action Plan** (hereafter JAP)<sup>17</sup> which identifies the actions that the Greek Government, in cooperation with European institutions, should be taking over the subsequent months. In general, the Commission hopes for greater use of the assessment procedure on admissibility of asylum applications and for accelerated procedures, which include the use of administrative detention.

Among the suggested actions indicated by the JAP, to be discussed further below, there includes the evaluation of possibly re-admitting into Turkey even vulnerable asylum seekers or those who could access the family reunification procedure under the Dublin Regulation; thus, extending the assessment of eligibility even to these categories of applicants. It is thus necessary to assess the possibility of reducing the number of degrees of appeal in the framework of international protection recognition procedures.

If it were already evident that the use of accelerated procedures<sup>18</sup> and eligibility assessment procedures for asylum applications was important for the agreement to be a success, today it is even clearer in light of the JAP. Its importance is made further evident if we consider that the provisions contained in the document reflect the general direction European institutions follow with regard to migration flow management. Similar solutions are likely to be applied to the whole European space given the increasingly pervasive interventions of EU policies in this area.

Repatriating vulnerable asylum seekers or those who may be reunited under the Dublin Regulation to Turkey would not necessitate the proposal of a new amendment or different interpretation of Greek asylum law<sup>19</sup>, but it would

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14 According to the “*Law on Foreigners and International Protection*” approved in Turkey in 2013 and subsequently amended to allow temporary protection workers to benefit from the exercise of employment activity and to guarantee the maintenance of this status even if they temporarily leave the Turkish territory.

15 See the “*Experiment Greece*” report of 2016.

16 See Amnesty International’s appeal relating to the proceedings before the Council of State ([http://ua.amnesty.ch/urgent-actions/2016/10/223-16/223-16-1?ua\\_language=en](http://ua.amnesty.ch/urgent-actions/2016/10/223-16/223-16-1?ua_language=en)).

17 Downloadable at the link [https://ec.europa.eu/commission/sites/beta-political/files/december2016-action-plan-migration-crisis-management\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/december2016-action-plan-migration-crisis-management_en.pdf); A report on its application was then published in March 2017 [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302\\_progress\\_on\\_the\\_implementation\\_of\\_the\\_joint\\_action\\_plan\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_progress_on_the_implementation_of_the_joint_action_plan_en.pdf). For a critical analysis see Apostolis Fotiadis “Greece Plans to Fast Track Asylum Claims to Save E.U.-Turkey Deal” published on 10 February 2017 on <https://apostolisfotiadis.wordpress.com>.

18 See the first part of this report on the procedures.

19 Options that would seem to have been provided by the Greek government in order to be able to apply border and acceleration procedures to these two categories of people.

require a change in the practices employed by the Greek government thus far<sup>20</sup>.

It should be further emphasized that, **since December 2016, the eligibility procedure has also been extended to non-Syrian asylum seekers** from countries with a high rate of recognition of international protection<sup>21</sup>. This has led to an articulation of increasingly complex procedures based on the applicants' nationality, which the Asylum Service sought, with difficulty, to synthesize in a conceptual map<sup>22</sup>. This theme will be subsequently dealt with.

Differential treatment on the grounds of nationality can also be found in **the deprivation of personal liberty during the execution of the procedure** for the recognition of international protection. Greek law, indeed, provides for the possibility of detaining asylum seekers who have illegally crossed the border, even if it is subject to certain conditions. However, the designated centres on the islands (RIC - Reception and Identification Centres) are not actually closed structures. The exception to this is the Moria (Lesbos) *hotspot* sector that has at times, been used for the administrative detention of applicants from countries with a low recognition of protection rate<sup>23</sup> and, more systematically, for those who are subject to readmission or return procedures.

Detention on the ground of illegally entering the territory has a maximum duration of 25 days, after which applicants are free to leave the centre (if, indeed, their exit has actually been prevented) but remain subject to a restriction on freedom of movement which does not allow them to leave the territory of the island on which they are located. Asylum applicants considered vulnerable or with access to reunification under the Dublin Regulation are not subject to such limitations, but this practice seems to be in the process of being redefined, precisely to meet the requirements of the JAP.

The implementation of the detention measure is mainly accomplished on the island of Lesbos (in the so-

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20 See Focus: Vulnerables and Dublin Reunifications.

21 This evaluation is based on the statistics published by Eurostat every four months: [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_quarterly\\_report](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report). It should be noted that extending the application of this procedure to non-Syrian asylum seekers does not correspond to any legislative change or practice regarding access to international protection in Turkish law. Therefore, in Turkey, only Syrian citizens have the possibility to apply for a residence permit, which allows a concrete, though limited, access to social rights and effective protection against the risk of *refoulement*. For more information, especially regarding the condition of asylum seekers in Turkey, see S. Tunaboylu and J. Alpes, *"The EU-Turkey deal: what happens to people returning to Turkey?"* Published in Forced Migration Review - Refugee Studies Centre University of Oxford and *"No safe Refuge. Asylum seekers and refugees denied effective protection in Turkey"* published by Amnesty International. This document illustrates the principles of the new Turkish law governing the legal status of a foreigner regarding international protection. It is stated in particular that « *The Law on Foreigners and International Protection establishes a unique dual asylum structure. On one hand are refugees from Syria, who are provided with "Temporary Protection" as a group. On the other hand, asylum-seekers from other countries, who can be granted one of three individual "International Protection" statuses from DGMM: 1) "refugees" who are fleeing from events in Europe and who are allowed long-term integration in Turkey; 2) "Conditional Refugees", who are fleeing from events outside Europe, and who must wait for resettlement to a third country; And 3) "subsidiary protection" beneficiaries, who do not qualify as refugees or conditional refugees but who need protection because they face the death penalty, torture or generalized violence resulting from armed conflict in their country of origin. For all International Protection applicants, Turkey has what is called a "satellite city policy", which requires them to live in a designated province (which excludes the largest cities of Ankara, Istanbul and Izmir). Turkey has also recently demanded that the Syrian refugees under Temporary Protection remain in the province in which they first registered.*»<sup>37</sup> In the new system, the precise role of UNHCR, which for decades was the principal *de facto* refugee status decision maker in Turkey, is unclear. In theory, the Law on Foreigners and International Protection made DGMM the sole decision-maker on asylum matters. In practice, however, UNHCR continues to undertake registration for non-Syrians and refugee status determination for a limited number of individuals who are identified as being vulnerable – based on UNHCR's mandate, not Turkish law – as well as the processing for resettlement of Particularly vulnerable Syrian refugees. According to the NGO Refugee Rights Turkey, the legal significance of UNHCR's RSD decisions in Turkey's new asylum system is unclear». The article by S. Tunaboylu and J. Alpes, on the other hand, describes the moments following readmission in Turkey. Non-Syrian citizens, as confirmed by the Commission in the implementation report of the agreement published in December 2016, are transferred to expulsion centres in the border area with Bulgaria. Non-governmental organizations and researchers point out that people who are detained, for long periods of inadequate detention here, do not receive adequate legal information about the possibility of access to forms of international or humanitarian protection. The risk of return in these cases is escalating because of Turkey's ever-increasing commitment to its bilateral readmission policy, with countries such as Pakistan for example. Syrian citizens, however, are transferred to centres located in the Turkish regions bordering Syria, and undergo some periods of detention for identification and security purposes. Again, in these cases, there is a much difficulty in accessing rights and information, particularly that which explains the possibility of requesting the temporary protection reserved for Syrian citizens.

22 See map at [page 38](#)

23 See Focus Detention.

called Sector B or in police stations); but is done through the transfer of migrants awaiting readmission or return to expulsion centres on the mainland (mainly in the Athens area). The detention in these cases begins with notification of the provision by which the Appeals Committee either rejected the appeals against the determination of inadmissibility or dismissed the asylum application, after which an appeal to the Administrative Courts would not automatically suspend the enforceability of the contested provision. Moreover, due to the de-facto nature of the appeal and the difficulty of finding a defence attorney, even more at this stage of the procedure, few applicants have effective access to this defence tool<sup>24</sup>.

## THE ROLE OF NON-INSTITUTIONAL ACTORS AND EUROPEAN AGENCIES

Lastly, **the already important involvement of European agencies and international organizations (both governmental and non-governmental) is reinforced** in both phases of the asylum procedure and, more generally, in the management of the migratory phenomenon in Greece.

Greece can be further regarded as a laboratory in this respect – especially considering the recent reform of the regulation governing the activities of Frontex (Reg. 1624/2016) and the proposed EASO regulation<sup>25</sup>, currently under discussion. Both texts tend to attribute increased extensions of the tasks and faculties to the two agencies in their respective areas of influence: border management and control, and return activities in the case of Frontex; and procedures for international protection recognition in the case of EASO.

**EASO** in Greece provides: defining guidelines and forms used at all stages of the international protection recognition process, including the applicant's personal hearing; the establishment of COIs particularly in relation to the most widespread nationalities among island applicants (Pakistan, Afghanistan, Iraq); training of actors involved in the various phases of the procedure; supporting the Asylum Service, especially in Lesbos and Chios, even in handling requests as well as in organizing the hearings. Since the entry into force of the new Greek Asylum Act (No. 4375/16) last year, EASO conducted interviews related to first-degree assessment of eligibility of asylum claims, and then formulated an opinion. In March of this year, EASO officials attended the audits conducted under the *merge procedures*, together with those of the Asylum Service, which simultaneously included an assessment on the admissibility and on the substance of an application for international protection. **This role was further strengthened after the amendments proposed in March 2017 to the Greek asylum law, which included an intervention – albeit indirect – by officials selected by EASO who were charged with supporting the Appeals Commissions** again through the drafting of opinions relating to individual appeals, with the aim of speeding up the second-rate procedures as well.

**It also strengthens the role of non-governmental organizations that are increasingly called upon to address the systemic shortcomings** characterizing the Greek asylum system in terms of guarantees and respect for the rights of asylum seekers. In addition to providing support for inadequate reception conditions, which have been subject to countless complaints<sup>26</sup>, NGOs also intervene in order to secure additional rights, such as, for example, the right to defence. In fact, on the islands in particular, lawyers who support applicants during the first and second degree protection recognition procedures are supported by NGOs (notably METAdrasi but also Advocates Abroad, European Lawyers in Lesbos and others) in a program recently approved in agreement with UNHCR. Even vulnerability screening for incoming immigrants seems to have been almost completely delegated to NGOs, such as Medicines du Monde, who conduct this assessment at the hotspot in Lesbos.

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<sup>24</sup> On this point we will return to the procedure on the degree of the appeal.

<sup>25</sup> "Proposal for the European Asylum Agency and repealing Regulation (EU) No. 439/2010" COM(2016)271 final of 4.5.2016 available at <https://ec.europa.eu/transparency/regdoc/rep/1/2016/IT/1-2016-271-IT-F1-1.PDF>.

<sup>26</sup> See, among others, the recent MSF report "One year on from the EU-Turkey deal: challenging the EU's alternative facts".

# THE NATURE OF THE AGREEMENT AND WHY IT INTERESTS US

The objective of drastically containing migratory flows has been achieved through questioning some of the fundamental principles of European law, as has been widely observed<sup>27</sup>.

A central issue in the debate on the agreement/statement relates to its very nature: is it a genuine international treaty or a political statement?<sup>28</sup> Depending on which of these two different approaches one takes, there are consequences both in terms of the validity and effectiveness of the agreement as well as of possible remedies, even in the context of strategic litigation.

Over the course of these months, two main arguments were disputed. The first of which is more formalist and inclined to consider the agreement as a mere statement of intent, giving weight to both its form and the language used in the press release published on the European Council website<sup>29</sup> (for example the use of the auxiliary verb «will» in place of «shall» or «should», as is normally the case in the language of treaties)<sup>30</sup>. The second argument, however, was based on the guidelines of the Vienna Convention and the consistent case law of the International Court of Justice, and supported the necessary application of the principle that form is irrelevant when compared to the intent of the international agreements. According to this approach, an international agreement is defined by its content (particularly if it is able to create links between States) and by the circumstances around which it was reached. In accordance with this perspective, many authors have adamantly argued that the EU-Turkey Statement is truly an international agreement by nature. Thus, considerations regarding the unlawfulness of such an agreement, which should be adjudicated by the European Council when there is a violation of the Union's legislation regarding the conclusion of international agreements and the failure to comply with the prerogatives of the European Parliament and relevant national parliaments<sup>31</sup>. Some speculate that further claims to illegitimacy can be made with reference to international law<sup>32</sup>, which could lead to the invalidation of the agreement.

**In any case, the European Parliament's Legal Service has adhered to the formalist view on the nature of the agreement and Parliament has not referred to the Court of Justice to enforce the alleged breach, implicitly taking on a position that is clear enough and with significant consequences from a legal point of view.**

The decision of 28 February 2017 by the Court of the EU<sup>33</sup> intervenes in this debate in an unexpected way.

The complainants, two Pakistani nationals and one Afghan national called on the Court of the EU **to obtain the**

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27 See, among others, Maarten den Heijer and Thomas Spijkerboer *"Is the EU-Turkey refugee and migration deal a treaty?"*, published on 7 April 2016 at [www.eulawanalysis.blogspot.it](http://www.eulawanalysis.blogspot.it), Steve Peers, *"The final EU / Turkey refugee deal: a legal assessment"* published on 18 March 2016 at [www.eulawanalysis.blogspot.com](http://www.eulawanalysis.blogspot.com), Carmelo Danisi *"Taking the 'Union' out of 'EU': EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law"* published on 20 April 2017 on [www.ejiltalk.org](http://www.ejiltalk.org), Chiara Favilli *"EU-Turkey cooperation for Contain the flow of migrants and asylum seekers: a successful goal?"* in Human Rights and International Law, 2016, 2, pp. 1-22 (<http://www.sidi-isil.org/wp-content/uploads/2016/05/Chiara-Favilli.pdf>).

28 For a closer look at the topic, see M. Marchegiani and L. Marotti, *"L'accordo tra l'Unione Europea e la Turchia per la gestione dei flussi migratori: cronaca di una morte annunciata?"* in Law, Immigration and Citizenship n. 1-2 2016, p. 59.

29 <http://www.consilium.europa.eu/it/press/press-releases/2016/03/18-eu-turkey-statement/>

30 This, for example, was the thesis coupled with the European Parliament's Legal Service, as reported by M. Marchegiani and L. Marotti in the article above.

31 See in this regard M. Gatti, *"The EU-Turkey statement: a treaty that violates democracy"* published by [ejiltalk.org](http://ejiltalk.org), <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>

32 M. Marchegiani and L. Marotti in the aforementioned article highlight the possible contrast of the agreement with the Vienna Convention of 1969 and the 1986 Convention on the Law of Treaties, which also identify certain causes of invalidity of international agreements, and the manifest violation of internal rules of fundamental importance regarding the competence to stipulate. In the present case, according to the authors, there might be a contradiction between the modalities for concluding the agreement and Art. 218 of the TFUE.

33 Case T-192/16, T-193/16 and T-257/16, pronouncement of 28.02.2017. For further details see the document curated by Dr. Marilù Porchia available on the blog [www.pushandback.com](http://www.pushandback.com).

**annulment of the “agreement” concluded between the European Council and the Republic of Turkey dated 18 March 2016 and entitled “EU-Turkey Statement, 18 March 2016”, for violating the norms of the Treaty on the Functioning of the EU regarding the conclusion of international agreements<sup>34</sup>.**

Unexpectedly, the Court actually affirmed that the authorship of the EU-Turkey Statement of 18 March 2016 was not to be attributed to the European Council or to any other EU institution, but to the Heads of State and Governments of each Member State, thus affirming its lack of jurisdiction regarding such an act.

In the judgment, the Court particularly focused on the meaning of the language of the agreement (to be understood as “journalistic”, given its format as a press release) and the circumstances in which the agreement was formulated. With regard to the first point, the Court maintains, for example, that the press release about the agreement speaks of a meeting between *«members of the European Council and their Turkish counterparts»*, an expression which should refer to representatives of individual Member States and not to members of the European Council acting in the name of that institution. The same could be said of the use of the expression *«EU-Turkey Agreement»*: **for «EU», a term used in the journalistic sense, should be understood as «EU Member States»**. Furthermore, regarding the circumstances surrounding the conclusion of the agreement, the Court points to the subdivision of working time and certain logistical aspects related to the organization of the meetings leading to its conclusion to suggest that representatives of the Member States were the ones to have engaged in relations with the Republic of Turkey.

The conclusions of the Court of the EU leave different issues unanswered, including the question of the Member States’ effective competence to conclude international agreements in this area, particularly with regard to the assumption of economic commitments made without the endorsement of national parliaments on behalf of the Union (for example, return costs are borne by the Union, as part of the 3 billion to be allocated to Turkey for the reception of Syrian refugees as provisioned under the agreement). There is great symbolic significance of such a decision since it suggests the possibility of systematically consenting to the use of bilateral agreements in these matters, effectively releasing the European institutions, which have directed and will direct negotiations with third countries and promoted an increased Europeanization of migration policies, from being held responsible.

During this year, various actions were taken to challenge the legitimacy of the EU-Turkey agreement. These will be considered in the final part of the report.

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34 In support of their appeal, the appellants put forward five pleas: the first plea states that the agreement between the European Council and Turkey of 18 March 2016, entitled *“EU-Turkey Statement, 18 March 2016”*, is incompatible with the fundamental rights of the EU, in particular Articles 1, 18 and 19 of the Charter of Fundamental Rights of the European Union; the second reason is that Turkey would not be a safe third country in accordance with Article 36 of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards for the procedures applied in the Member States for the purpose of recognition and withdrawal of refugee status (OJ 2005 L 326, p. 13); the third plea refers to Council Directive 2001/55/EC of 20 July 2001 on the minimum standards for granting temporary protection in the event of a mass influx of displaced persons and the promotion of balanced efforts between the Member States receiving the displaced persons and the consequences of their acceptance (OJ 2001 L 212, p. 12), which should have been implemented; the fourth plea alleges that the disputed agreement would in fact be a binding treaty or an “act” having legal effects for the appellant and that failure to comply with Article 218 TFEU and / or Article 78 (3) TFEU, jointly or separately, renders the disputed agreement invalid; the fifth plea alleges an infringement of the prohibition of collective expulsions referred to in Article 19 (1) of the Charter of Fundamental Rights of the European Union.

# THE PROCEDURE - UPDATES

## THE FIRST STAGE OF THE PROCEDURE

Greek legislation on asylum, which entered into force in April 2016 (l.n. 4375/2016), just over a month after the publication of the press release containing the EU-Turkey Statement, reflects the procedures in Directive 2013/32/EU (the so-called “Asylum Procedures Directive”) regarding the eligibility assessment of asylum applicants coming from countries of “first asylum” or “safe third country”<sup>35</sup>. The same law describes the possibility of employing different types of procedures in the assessment of asylum applications. Art. 51 lays out the time limits and modalities for carrying out the so-called regular procedure and indicates the cases in which accelerated procedures must be applied. Art. 60 further regulates the border procedure, which is particularly in use on the islands since it is applicable when the asylum application is presented at ports or in airports, or when a large number of requests are made in border areas.

## ACCELERATED PROCEDURES - BORDER PROCEDURE<sup>36</sup>

A key issue for achieving the objectives of the agreement concerns the type of procedure applied to asylum applications submitted in Greece.

As already mentioned, **Greek law provides for three types of procedures: regular procedure, accelerated procedure and border procedure**. What distinguishes the regular from the accelerated procedure is exclusively the processing time.

**The cases where the accelerated procedure is applied are indicated in Art. 51<sup>37</sup>**, and concern asylum seekers coming from «safe countries of origin»<sup>38</sup> or those who refuse to be identified. It should be emphasized, however, that the ordinary procedure must always be applied to «vulnerable»<sup>39</sup> applicants.

**A different discourse must instead be made for the border procedure** which, to date, would seem to be applied to all asylum applications submitted on the Aegean islands – the main entry points in Greece for asylum seekers coming from or passing through Turkey<sup>40</sup>.

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35 Art. 33 and ff. dir. 2013/32 / EU. For a more in-depth description of the admissibility assessment procedure for asylum applications in Greece, see the “Greece Experiment” report available at <https://pushandback.com/esperimento-grecia/>

36 These two types of procedures for examining asylum applications, with their centrality in the management of migration flows in Greece, find no correspondence not even in existing directive procedures nor in the proposal for procedure COM(2016) 467, Art. 40 and 41.

37 The accelerated procedure shall apply if: (a) the applicant is from a “country of safe origin”; (B) the asylum application is manifestly unfounded; (C) the applicant has submitted false information or documents concerning his nationality or identity to the police authorities; (D) the applicant has badly destroyed his identity papers or travel documents which would have contributed to determining his identity or origin; (E) the asylum application has been filed in order to avoid or prevent the execution of a return or readmission order; F) the applicant refuses to be identified in accordance with the applicable law.

38 According to Art. 57 countries considered to be of safe countries of origin are those included in the list drawn up by the Council of the European Union and those detailed in another list prepared through the ministerial decision of the Ministries of Interior, Foreign Affairs and the Administrative Reconstruction, taking into consideration the information gathered from other states and major international and European organizations such as UNHCR, EASO and the Council of Europe. Currently, this list does not seem to have been published.

39 Art. 50 indicates that the vulnerable persons who are excluded from accelerated procedures are all those who need special procedural guarantees, with particular reference to persons for whom there are indications that they have suffered torture, sexual violence or other forms of physical, psychological or sexual.

40 According to AIDA’s 2016 report, it appears that the border procedure has also been applied to asylum seekers detained at Corinth’s pre-removal detention centre, who had applied for international protection within the facility. See p. 59 (<http://www.aida.it/>)

This procedure should be applied to all cases where the asylum application was submitted in port and airport transit zones or in the case of a high number of requests lodged in the border areas of the country. The main peculiarity of the border procedure lies in the possibility of detaining asylum seekers – for the purpose of assessing the admissibility and the substance of an application for international protection – for a maximum period of 28 days before the entire procedure should come to completion. If the duration of the procedure exceeds that time, the applicant must be admitted to the national territory and the application must be analysed in accordance with the regular or accelerated procedure, as is appropriate. In the event of a negative decision in the proceedings, the time-limit for challenging the first instance decision is reduced to **five days** after notification. Furthermore, in Art. 60 there is an express prohibition on the application of border procedure to vulnerable asylum seekers<sup>41</sup> as well as to those who could access the family reunification procedure in accordance with the Dublin Regulations.

This aspect is important in the light of indicators contained in the Joint Action Plan and activities described in the report on its implementation, which were published in March 2017 by the EU Commission<sup>42</sup>, and establish the conditions for the readmission in Turkey of these two categories of applicants as well.

During the monitoring activities conducted on the islands, it was possible to observe the general application of the border procedure – but not its application to these two categories of people. The border procedure processing time limits, however, were almost never met. Administrative detention was applied only on the island of Lesbos in relation to applicants from certain countries (such as Algeria, Morocco, Tunisia, Pakistan, Bangladesh, Sri Lanka) on the ground of an order of the public security authorities, called “Pilot project”, which will be discussed later. The rules on the border procedure were fully respected only with regard to the deadlines for submitting appeal in front of the Appeals Committee against the first instance decision (5 days).

Indeed, as confirmed by the organizations and other actors interviewed, the timing of the procedure, especially with regard to applicants who arrived on the islands just before the agreement with Turkey, may also be very lengthy, and on Lesbos island is possible to meet people who arrived in March 2016, who are still waiting.

On the mainland, the timings appear to be unchanged from those described in the previous report. At present, the implementation of the procedure on the islands seems to be faster. It seems to end within the span of few months and, in some cases, few weeks. However, extreme delays persist, especially with regard to some categories of applicants, such as those who arrived on Greek territory during the first months of 2016.

**One of the major obstacles to a swift analysis of asylum applications can be seen in the lack of interpreters**, since hearings are scheduled according to their availability, on both the mainland as well as on the islands.

A general lack of interpreters affect not only the implementation of asylum procedures, but also the management of identification centres. Trying to solve this and other issues related to the life within the Moria *hotspot*, the

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[asylumineurope.org/news/28-03-2017/aida-2016-update-greece](http://asylumineurope.org/news/28-03-2017/aida-2016-update-greece)).

41 In this case reference is made to paragraph 8 of Art. 14, which indicates that the following categories of vulnerable asylum seekers: unaccompanied minors, persons with disabilities or serious illnesses, elderly, pregnant or newly born women, single-parent families with younger children, victims of torture, rape or other forms of psychological, physical or sexual violence, particularly victims of exploitation, people with post-traumatic stress disorders, particularly victims or relatives of victims of shipwrecks, victims of trafficking.

42 JAP p. 2 «The Greek Asylum Service to examine, on a case-by-case basis and in full respect of Article 7 of the EU's Fundamental Rights Charter, the application of the inadmissibility procedure under Articles 55 and 56 of Law 4375/2016 / 32), to Dublin family reunification cases with a view to their possible return to Turkey, subject to having received from EASO and Member States relevant information which: a) would provide sufficient legal certainty as to the possibilities of family reunification from / to Turkey ; And b) would enable the above mentioned examination. The information required should, in particular, concern the rights to family reunification from Turkey or Turkey under the laws of the Member States, to the extent not covered by the Family Reunification Directive (case of family members who have been recognized as beneficiaries of subsidiary protection by a Member State) and the national law of Turkey. The Greek authorities shall adopt the necessary provisions to make Article 60 (4) (f) of Law 4375/2016 applicable to Dublin family reunification cases applicable. Processing the vulnerability cases: The Greek Asylum Service is to be examined on a case-by-case basis and in full respect of Articles 6 and 7 of the EU's Fundamental Rights Charter (Art. 55 and 56 of Law 4375/2016 Article 33 of Directive 2013/32), to vulnerable applicants with a view to their possible return to Turkey. Greek authorities to examine whether Article 60 (4) (f) of Law 4375/2016 could apply to vulnerable applicants in accordance with Article 24 (3) of the Asylum Procedures Directive».

migrants living there started in 2016 to nominate amongst themselves *community representatives*, in order to participate in weekly meetings with members of the police authority, the Asylum Service, the organizations and the NGOs that are carrying out activities there. These meetings are intended to provide information to all members belonging to particular communities or linguistic groups about the rules of the camp and how it works, but they are also used to provide legal information, sometimes even to individual members of the community. In some cases, hearings are also held through these representatives, who thus act, at least, as mediators within the camp. *Community representatives* are generally elected by their same communities, each one with its own method.

Many of the organizations encountered reported, regarding the conduct of the hearing, that the applicants in the islands do not receive a copy of their personal interview, unless they had expressly requested it. Even in that case, the copy is given only after several days. It was also been reported that frequently, applicants are invited to sign the minutes of personal interview, without it being previously translated, neither in full or in summation.

## THE ADMISSIBILITY PROCEDURE FOR INTERNATIONAL PROTECTION APPLICATIONS. THE MERGE PROCEDURE

Regarding the admissibility procedure of the international protection application<sup>43</sup>, two relevant changes will be reported concerning the recipients of the proceedings and their interaction with other procedures.

Compared with the previous report, it has been noted that not only the asylum claims advanced by Syrian citizens, but even those submitted **by nationals from countries with a high rate of decisions granting international protection**, are subject to the admissibility procedure. To be precise, applicants belonging to nationalities for which the proportion of first instance decisions granting international protection is higher than 25% , based on the available updated Eurostat quarterly data published every 4 months, are subject to the same admissibility procedure of Syrian citizens<sup>44</sup>. It is necessary to point out that **the extension of the application of the admissibility procedure to non-Syrian asylum seekers does not correspond to any change in legislation or praxis regarding access to international protection in Turkish law**. Therefore, in Turkey, only Syrian citizens have the possibility to apply for a residence permit that allows real, albeit limited, access to social rights and effective protection against the risk of *refoulement*<sup>45</sup>. As will be explicated focusing on the role of EASO, the Asylum Service and the European Agency have different position in relation to the admissibility of the international protection claims by non-Syrian citizens coming from countries with a high recognition rate in Europe. Actually, **they are subject to the admissibility procedure at the same time as the substance of the asylum application is assessed**: from whence derives the term *merge procedure*. In practice, during the same hearing, the asylum seeker talk about the risks that they may suffer if they were returned to Turkey, or about the kinds of recognition there may be for his/her rights and protection needs (in order to assess the eligibility of his/her asylum claim and, further, the possibility of considering Turkey as a “first country of asylum” or “safe third country”), and subsequently, about the qualifying motives that led him/her to leave his/her country of origin and the dangers connected his eventual return.

On the contrary, asylum-seekers who are citizen of countries with a recognition rate of less than 25% are subject to an assessment procedure based solely on the evaluation of the asylum application.

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<sup>43</sup> Please refer to the July 2016 report.

<sup>44</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_quarterly\\_report](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report). Evidently, some European countries, particularly Germany, receiving the largest number of asylum applications may have a decisive role in the ranking of recognition rates based on nationality.

<sup>45</sup> For a closer look, especially about the status of asylum seekers in Turkey, see footnote 21.

## FOCUS ON THE SUBSEQUENT APPLICATION

Over the course of the monitoring, legal norms and praxis regarding the «*subsequent application*»<sup>46</sup> were investigated for cases in which a subsequent application could be considered. In these cases, few rights and many restrictions were granted to citizens submitting a subsequent application for international protection, and many illegal practices were encountered.

The relevant framework is outlined in Art. 34 letter t): «*Subsequent application is the application for international protection submitted after a final negative decision or a decision to interrupt the examination of the application pursuant to Article 47 paragraph 2. Any new application for international protection submitted after the withdrawal of an application under the provisions of Article 47 shall also be considered as a subsequent application*»<sup>47</sup>.

Articles 51<sup>48</sup>, 54<sup>49</sup> and 59<sup>50</sup> of Greek asylum law stipulate that **a second application for asylum must be submitted first to an admissibility procedure**. That admissibility procedure should have priority over the applications for protection which are advanced by other citizens. Indeed, the application for protection will be declared inadmissible if it does not contain any new elements. The new application for international protection will first be evaluated on the ground of any new item that have come up or have been provided by the applicant. The applicant may submit the new elements in writing or may be able to verbally clarify

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46 The same legislation is also envisaged in Art. 42 of the rules of procedure, which sets out in detail the cases of subsequent application. It also provides for the necessary examination of the admissibility of the application rejected because of the absence of new and concrete elements (paragraph 4) and of the claim that the application is manifestly insubstantial or lacking prospects of success.

47 Art. 34 t. «*Subsequent application*» is the application for international protection submitted after a final negative decision or a decision to interrupt the examination of the application pursuant to Article 47 paragraph 2. Any new application for international protection submitted after the withdrawal of an application under the provisions of Article 47 shall also be considered as a subsequent application.

48 Art. 51 paragraph 6: the competent Receiving Authorities may register and examine by priority applications for international protection which concern: g. individuals who submit subsequent applications for international protection, at the admissibility stage.

49 Art. 54 The Decision Authorities shall reject as inadmissible, with a relevant act, an application for international protection if: letter e) The application forms a subsequent application of the applicant and the preliminary examination, in accordance with Art. 59 par. 2 below, has not revealed new substantial elements.

50 1. In case of a subsequent application the competent Decision Authorities shall examine the details of the subsequent application in conjunction with the elements in the file of the initial application. 2. A subsequent application shall be initially examined at a preliminary stage during which it shall be examined whether new, substantial elements have arisen or are submitted by the applicant. During this stage, the applicant shall submit in writing to the competent Receiving Authorities any new elements he/she provides without the realization of an interview. Exceptionally, the applicant may be invited, according to the provisions of this Part, to a hearing to clarify elements of the subsequent application, when the Determining Authority considers this necessary. 3. The competent Receiving Authorities shall ensure that applicants, whose application is being examined according to the provisions of the previous paragraph, enjoy the guarantees provided in Article 41 paragraph 1(a), (b), (c), (e) and (f). Until the conclusion of the administrative procedure for the examination of the application on the preliminary stage, all measures of deportation, return or other form of removal against the applicants shall be suspended. Similarly, during this stage, an extradition decision shall not be enforced, if the applicant claims fear of prosecution at the requesting state. 4. If, during the preliminary examination mentioned in paragraph 2, new substantial elements arise or are submitted by the applicant, which influence the judgement on the application for international protection, the application shall be deemed admissible and shall be further examined in conformity with the provisions of this Part; the applicant shall receive an International Protection Applicant Card. In the opposite case, the application shall be rejected as inadmissible. 5. The procedure of this article may also apply if a family member of the applicant lodges an application after having consented, according to Article 36 par. 6, that his/her case shall be part of an application made on his/her behalf. In this case the preliminary examination, stated in paragraph 2 of this Article shall regard the eventual existence of evidence that justify the submission of a separate application by the depending person. In this case, an interview shall be conducted at the preliminary stage. 6. When an application for international protection is lodged before a final decision on a previous application by the same applicant has been issued, it shall be considered as a complementary element to the initial one and shall not be subject to the provisions of this Article 7. Any new identical, subsequent application shall be filed by the Head of the competent Regional Asylum Office or autonomous Asylum Unit, in accordance with the provisions of Article 4 of the Code of Administrative Procedure. 8. Where an applicant for whom a transfer decision must be enforced pursuant to Regulation (EU) No. 604/2013 of the European Parliament and of the Council, makes a subsequent application, it shall be examined by the responsible Member State, as defined in that Regulation.

them or present them to the relevant authority. **The applicant who has submitted a new application may not be returned or be subjected to any other form of transfer** if the examination of his application is still pending. The authority will then decide whether to declare the application eligible for protection on the bases of new elements produced by the applicant, if eligible for making a different decision other than the one made on the previous request for protection. In the case of a declaration of admissibility, the applicant will have a residence permit and his application for protection will be treated as it is in ordinary cases. On the other hand, if the claim is considered to be a subsequent application, insofar as the applicant has not adduced new admissible items, the claim is declared inadmissible. Such rejection may be challenged before the Appeals Committee within 15 days of the notification and the eventual appeal shall have an immediate suspensive effect.

**Asylum Service shall to verify that the previous procedure for examining the international protection application, following the first application for asylum, has ended, before considering a request for international protection to be subsequent.** Indeed, in cases where no rejection has been issued, the Asylum Service must comply with the will of the asylum seeker, who can **request to reactivate the procedure within 9 months** of withdrawing the application for asylum, or within 9 months from when the Asylum Service interrupted the procedure following the implied withdrawal of the application. In such situations, the applicant's request cannot be considered a subsequent application: it simply re-activates the previous one.

This provision should be read in conjunction to the article providing the interruption of the international protection procedure because of the implied withdrawal of the asylum application.

## ON THE IMPLICIT WITHDRAWAL OF THE INTERNATIONAL PROTECTION APPLICATION<sup>51</sup>

Article 47 paragraph 3 stipulates, in addition to cases of explicit withdrawal of the application, cases of implied withdrawal of the application. As analysed during the monitoring, it created opportunities for abuse and illegal practices. Indeed, the decision to interrupt the application for international protection **is determined by certain conduct that leads to a conclusion about the asylum seeker's alleged disregard for his case**<sup>52</sup>. The situations mentioned in the notes also refer, between cases of implied withdrawal of the application, **the failure to submit to the competent authority the request to renew the permit for asylum or leaving the place of residence** or the place where the applicant is required to reside. These situations occur frequently. For example, many asylum seekers secretly leave the islands to reach the mainland and try to reach other states of the European Union. At the same time, notification of appointments can take place in different ways; not all of them ensure the correct and timely knowledge of appointments and required actions. The notification of appointments with competent authorities (EASO or the Asylum Service) may alternatively take place during the renewal of the Card for asylum seekers, with the submission of a list of identification codes of the asylum seekers convened, via the daily staff present in the governmental camps and in the *hotspot* to summon the asylum seekers concerned, or through announcements emitted by a speaker.

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51 The proposed Rules of Procedure provide for detailed rules on the implicit withdrawal of the asylum application, identifying the cases in which this implicit waiver is established and providing that, if within one month of the communication of the suspension of the procedure, the applicant fails to Contact with the authorities, the request must be rejected definitively (Article 39 of the proposal).

52 To be precise, the question is considered implicitly withdrawn when the applicant does not provide clarification and information on his application for protection, does not appear at the hearing without indicating possible reasons for his absence, runs from the place where he or she is detained or does not respect the limitations of his personal freedom, left his place of residence without asking for any authorization, did not comply with the obligations of documentary production, did not submit himself in time to renew his card as an asylum seeker following its expiration.

## ILLEGAL PRACTICES ENCOUNTERED

The monitoring revealed that asylum seekers can be traced back to Greek territory, on the islands or the mainland through an expired Card for asylum seekers or even in the absence of documents. Foreign citizens can be tracked by law enforcement even outside the island on which they were supposed to stay.

In some of these cases, the citizens that are tracked down and taken to police stations are notified of the rejection of their international protection application at the second administrative rank. As previously stressed, they are detained and taken to pre-removal centres or police stations. Given the scarce possibilities for recourse in front of administrative or judicial authorities, they are often readmitted to Turkey or returned.

**Sometimes, they leave before being interviewed** and are then tracked down by law enforcement officials after their international protection application is **shelved following its "implicit withdrawal"**. This situation occurs with greater frequency given that, as reported by the UNHCR representative in Chios, local police have established systematic controls to track down those who are away from where they should reside and those who find themselves without documents. **These citizens are taken to the police stations and are notified of the shelving of their asylum application** because of their failure to attend their hearing or their failure to comply with the orders given by the authority, which has caused the Asylum Service to ascertain that they show a lack of interest in the international protection process. Nonetheless – and from here the monitoring activities by UNHCR were derived – the police do not enforce nor does the Asylum Service notify asylum seekers of the possibility of reactivating the procedure if, as in most cases, nine months have not yet elapsed after the decision to shelve the application.

The United Nations organization, without publicly declaring its position, but acknowledging the gravity and the risk of having foreign citizens unlawfully returned to countries where their security is not guaranteed, has begun monitoring the presence of these asylum seekers at police stations, at least on the islands, and providing them with adequate legal information, describing the possibility of reactivating the asylum application procedure. UNHCR has found that – at least on Chios Island – **the police force commences readmission or return only after communicating with the Asylum Service.**

## FOCUS ON THE ROLE OF EASO

Reading many of the provisions of Law 4375/16 on asylum it is already possible to note that the European Asylum Support Agency is gaining increased centrality within the Greek asylum system<sup>53</sup>.

Indeed, the first formulation of this law<sup>54</sup> stipulates that EASO should cooperate with Greek authorities: in the training of employees in both the Asylum Service and the Reception and Identification Service; providing support to Greek authorities in asylum procedures, in identification procedures and in the context of reception of asylum seekers; and contributing to the formation of the national list of safe countries of origin through the drafting of COIs<sup>55</sup>. Furthermore, Article 60 states that during the border procedure, the Asylum Service official may be accompanied by personnel and interpreters from EASO when they conduct the personal interview<sup>56</sup>. Indeed, to date, EASO is the one that conducts the personal interviews to assess the eligibility of asylum applications through its officials and interpreters. At the end of the interview, EASO issues a non-binding opinion for the Asylum Service, which remains competent to issue the final decision. Increasingly, the Asylum Service and EASO tend to concentrate on one and only one hearing – both evaluating the admissibility and the qualifications of asylum applications submitted to the islands (this is the merger procedure applicable to asylum seekers with a protection rating of more than 25%). In these cases, **EASO officials are present and issue an opinion on the admissibility of the application, which, in most cases, the Asylum Service tends not to revise**, thus resulting in their direct decision on whether the applicant qualifies as a beneficiary of protection as well. This therefore highlights the

53 See Articles 1f, 2, 11, 14, 39, 57 and 60 of law number 4375/16.

54 See also Art. 2 of COM (2016) 271: «The Agency shall perform the following tasks: (a) facilitate, coordinate and strengthen practical cooperation and information exchange among Member States on various aspects of asylum; (b) gather and analyse information on the situation of asylum and on the implementation of the CEAS; (c) support Member States in implementing the CEAS; (d) assist Member States on training of experts from all national administrations, courts and tribunals, and national services responsible for asylum matters, including the development of a common core curriculum; (e) draw up and regularly update reports and other documents providing for information on countries of origin at the level of the Union; (f) coordinate efforts among Member States to engage in and develop a common analysis of the situation in third countries of origin; (g) provide effective operational and technical assistance to Member States, in particular when they are subject to disproportionate pressure on their asylum and reception systems; (h) assist with the relocation or transfer of beneficiaries of international protection within the Union; EN 22 EN (i) set up and deploy asylum support teams and an asylum intervention pool; (j) deploy the necessary technical equipment for the asylum support teams and the experts from the asylum intervention pool; (k) establish operational standards, indicators, guidelines and best practices in regard to the implementation of all instruments of Union law on asylum; (l) monitor and assess the implementation of the CEAS as well as the asylum and reception systems of Member States; (m) support Member States in their cooperation with third countries in matters related to asylum, in particular as regards resettlement».

55 The same indication is contained in the wording of arts. 8, 9 and 11 of the proposal for a regulation COM (2016) 271. In particular, Art. 11, as outlined in the proposal, provides that «the Agency shall assist the Commission in regularly reviewing the situation in third countries which are included in the common EU list of safe countries of origin e, including those that have been suspended by the Commission and those that have been removed from that list. 2. The Agency shall, at the request of the Commission, provide it with information on specific third countries which could be considered for inclusion in the common EU list of safe countries of origin 3. When notifying the Commission in accordance with Articles 37(4), 38(5) and 39(7) of Directive 2013/32/EU, Member States shall also inform the Agency of the third countries which are designated as safe countries of origin or safe third countries or to which the concepts of first country of asylum, safe third country, or European safe third country is applied pursuant to Articles 35, 38 and 39 of Directive 2013/32/EU, respectively.22 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (OJ L 337, 20.12.2011, p. 9). EN 27 EN The Commission may request the Agency to carry out a review of the situation in any such third country with a view to assess whether the relevant conditions and criteria set out in that Directive are respected».

56 With respect to this possibility, Art. 16 and 22 of the proposal for the regulation of EASO COM (2016) 271, provide that Member States may request the agency's support if they are subject to disproportionate pressure. EASO may, in such cases, under certain conditions also act on its own initiative. Among the activities that may be carried out by EASO in situations of "disproportionate pressure" are included: «(a) assist Member States with the identification and registration of third-country nationals; (b) facilitate the examination of applications for international protection that are under examination by the competent national authorities; (c) provide assistance to competent national authorities responsible for the examination of applications for international protection».

complexity of the relationship between national authorities and non-state actors in asylum procedures.

**EASO officials on the islands have also started conducting personal interviews on the substance** of asylum seekers from nations with an international protection recognition rate of less than 25%.

**EASO has offices within hotspots and performs its functions with great autonomy.** It is well known, for example, that in 2016, the European agency recruited members of a private security agency (G4S) to protect its officials whose safety was determined to be in jeopardy by the numerous riots that broke out within the camps after the agreement with Turkey<sup>57</sup>.

The role of EASO is to become increasingly centralized as a result of recent changes to the asylum law, which seem to attribute more tasks to the agency – albeit in an apparently indirect form – even in second degree procedures.

In particular, **the amendments introduced to Law 4375/16 in March of this year**, apart from simplifying the appointment procedures of the Director of the **Appeals Committees, call upon support from EASO** in the event that many requests for asylum are submitted at the same time<sup>58</sup>. EASO would make available administrative staff with the aim of preparing an analytical and extended opinion for the individual applications submitted, which includes the registration and description of the individual applicant's statements, as well as how they compare to relevant information on their country of origin.

It can reasonably be stated that over the course of the last year EASO saw an extension of its skills and activities within the Greek asylum system. This circumstance is absolutely in line with the greatly supported direction of the EU Commission, which calls for an increasingly central EASO in building a common European asylum system<sup>59</sup>.

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57 <https://apostolisfotiadis.wordpress.com/2016/06/21/while-hot-spots-become-chaotic-easo-calls-in-g4s-for-protection/>

58 The English translation of the proposed amendment by Marialena Avgerinou is available at the following link: [www.pushandback.com](http://www.pushandback.com)

59 See again the "Proposal for the European Union Agency for asylum and repealing Regulation (EU) No. 439/2010" COM(2016)271 final of 4.5.2016, which envisages an overall expansion of the role of the agency in several respects, such as gathering information on countries of origin but, above all, the intervention of its officials in the conduct of national procedures.



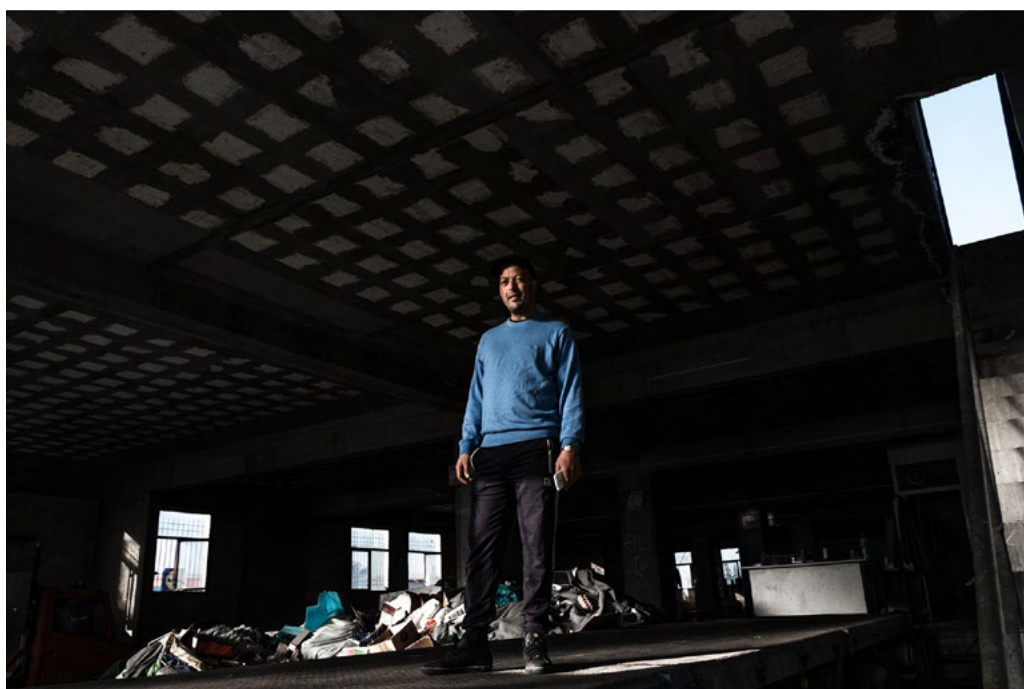
Algerian people living in an abandoned warehouse in Mytilene



A place of worship built by migrants in the abandoned warehouse they have been occupying



Pakistanis cooking chapati for all the migrants living in the abandoned warehouse they share with



A migrant from Algeria living in an abandoned warehouse in Mytilene

# APPEAL AGAINST FIRST-INSTANCE DECISIONS

As already outlined in the July 2016 report<sup>60</sup>, the Greek legal system on asylum provides **the right to appeal against decisions** issued by the Asylum Service at the end of both the admissibility procedure and the substance procedure. The competent body for this has been identified as the Appeals Committee (divided into different sections), which is based solely in Athens<sup>61</sup>. The applicants for international protection may appeal to the Administrative Courts against the decisions issued by that administrative body.

During the monitoring in March 2017, it was possible to **verify the effects of the new Greek legislation that modified the composition of the Appeals Committee**. The new composition of the commission was formulated with the aim of obtaining pronouncements that were more favourable to the overall economy of the system. Indeed, the decision passed by the Asylum Service that an asylum application is inadmissible and confirmed by the Appeals Committee is the essential step for a quick and effective readmission of citizens – at the moment mainly Syrians – in Turkey. Indeed, as will be discussed further, it is possible to appeal to the Administrative Courts against the pronouncements of the Appeals Committee, without automatically suspending its effects. Both the way the injunction is served, as well as the difficulty of gaining access to free sponsorship and technical defence, make it particularly difficult to effectively protect against the risk of return or readmission.

## ON THE COMPOSITION OF THE APPEALS COMMITTEES

In June 2016, there was a revision to the composition of the Appeals Court competent to review the appeals. The new composition, which was officially implemented to incorporate constituents that are closer to governmental bodies, intends to render the Euro-Greek system effective based on **common and shared considerations of Turkey as a safe third country or country of first asylum**. Before the previously cited amendment, the different orientation of the Appeals Committees was one of the major obstacles to the implementation of the agreement because it continued to consider Turkey to be a country in which there is still a possibility of persecution and risk for citizens – particularly Syrians – who would not have sufficient guarantees against *non-refoulement* and the right to life and personal safety<sup>62</sup>.

To be precise, Article 86 of law number 4399/2016, published on 22 June, states that Appeals Committees are composed of **two judges from the Administrative Courts** knowledgeable about of asylum law, and **one person named by the Interior Ministry chosen from a list of persons indicated by UNHCR** and selected based on their training. Before this modification, in addition to the person selected off the list prepared by UNHCR, the other two members came from public administration and were appointed by the National Commission for Human Rights.

Contrary to the previous state of affairs, since the new Appeals Committees entered into force (on 21 July 2016), and up until 31 December 2016, the international protection recognition rate did not go above 0.4%, considering that since 19 February 2017 the new Appeals Committees issued only 21 decisions on admissibility

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60 [http://www.asgi.it/wp-content/uploads/2016/08/2016\\_giugno\\_Esperimento-Grecia.pdf](http://www.asgi.it/wp-content/uploads/2016/08/2016_giugno_Esperimento-Grecia.pdf)

61 The appeal procedure is provided for by Art. 61 and ff. of law number 4357/2016.

62 On the orientation of the Appeals Committees before the legislative amendment refer to the July 2016 Report ([http://www.asgi.it/wp-content/uploads/2016/08/2016\\_giugno\\_Esperimento-Grecia.pdf](http://www.asgi.it/wp-content/uploads/2016/08/2016_giugno_Esperimento-Grecia.pdf)).

and confirmed all decisions on first instance applications that were considered inadmissible<sup>63</sup>. This change of orientation, connected with the change in composition, came to fully comply with the law starting in March 2017, despite criticisms from civil society organizations over the stipulation that **EASO members can formulate opinions even for appeal commissions**.

## THE APPEAL PROCEDURE - TEMPORARY SUSPENSION OF DECISIONS

The asylum seeker has the personal hearing before the members of EASO and the Asylum Service, after formalizing the request for international protection. They – based on the nationality of the applicant – decide on the admissibility and/or the validity of their application.

The asylum seeker whose application was declared inadmissible or unfounded may appeal the decision before the Appeals Committees within 5 days, which is filed and communicated to the Asylum Service<sup>64</sup>. The appeal can also be individually prepared and submitted to the administrative body. However, most applicants are encouraged to make use of a technical defence by the Asylum Service itself. Indeed, **the same official who notify the rejected decision, connects the asylum seeker with the non-governmental organization providing free legal assistance**. On the islands of Chios and Lesbos this NGO is the Greek METAdrasi.

The decision to reject or declare inadmissible the international protection claims immediately suspended after the proposition of the appeal. Asylum seekers have no restriction on their freedom of movement, except those already established by the geographic restriction. The detained asylum seeker continue to be detained, but their transfer is suspended. Within the next 3 days<sup>65</sup>, the Appeals Committee should issue a court decision, but generally it takes longer. **At the time of monitoring, the Appeals Committees have been issuing decisions anymore on appeals against pronouncements of inadmissibility** of international protection claim. To avoid overburdening pending proceedings, the Asylum Service itself interrupted the notifications of inadmissibility.

This last situation is the result of a major appeal still pending before the State Council, which, in addition to other issues, will have to decide definitively on the possibility of considering Turkey as a safe third country or a country of first asylum, at least for Syrian citizens. The Appeals Committees will therefore resume issuing decisions on proposed actions after the decision of the State Council is released, which will – in any case – determine the interpretative direction that committees and judges will have to take on the matter.

**Otherwise, notifications for decisions regarding the admissibility of the request and the rejection/acceptance on the substance of the request for international protection still continuing.** Against the rejection decision – as in the case of an inadmissibility decision – the applicant can appeal to the Appeals Committees and submit the appeal individually or through a lawyer who will most likely be the lawyer provided by the NGOs present within the *hotspot*.

**The appellant has the right to appeal to the judicial authority against the decision of the Appeals Committee<sup>66</sup>.** This procedure is the one which presents the greatest risks of ineffectiveness, since neither widespread and simple access to legal aid paid for by the State, nor the automatic suspension or availability of the contested decision of the appeals committee, is guaranteed.

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63 As in accordance with the AIDA report on Greece (<http://www.asylumineurope.org/news/28-03-2017/aida-2016-update-greece>).

64 As already mentioned above, the islands apply the border procedure provided for in Art. 60 of law number 4357/2016.

65 Article 64e law number 4375/2016

66 Both the Joint Action Plan of 6 December 2016 and the JAP implementation report recommends limiting the degree of appeal «The Greek authorities to explore the possibility of limiting the number of appeal steps».

# THE RIGHT TO AN EFFECTIVE APPEAL

## - THE POSSIBILITY TO BE HEARD

The aforementioned reform<sup>67</sup> has also impacted the right to an effective appeal – which is already scarcely effective. The new procedure give no possibility to the single claimant to be heard, in favour of **an evaluation based solely on the file provided by the attorney**. While the claimant's application is discussed by the Appeals Committee located exclusively in the city of Athens, the asylum seeker remains a few kilometres away, still confined to the islands. **Indeed, the reform of June 2016 also eliminated the possibility for appellants to request a hearing at the Appeals Committee**. The reform has retained the possibility for committees to hear the applicant only when it deems it necessary. In such a case, the personal interview may be held via teleconference, if the applicant is on the islands and the Greek authorities do not allow him to move to the mainland.

## - ACCESS TO FREE LEGAL AID<sup>68</sup>

Regarding access to free legal aid in the case of an appeal before the Appeals Committee, it is apparent that this is provisioned for in Greek law on international protection. This law requires, however, the issuance of an implementing regulation, **which at this time does not appear to be in force**. This gap means that it is not possible, concretely, to obtain legal aid paid for by the State for the proceedings before the Appeals Committee.

To partially fill this gap, **UNHCR is funding a program to provide legal aid to the applicants**. UNHCR finances some associations (JRC and METAdrasi) charged with selecting and supporting lawyers who can assist the protection applicants. In the selection and financing, local attorneys from the place where assistance is needed are given preference: at the time of the monitoring, about 70% of lawyers were employed by NGOs in the places where they have legal practices. At present, 63 lawmakers are funded: 36 on the islands and the rest on the mainland.

**This project, which was designed to provide free legal assistance during the phase of appeal made to the Appeals Committee**, extends, discontinuously, to other phases. In some cases, such legal personnel provide legal assistance even in the first appeal, during detention or in proceedings before the court – but technical representation at such stages is not guaranteed or sufficient, covering only a few cases. On the island of Lesbos, this assistance is provided by the European Lawyers NGO in Lesbos.

Many of the people interviewed, including UNHCR representatives, have emphasized that this service is insufficient to cover the total need for legal aid required by protection applicants, and is geographically limited to the islands and Athens. If it is not possible to aid all applicants, preference is generally given to so-called "pilot cases", as well as vulnerable people, or those who are considered more fragile or in difficulty.

**Regarding the proceedings before the Administrative Courts, it should be noted that there**

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<sup>67</sup> L.n. 4399/2016, published on 22 June 2016

<sup>68</sup> In the proposed Regulation procedure COM(2016) 467 access to assistance and legal representation are detailed in Articles 14-17. It is emphasized among other things that in Art. 15 provision is made that *«the provision of free legal assistance and representation in the administrative procedure may be excluded where: ... (b) the application is considered as not having any tangible prospect of success; ... (c) the appeal or review is at a second level of appeal or higher as provided for under national law, including re-hearings or reviews of appeal»*.

is no specific rule concerning access to legal aid for protection seekers<sup>69</sup>. There is a general law regarding anyone's access to that benefit for Greek and citizens alike, but it is not applied to protection seekers<sup>70</sup>. In the project funded by UNHCR, it is also possible that they will sustain the costs of legal assistance before the Courts. However, the current shortcomings of available legal personnel limit this possibility to cases considered to be particularly relevant or to so-called "pilot cases".

## - THE SUSPENSION OF THE CONTESTED DECISION

**Greek legislation stipulates that the rejection or inadmissibility measure issued by the Asylum Service is immediately suspended in the case of an appeal to the Appeals Committee<sup>71</sup>.**

Notification of the measure takes place within the hotspot and asylum seekers are immediately put in contact with their defenders. Claimants remain free to move during the appeal process or, if they are already detained, their transfer or return is suspended. **On the contrary, the measure issued by the Appeals Committee is immediately enforceable and an appeal to the administrative court does not suspend its effectiveness.** In this case, the way of notification of the measure differs from the one previously described. The applicant is notified of the rejection or inadmissibility measure issued by the Appeals Committee **in the presence of the police forces or in such a manner as to immediately limit the personal freedom** of the asylum seeker in order to make the subsequent readmission to Turkey or return more effective. Indeed, even when the applicants can get a consultation with a lawyer, they can only do so inside the police station where they are detained or from the centre of Moria where they are transferred for return or readmission to Turkey<sup>72</sup>. From an interview with an UNHCR representative in Chios, it emerged that the United Nations Refugee Organization is aware of the situation of non-access to technical defence for asylum seekers whose applications were rejected or declared inadmissible by the Appeals Committees. UNHCR constantly monitors Chios police stations to see if there are any new cases – preferably vulnerable or of major strategic interest – that can be directed to METAdrasi lawyers, who are part of their funded project<sup>73</sup>. However, this lack of systematic access to technical defence has never been the subject of a clear and public position on the part of the NGOs present or even by UNHCR itself.

The lack of access to technical defence, as well as being physically precluded through the restriction of personal freedom, is **aggravated by the impossibility of accessing state compensated legal aid.** In fact, the law provides that the applicants may bring the matter before judicial authorities (in addition to having recourse to declare the inadmissible measure or refusal of the international protection application to be illegitimate) even in a pre-trial (ante causam) case where they can request a release within a few days of suspension of the transfer order. However, this case is subject to payment of a costly standard contribution, in addition to the remuneration for the defence attorney, which is in no way covered by state compensated legal aid, since access to such remains completely blocked. At this stage, it is clear that only the sporadic intervention of NGO lawyers financed by the UNHCR project may allow some of these citizens to effectively have recourse to oppose the measure issued by the administrative authority.

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69 The general law in reference is Law No. 3226/2004

70 As specified by the lawyers interviewed, the rule would not in practice apply to citizens because there are no rules or regulations that address specific issues related to the citizenship of the subjects concerned. In particular, reference is made to the country-of-origin taxation certificate, which should be issued by the embassy of each applicant; however, asylum seekers cannot contact the authorities of their country of origin, nor can they go to Athens where embassies are found.

71 Art. 61 Law No. 4357/2016.

72 See Focus Detention.

73 Please refer to the section on access to free legal aid.

## FOCUS ON DETENTION

Under certain conditions, the Greek Asylum Act provides for the possibility of appealing the administrative detention of: citizens or stateless persons caught crossing the border irregularly (Article 14<sup>74</sup>), asylum seekers (Article 46<sup>75</sup>), and asylum seekers in the context of the border procedure (Article 60<sup>76</sup>) Detention may be further required for the purposes of carrying out a readmission or return measure under law number 3907/11 which incorporated the so-called Return Directive.

The act of depriving asylum seekers, or persons for whom their request for asylum is denied / deemed inadmissible, of their personal freedom is primarily used to ensure their readmission in Turkey. This measure is performed mainly on the island of Lesbos, at the Moria *hotspot* or in police stations.

As already explained in the previous report, applicants for asylum who have submitted a request at the border are formally subject to detention measures within the RIC for a maximum period of 25 days after which the measure is revoked and a clause on territorial restriction is then applied<sup>77</sup>, requiring applicants not to leave the territory of the islands for the entire duration of their asylum procedure.

The legislation, frequently not respected, is that provisioned in Art. 14 of the Greek law on asylum.

This ruling provides for precise regulation regarding procedures and guarantees for foreigners detained, though it is not consistently respected. For example, Article 14 provides for the possibility of challenging the decision of the RIC manager ordering the detention before the Administrative Judge. This, however, is often impossible, right from the onset, because the concerned people are rarely notified of such measures. Additionally, those who have expressed their willingness to seek international protection should be welcomed in different and more appropriate RIC facilities. Vulnerable people (including unaccompanied minors) can be detained but in separate structures and exclusively after being reported to social services. According to the information collected during this research, asylum seekers are not transferred to more appropriate facilities and vulnerability reporting is not systematically performed.

In Samos and Chios, one continues to come up against a situation of de facto freedom, whereby applicants, although formally detained at *RICs/hotspots*, may freely leave, while remaining subject to geographical restraint. Generally speaking, the situation is analogous in Lesbos as well – even though Sector B was established within Moria *hotspot* in the summer of 2016 and was supposed to be used for the administrative detention of certain categories of foreigners coming from specific geographic areas.

The preparation of this area for effective detention within the Moria camp, as well as the application of the

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74 In this case, the order of restriction of personal freedom is issued by the head of the Reception and Identification Centre where the foreigner is detained within 3 days of his entry. The same entity can decide to extend the detention for a maximum period of 25 days or, in the case of a significant increase in arrivals, request transfer to a centre on the mainland. Against the measure of restriction on personal liberty, it is possible to appeal before the Administrative Court of 1st degree. The restriction of personal freedom under Art. 14 can also be applied to asylum seekers, vulnerable people and unaccompanied minors who are waiting to be transferred safely to a reception centre.

75 Asylum seekers may be subject to detention measures when they applied for international protection while they were in detention and this is considered necessary for the purpose of analysing the asylum application for any one of the following reasons: (a) it is necessary to ascertain the identity or nationality of the applicant; (b) there is a risk of escape under Law No. 3907/11 which has recognized the Return Directive; (c) the application was made solely for the purpose of delaying return; (d) the applicant constitutes a danger to national security or public policy; (e) there is a risk of flight under Article 2 of the Dublin Rules. The detention order shall be made by the competent Police Chief for a maximum of 45 days extending for another 45 in cases (a), (b), (c) and three months in the others. Asylum seekers should be detained in special facilities. Unaccompanied asylum seekers, in "exceptional cases", remain in detention, as a last resort (*extrema ratio*), to ensure their safe transfer to appropriate reception facilities and their detention cannot last more than 25 days.

76 Under this rule, foreigners who have applied for asylum at the border may be detained for a maximum period of 28 days in which the procedure for the recognition of international protection is to be completed. If this deadline is exceeded, the asylum seeker continues the procedure as provided by law in relation to the ordinary and accelerated procedure in the state of liberty.

77 Art. 41 paragraph 1 law No. 4375/16

detention measure to only certain categories of migrants, has often been traced back by interviewees to the information contained in the police circular of the Ministry of the Interior and the Head of the Greek Police from 18 June 2016, which is better known as the "Pilot Project". This circular contains guidelines for the Aegean Island's police authorities regarding detention procedures that are particularly aimed at relocating persons to Turkey. Firstly, it distinguishes "economic profile" from "refugee profile" migrants. The first category would include asylum seekers from countries with a low international protection recognition rate ("Pakistan, Bangladesh, Morocco, Tunisia, Algeria, Egypt, etc.") and the second, includes those coming from countries with a high recognition rate of protection ("Syria, Iraq, Yemen, South Sudan, Palestine, Eritrea, Somalia etc."). The circular stipulates that, in the case of readmission to Turkey, only the first category may be included in the list of "undesirable foreigners", with the consequence that it makes it impossible for them to apply for entry visas to Greece in the future. It has in fact been discovered by organizations on Lesbos island that this kind of discrimination based on the nationality of applicants is further reflected in the detentions occurring in sector B, where only persons belonging to nationalities with an "economic profile" would be held, mostly Algerian citizens.

Within Sector B there are currently detained people who have been notified of the denial / inadmissibility of their asylum application, people who have applied for admission to Assisted Voluntarily Return Programs, people who have withdrawn their asylum application, and people who have been charged of having "delinquent behaviour"<sup>78</sup>. Following the numerous rebellions within the camp and the harsh living conditions within it, it would appear that the instrument of detention was also sometimes used – informally – for punitive purposes.

The encountered organizations report that lawyers are effectively denied access to Sector B, such that sometimes conversations with assisted detainees must be conducted outdoors in an area separated by a wire mesh, but totally lacking confidentiality.

The circular of June 18 describes in detail the various factual circumstances that may justify the use of the instrument of detention against those who were caught illegally crossing the border, even following the submission of their application for asylum. The primary objective is obviously to ensure the effectiveness of readmission procedures in Turkey. It is for this reason that the Ministry and Police Chiefs repeatedly underline the importance of ensuring the arrest and detention "within a limited space" of those who are notified of the negative action of the Appeals Committees or who have withdrawn their asylum application, as well as those who have violated alternative measures for detention or geographical restraint.

As regards unaccompanied minors, their detention is not excluded from Art. 14 and 46, as already mentioned. On the contrary, in the case of asylum-seekers, the law expressly states that they may be held for up to 25 days with the "protective" purpose of ensuring them access to more appropriate facilities.

The measure of "protective custody", as it is sometimes called, would seem to find less of an application in March 2017 than it did at the time of the previous monitoring. After a period in which children could be detained for up to several months, even promiscuously with adults, it would seem that today the phenomenon is much smaller since minors on the islands are rapidly transferred as vulnerable applicants to structures on the mainland. This situation seems to be about to change in view of the forthcoming adaptation of Greek legislation and practices in compliance with what the European Commission has called for with the JAP<sup>79</sup>.

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<sup>78</sup> People who committed crimes of theft, threats, "verbal abuse" or injuries. The circular does not specify whether in these cases only the presence of reports or complaints should be considered for the purpose of assessing "delinquent behaviour", or the existence of definitive convictions against foreigners concerned.

<sup>79</sup> See also the report on the implementation of the JAP of 2.3.2017, regarding the possibility of returning "vulnerable asylum seekers" to Turkey, p. 2: «The Greek Reception and Identification Service, together with EASO, are working on defining some of the vulnerability categories and developing a Standard Medical Assessment Template for the processing of vulnerable persons. In a meeting on 12 January, EASO, the Greek Asylum Service and the Greek Reception and Identification Service identified information needs related to the treatment of vulnerable applicants in Turkey and access to health care. EASO is working with the Greek Asylum Service, which has also received Member States' responses, to include an updated information pack on Turkey with reference to incurable/serious diseases».

While the transfer times depend on the persistent shortage of vacancies in appropriate structures, the mechanism to appoint a tutor to the minor does not require a very long waiting time.

## FOCUS ON VULNERABLES AND DUBLIN REUNIFICATIONS. THE NORMATIVE SITUATION AND PROSPECTS

Greek legislation defines with great precision the categories of asylum seekers who must be considered “vulnerable” and must therefore be subject to particular procedural regulations due to their physical and/or psychological fragility.

First of all, paragraph 8 of Article 14 indicates the following categories of vulnerable asylum seekers: unaccompanied minors, people with disabilities or serious illnesses, the elderly, pregnant women or women with new-borns, single-parent families with younger children, victims of torture, rape or other forms of psychological, physical or sexual violence.

Such subjects are excluded, as already explained above, from the border procedure and, in part, from accelerated procedures. Asylum seekers, who have family members in other EU Member States with whom they could be reunited, according to the provisions of EU Regulation 604/2013, are not subject to the border procedure.

**Additionally, it should be added that both those considered vulnerable and those who could benefit from reunification under EU Regulation 604/2013 are not subject to the admissibility procedure**, but are transferred as soon as possible to the mainland and their request is directly examined on its merits.

At this stage, it is useful to point out that **the failure to submit such vulnerable persons and applicants with family members in other EU countries to the admissibility procedure is not a result of a legislative provision**, but a decision by the Greek Government, which has so far exonerated these subjects from this procedure. At present, there is no doubt that vulnerable persons would not find in Turkey conditions of life and assistance that would guarantee the protection of their specific physical and psychological frailties, while those entitled to reunification under the Dublin Regulations could have easily exercised that right from Greek territory. **Conversely, if returned to Turkey, their right to family unity would have been undermined.**

The monitoring carried out shows that many people do **not fall within the application of the EU-Turkey Statement**<sup>80</sup>. Indeed, almost half of asylum seekers, according to the Asylum Service in Athens<sup>81</sup>.

Specifically, the need to relocate vulnerable persons to the mainland responds to evident **humanitarian considerations and concern for their welfare**. Indeed, on the islands, as identified during the observations carried out, there are no sanitary, reception, recreational and educational facilities suitable to meet the needs of subjects in states of severe physical and psychological vulnerability.

<sup>80</sup> According to UNHCR data, on average 29 people migrate daily from the islands to the mainland. See <https://data2.unhcr.org/en/documents/download/56356>.

<sup>81</sup> According to the data provided by the Asylum Service between 20/03/2016 and 28/05/2017 7578 asylum seekers were sent to the Greek Islands in this situation.

However – and from here derives the interest in not transferring vulnerable asylum seekers to the mainland – **Turkey would only accept readmission from asylum seekers from the islands. Thus, those on the mainland could not be moved to Turkey.** It is for this reason that, once transferred to the mainland, Greece no longer has any interest in submitting asylum applications from vulnerable persons to the admissibility procedure.

It would be different if the vulnerable subjects remained on the islands and their applications were preliminarily screened for admissibility. In this way, the removal of a large proportion of asylum seekers from the enforcement of the EU-Turkey Statement would be avoided.

As mentioned, vulnerable persons could then easily be subjected to the admissibility procedure (as this is not excluded by law), while not being subjected to the border procedure and the accelerated procedure. Evidently, any legislative amendment to this effect would be exposed to excessive criticism from all fronts, both by civil society and international organizations, given the vulnerability of these specific asylum seekers. For this reason, the Greek state may not change the legislation in question, but **require such asylum seekers to limit their movement to the territories of the islands on which they arrived.** Thus, despite the serious damage and discrimination that could be detrimental to these individuals, their asylum applications could readily be submitted to the admissibility procedures on the islands, without the risk that they would reach the mainland thus rendering their readmission to Turkey impossible.

Obviously, to achieve this objective, it is necessary that Turkey be a suitable country to accept asylum seekers with specific vulnerabilities (or at least considered to be as such).

For all the reasons put forward, the EU Commission has already asked the Greek state, through the JAP, to apply the admissibility procedure to vulnerable asylum seekers<sup>82</sup>. Thus, the Greek Reception and Identification Service, together with EASO, have moved in two directions: on the one hand, they have drawn up guidelines to evaluate an asylum application submitted by a vulnerable subject; on the other, they are collecting information on the treatment of vulnerable asylum seekers and their access to the Turkish health care system<sup>83</sup>.

Additionally, the EU Commission and the Greek Government are moving in the same direction with regard to **asylum seekers who could be reunited with family members present in EU Member States**<sup>84</sup>. The European Commission, already with the December 2016 document, asked the Asylum Service to apply the admissibility procedure, provided for in Articles 54-56 of law number 4375/2016, to the applications for protection submitted by these subjects.

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82 In the Dublin Regulation, the admissibility procedure is also applicable to those who may benefit from reunification under its regulations. It reads that *«Before the start of the process of determining the Member State responsible, the Regulation introduces an obligation for the Member State of application to check whether the application is inadmissible, on the grounds that the applicant comes from a first country of asylum or a safe third country. If this is the case, the applicant will be returned to that first country or safe third country, and the Member State who made the inadmissibility check will be considered responsible for that application. The Member State of application must also check whether the applicant comes from a safe country of origin or presents a security risk, in which case the Member State of application will be responsible and has to examine the application in accelerated procedure»*. In the proposal of the Procedural Regulations there are no obstacles to submitting even vulnerable subjects to the admissibility procedure.

83 Processing the vulnerability cases: · The Greek Asylum Service to examine, on a case by case basis and in full respect of Articles 6 and 7 of the EU Fundamental Rights Charter the application of the inadmissibility procedure under Article 55 and 56 of Law 4375/2016 (Article 33 of Directive 2013/32), to vulnerable applicant cases with a view to their possible return to Turkey. · Greek authorities to examine whether Article 60(4)(f) of Law 4375/2016 could apply to vulnerable applicant cases in accordance with Article 24(3) of the Asylum Procedures Directive. 3 · EASO to provide the Greek Asylum Service with relevant information, particularly as regards the treatment of vulnerable persons in Turkey, which would enable the above mentioned examination. The Greek Reception and Identification Service, together with EASO, are working on defining some of the vulnerability categories and developing a Standard Medical Assessment Template for the processing of vulnerable persons. In a meeting on 12 January, EASO, the Greek Asylum Service and the Greek Reception and Identification Service identified information needs related to the treatment of vulnerable applicants in Turkey and access to health care. EASO is working with the Greek Asylum Service, which has also received Member States' responses, to include an updated information pack on Turkey with reference to incurable/serious diseases.

84 According to what the Asylum Service provided to us between 20/03/2016 and 28/05/2017, 2557 asylum seekers were transferred to the Greek Islands in this situation.

Even in this case, the immediate transfer to the mainland of these asylum seekers is easily explained: from Athens, their reunification with family members living in other member countries would have been easier. However, as already pointed out, once they have landed on the mainland, they are taken away from possible readmission in Turkey and the operatives of the agreement. Even so, the Greek Government may decide to apply the admissibility procedure by arranging for them to stay within a limited geographic area during the time required to complete the admissibility procedure.

The assessment of the possibility of declaring their claim inadmissible pursuant the already known categories of first country of asylum and safe third country **should specifically keep in mind the possibility of accessing family reunification directly from Turkey<sup>85</sup>, a possibility that is not foreclosed by the JAP.**

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85 Processing the Dublin family reunification cases: · The Greek Asylum Service to examine, on a case by case basis and in full respect of Article 7 of the EU Fundamental Rights Charter the application of the inadmissibility procedure under Article 55 and 56 of Law 4375/2016 (Article 33 of Directive 2013/32), to Dublin family reunification cases with a view to their possible return to Turkey, subject to having received from EASO and Member States relevant information which: a) would provide sufficient legal certainty as to the possibilities of family reunification from / in Turkey; and b) would enable the above mentioned examination. The information required should particularly concern the rights to family reunification from Turkey or in Turkey under the national laws of Member States, to the extent not covered by the Family Reunification Directive (case of family members who have been recognised as beneficiaries of subsidiary protection by a Member State), and the national law of Turkey. · The Greek authorities to adopt the necessary provisions to make Article 60 (4) (f) of Law 4375/2016 applicable to Dublin family reunification cases applicable.



Outside the Hotspot of Moria



Outside the Hotspot of Moria. B., from Guinea, reached Lesbos by sea from Turkey

# LEGAL REMEDIES AVAILABLE AT THE EUROPEAN AND NATIONAL LEVEL

The aforementioned July 2016 report devoted an entire section to the analysis of factual and observed violations to European and international law — violations that could be taken up by the European Court of Justice or the European Court of Human Rights. It also illustrated remedies available in EU legislation, the effects of which can be taken further into account here. Thus, by confirming the possibility of bringing all the violations already outlined before both the European Court of Justice, to evidence the disparity between domestic and European law, and before the ECHR, to raise the issue of violations to the European Convention on Human Rights, further legal instruments are specified that could be implemented or have already been put in place to counter the *non-agreement* between the EU and Turkey.

## ACTION FOR ANNULMENT BEFORE THE EUROPEAN COURT OF JUSTICE. THE ABILITY TO ACT WITH THE INSTRUMENTS OF NATIONAL LAW: THE LEGITIMACY OF NATIONAL PARLIAMENTS.

As the July 2016 report already explained in greater detail (which will only be cursorily referred to so as to focus on the nature of the agreement), the first paragraph of Article 263 of the Treaty on the Functioning of the European Union (TFEU) establishes that «*the Court of Justice of the European Union **shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.***». Furthermore, as far as we are concerned, pursuant to the fourth paragraph of Article 263 of the TFEU, «*any natural or legal person may (...) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*». The action for annulment was lodged during the first ASGI monitoring by three asylum seekers in Greece<sup>86</sup>. On 28 February 2017, the European Court of Justice issued three ordinances<sup>87</sup> in which it declared its lack of jurisdiction over these three proceedings. As already stated, the General Court of the European Court of Justice – re-establishing the factual background that preceded and followed the conclusion of the agreement – ruled that **the European Council, as an institution, had not concluded an agreement with the Turkish Government in the name of the European Union**, and the European Union has therefore not been bound to the terms of Art. 218 of the TFEU. On the contrary, the statement or agreement (depending on the differing viewpoints of its defendants and appellants) **was made by the individual member countries present through their representatives**. The General Court concludes that independent of its juridical nature – whether merely political as claimed by the European Council and the European Commission, or capable of producing binding legal effects, as the applicants claim – the *EU-Turkey statement*, as circulated by press release number 144/16, cannot be considered a measure adopted by the European Council, or any other institution, body, or agency of the European Union. Therefore, the cases in question would fall outside the applicable jurisdiction of Article 263 of the TFEU, since the court lacks jurisdiction over agreements concluded by the Member States.

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<sup>86</sup> Cause T-192/16 NF v. European Council T-193/16 NG v. European Council T-257/16 NM v. European Council.

<sup>87</sup> Full text of the pronouncement is available at the following link: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf>

**This statement**, denying the circumstances – that up until then were uncontested – in which the statement/agreement with Turkey was taken by the EU through its institutions, **paved the way for the possibility of activating internal legal remedies provisioned by individual Member States**. Indeed, citizens and jurists in each Member State of the European Union may activate legal remedies that are provisioned by their own law to take up the issue of the illegitimacy of the agreement – from a formal point of view (such as in the case whereby the competence of a state body had not been respected, or that the procedures for the formation of legislative acts had not been followed) or from a substantive point of view (when the rules contained therein are contrary to internal laws or regulations).

## THE POSSIBILITY OF COUNTERING THE EU-TURKEY STATEMENT BY RESORTING TO LEGAL REMEDIES UNDER ITALIAN LAW. RAISING THE ISSUE OF CONFLICT OF COMPETENCE BEFORE THE CONSTITUTIONAL COURT

**According to the ruling of the General Court of the CJEU, Italy would be among the signatory parties to the agreement with Turkey.** The authors of this text continue to concur with the appellants in this case, and with many scholars of European law<sup>88</sup>, that the agreement reached with Turkey can take on the form of an international law agreement.

As will be explained below, Italian constitutional law provides that international law agreements are to be concluded by subjects who are authorized to commit the Italian state to comply with certain obligations and are subject to ratification by the parliament under certain circumstances. This can certainly be of relevance to us in this specific case since **one may thus advance that the EU-Turkey Statement was taken up in violation of the prerogatives of the Italian parliament**, resulting in a conflict of competency between the legislative power (which had to intervene in the ratification to confer efficacy and validity on the agreement) and the executive power who, through ministers, had signed the act without involving the parliament. The conflict of competency may arise between subjects holding a constitutionally limited sphere of legal competence. These disputes concern the powers of the State, in which the actions and behaviours of its respective bodies are adequately configured to be the ultimate and unmistakable expression of their respective power<sup>89</sup>.

To be specific, the agreement with Turkey appears to have been concluded in violation of the constitutional norms of Art. 80, particularly regarding the constitutional order, that completely bypassed the parliament, which, on the contrary, should have ratified such a type of agreement. **The Constitution stipulates that governmental members can legitimately resort to procedural simplifications when signing agreements only if the agreements are not of a political nature or do not contain financial commitments**. This agreement, however, definitely has a political content, and has as its subject matter the rule of law. Both circumstances lead one to the conclusion that the agreement should have been passed for ratification by the parliament, which has not occurred. Additionally, the agreement with Turkey commits Italy

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88 In particular, see Peers' *"EU-Turkey refugee deal: a legal assessment"*; *"EU-Turkey Refugee Deal Is Vulnerable to Legal Challenge"* by Mandal; *"L'accord Union européenne – Turquie: faux semblant ou marché de dupes?"* By Labayle; *"Will the EU-Turkey migrant deal work in practice?"* by Chetail. Chiara Favilli, *"La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?"*, in Human Rights and International Law, 2016, 2, pp. 1-22 (<http://www.sidi-isil.org/wp-content/uploads/2016/05/Chiara-Favilli.pdf>); On this point see also M. Gatti, *"La dichiarazione Ue-Turchia sulla migrazione: un trattato concluso in violazione delle prerogative del parlamento?"* (<http://rivista.eurojus.it/la-dichiarazione-ue-turchia-sulla-migrazione-un-trattato-concluso-inviolazione-delle-prerogative-del-parlamento/>)

89 Article 134 of the Italian Constitution attributes to the Constitutional Court the task of judging conflicts between state powers. **Judicial proceedings before the Court can be initiated either by claims that one's competency has been usurped by others**, or by denouncing the misuse of another's attributions which hinder the full exercise of their powers. According to the case law of the Constitutional Court, merely hypothetical conflicts are not allowed: **it is necessary for the behaviour (or act) to be capable of producing a concrete injury to the other's attributions**.

to contribute economic resources, given that the same press release claims that Member States agree to pay several billion euros to support their Turkish counterpart to meet the needs of refugee reception.

All of these elements suggest that the Italian Parliament could raise, through the two chambers<sup>90</sup>, this conflict of competency to the Constitutional Court by calling on the government as the defendant.

## ACCESS TO THE CONTENT OF THE AGREEMENT AND THE APPEAL AGAINST DENIED ACCESS TO DOCUMENTS AT THE EUROPEAN COURT OF JUSTICE

One of the major obstacles encountered by associations and single individuals aiming to counter the policies of bilateral agreements, and particularly the one with the Turkish government, is related to **the lack of timely and complete access to the text around which the agreement between the European Union and Turkey was formed**. In fact, more than a year later, the text of the statement has not yet been made public. Access to the text appears to be essential, even in the light of the recent ruling by the General Court of the European Court of Justice. Indeed, this claim has already been undertaken by the **Access Info Europe** association<sup>91</sup>, based in Madrid. **The association has tried twice now to get the text of the agreement by accessing the AsktheEu.org platform**. However, they have received incomplete answers and access was denied on the basis of generic reasons: *«the need for protection of legal advice, decision-making process and international relations»*. **Therefore, against such denials, the association filed an appeal with the European Court of Justice**, arguing for access in support of strong public interest and the great uncertainty that remains among the asylum seekers still stranded in Greece. The appeal is still pending.

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90 The procedure by which the constitution of the constitutional court – or the elevation of the conflict itself – is deliberated in the conflict between the two branches of the parliament, **with the only exception represented by the body competent to formulate the proposal for the Assembly**. The Senate prevails on the principle of competence on this matter. The rule of reference is Article 34, paragraph 1, of the Senate Rules: *«The President of the Senate shall refer bills and any business of a general nature on which a committee is required to resolve pursuant to these Rules to the committees having jurisdiction over the subject matter, or to a special committee, and shall duly inform the Senate thereof. The President of the Senate may also refer any texts, papers, measures and documents received by the Senate to a committee having jurisdiction over such matters»*. The subsequent phases in the procedure followed by Parliament in either passing judgement on the constitution or in raising the issue of a conflict of competence, are identical. **The two Presidents read the respective decisions in the Assembly for the Committee Bureau of the Chamber of Deputies and, in the Senate, for the select committee or the Commission responsible for the necessary Assembly ratification: the deliberations are determined to be acceptable unless requests for going to a vote are advanced (a tacit vote)**.

91 The statement regarding the action taken by the Access Info Europe association can be found at the following link: <https://www.balkanicaucaso.org/eng/layout/set/print/ECPMF/ECPMF-news/EU-Turkey-Agreement-an-appeal-to-the-European-Court-of-Justice>

## ACTION OF THE EUROPEAN OMBUDSMAN<sup>92</sup>

### - THE IMPACT OF THE EU-TURKEY AGREEMENT ON RESPECT FOR HUMAN RIGHTS. THE ROLE OF THE EUROPEAN COMMISSION

Some Spanish associations and some private citizens have appealed to the European Ombudsman with appeals no. 506-509-674- 784 -927 1381/2016/MHZ, to raise the issue of the injury that the EU-Turkey Agreement inflicts in relation to the human rights of the citizens and asylum seekers involved. To be precise, associations have informed the European Commission of the serious violations on the fundamental rights of asylum seekers due to the implementation of the agreement, particularly on women and children. Such a situation, according to the appellants, would undoubtedly require a specific and thorough assessment of the state of respect for the fundamental rights of the individuals involved. The European Commission, urged by the Ombudsman, first emphasized that, given the merely political nature of the agreement, it would not have been necessary to set up *assessment* mechanisms for human rights violations. Secondly, the Commission points out that, both with the communication of 16 March 2016 and with subsequent communications and reports, it has in any case complied with requests for monitoring. The European mediating body, on the other hand, pointed out that the purely political nature of the agreement does not exonerate the Commission from guaranteeing that its implementation will be carried out in full respect of the fundamental rights shared by all EU Member States. The mediating body, therefore, **put an end to the dispute<sup>93</sup> by recommending that the Commission give greater weight to, and better monitor the impact of, the Human Rights Respecting Agreement in future dealings on the implementation of the agreement.**

### - THE ROLE OF EASO: THE LEGITIMIZATION AND LEGITIMACY OF ITS ACTION UNDER THE EU-TURKEY STATEMENT<sup>94</sup>

On 28 April 2017, the European Centre for Human and Constitutional Rights (ECCHR) – with the support of *Brot für die Welt* – filed an appeal with the European Ombudsman on the role played by EASO regarding decisions of inadmissibility, asking the Ombudsman to open an investigation into it. Petitioning organizations point out that following the study of a series of interviews and decisions relating to the procedure for assessing the admissibility of asylum applications, **serious violations of the standards of fairness and impartiality** have arisen. To be precise, it has emerged that **interviews are conducted in a manner that does not allow for an impartial assessment of the individual case**, that there is no room for assessing the vulnerability of applicants, and that there is a lack of consideration of individuals in the critical assessment of

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92 The European Ombudsman is an independent and impartial body which calls upon the EU administration and conducts investigations into cases of maladministration in the activities of institutions, bodies, offices and agencies of the European Union. Only the European Court of Justice, in the exercise of its judicial function, does not fall within the Ombudsman's mandate. The latter identifies cases of maladministration where an institution fails to respect fundamental rights, rules or principles of good administration. This includes, for example, administrative irregularities, injustice, discrimination, abuse of power, lack of response, refusal of access to information and unjustified delay. All citizens or residents of the European Union, as well as companies, associations or other bodies with registered offices in the EU, may file a complaint. To do this you do not have to personally be a victim of the reported case. It should be recalled that the European Ombudsman can only deal with EU administration complaints, not those concerning national, regional or local administrations, even if they concern matters of the European Union. For more information, go to [www.ombudsman.europa.eu](http://www.ombudsman.europa.eu)

93 See the European Ombudsman's document at the following link: <https://www.ombudsman.europa.eu/cases/decision.faces/en/75160/html.bookmark>

94 For more information <https://www.ecchr.eu/en/international-crimes-and-accountability/migration/greek-hotspots/articles/international-crimes-and-accountability-migration-greek-hotspots.html>

whether to apply the category of safe third country to Turkey. Lastly, the ECCHR argues in the present case that EASO is violating its own guidelines for conducting interviews, and that its activity and its role in the procedures concerning the international protection application go beyond the powers and abilities that European law has attributed to the agency. The Ombudsman has not yet ruled on this appeal.

## APPEALS TO THE ECHR FOR THE VIOLATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

As detailed in the July 2016 report, Greece continues to incur numerous violations of the European Convention on Human Rights. These violations concern several aspects: the right to an effective appeal, the conditions of reception, the treatment to which asylum seekers are subjected, the restriction of their personal freedom. To fully deliberate over what has been mentioned, one must take into consideration some of **the pending proceedings before the European Court of Human Rights**.

In two cases, the ECHR ruled on the admissibility of an appeal and had asked specific questions to the appellants to better clarify the factual and legal situations indicated in the preliminary application.

The first appeal recorded under registration number 39065/16 was introduced by Mr. Olam Sarvar AHMADI and others against Greece on 5 June 2016 to raise the issue of the violation of Art. 2 and 3 of the Convention on the conditions and treatment to which asylum seekers are subjected to, especially in the Vial *hotspot*. The appeal is still pending.

The appeal to ECHR submitted by Ehsanullah SAFI and others against Greece, filed on 21 January 2015, is registered under registration number 5418/15 and is still pending. The appellants have come before the European Court of Human Rights to raise the issue of violations to Articles 2, 3 and 13 of the Convention. The case emerged from a terrible shipwreck on 20 January 2014 in the Aegean Sea, that occurred even though the fishing boat carrying the appellants was ferried away under the rescue operations of the Greek Coast Guard. The appellants, in a detailed reconstruction of the facts, specified certain elements that confer responsibility to the Coast Guard in causing the wreck. They additionally detailing the kinds of treatment and invasive body searches that foreign asylum seekers have been subjected to once they reach the island of Farmakonisi. Criminal proceedings against the complainants have been filed by the Greek authorities.

In another case<sup>95</sup>, the ECHR requested the Greek Government to provide more information on the situation of Syrian citizen BJ, a Christian of Armenian origin who, after living in Turkey for a year, was subject to serious limitations on his fundamental rights, and managed to reach Greece and apply for international protection in June 2016. And yet, his application for protection was declared inadmissible as Turkey was considered a safe third country for him. This decision, appealed before the Appeals Committees, has not been amended. Furthermore, this is only one of the two cases in which the Appeals Committees in their previous configuration did not accept appeals against the decision of inadmissibility. Consequently, the Court has posed precise questions to the Greek Government, which will now have to be answered regarding the compatibility of the admissibility procedure with Articles 3 and 13 of the Convention, on conditions of detention and reception in Turkey, on their compatibility with Art. 3, and finally on the detention conditions at the Mytilene police station where he was detained for more than a month and a half.

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95 <http://rsaegrean.org/the-european-court-of-human-rights-communicated-the-case-of-b-j-v-greece-and-has-addressed-the-greek-government-with-specific-questions/>



Here and above:  
Lifejackets and rafts in a dump in  
northern Lesbos

