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## **M.S.S. v. Belgium and Greece (No. 30696/09) group of cases**

General measures regarding asylum procedure and conditions of detention for the execution by Greece of the judgments of the European Court

Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights

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*The opinions expressed in this document are binding on neither the Committee of Ministers nor the European Court.*

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## I. INTRODUCTION

1. The *M.S.S v Belgium and Greece* case concerned the transfer of an asylum seeker to Greece by the Belgian authorities in application of the EU Dublin II Regulation. The Court found the following violations of the Convention with regard to Greece:

Shortcomings in the asylum determination procedure, which did not afford sufficient guarantees that the applicant's expulsion to a country, where he ran a risk of being subjected to treatment, contrary to Article 3 would be avoided. The Court noted that inefficiencies existed at all stages of the asylum process, namely, the access to the asylum procedure, the examination of asylum applications and the judicial review thereof (Art. 3 and 13).

The conditions of detention experienced by the applicant in a holding centre constituted degrading treatment (Art. 3).

The living conditions of the applicant as an asylum seeker were in violation of Article 3.

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2. On 20 July 2011, the Greek authorities provided their action plan as to the general measures. At its 1144th meeting (June 2012), the Committee of Ministers endorsed the assessment presented in the memorandum prepared by the Secretariat ([CM/Inf/DH\(2012\)19](#)) containing a detailed evaluation of the action plan. At its last examination in December 2013, the Committee decided to resume consideration of the outstanding issues regarding the asylum procedure and conditions of detention in June 2014 (1201st meeting) and the issue of living conditions at the latest in December 2014 (1214th meeting). The Committee instructed the Secretariat to make an assessment of the up-dated information regarding the new asylum procedure provided by the Greek authorities in November 2013.

3. To date a significant amount of information has been received not only from the Greek authorities but also from NGOs under Rule 9.2. Further, the national context has considerably changed since the *M.S.S.* judgment became final, in particular in respect to the asylum procedure since the new system envisaged by Law No. 3907/11 and Presidential decree ("P.D.") 113/13 became operational. In addition, subsequent judgments added new elements to the execution process. Against this background and in order to assist the Committee of Ministers in its assessment, the Greek authorities in the execution of the group of cases, as well as all other actors involved, the present document aims at making a fresh stocktaking of all outstanding issues. It does not replace memorandum ([CM/Inf/DH\(2012\)19](#)) but complements it.

## II. THE ASYLUM PROCEDURE

4. During the examination of the case at the 1186<sup>th</sup> meeting (December 2014), the Committee of Ministers, bearing in mind that the effectiveness of the asylum system in Greece was expected to have a positive impact on conditions of detention and living conditions of asylum seekers, decided to continue focusing its examination on the asylum procedure. The question will be again considered in June 2014.<sup>1</sup>

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<sup>1</sup> The Court found a violation of Art.13 in conjunction with Art. 3 on account of the risk of arbitrary removal of the applicant without his asylum application having been examined thoroughly. The risk was held to be due to a) shortcomings in access to the asylum procedure and b) in the examination of the application: insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters (Petrour Ralli) competent for the registration of applications, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, excessively lengthy delays in receiving a decision. Moreover almost all of first instance decisions

## **A. Main measures presented by the Greek authorities: the coexistence of the new and old regime and the first data concerning the new regime**

5. The Greek authorities in their action plan submitted in July 2011, announced the reform of the asylum system in compliance with the Court's judgment in *M.S.S.* Following a transitional period, the reform envisaged the establishment of an independent Asylum Service operated by trained civil personnel, an Appeals Authority as well as a First Reception Service for the initial reception and screening of new arrivals at the country's external borders.

6. The three new services were due to operate within twelve months after the law establishing them (3907/2011) had entered into force. However, they became operational only on 7 June 2013. In November 2013, a first set of data following the functioning of the services was provided. Additional data were submitted on 3/4/2014.

7. For the needs of the operation of the Asylum Service and the Appeals Authority the Greek authorities re-transposed Directive 2005/85/EC by promulgating P.D. 113/2013. The said Directive had been transposed by P.D. 114/2010, which regulated granting of asylum/international protection during the transitional period (from 22.11.2010) until the beginning of operation of the new services. The provisions of the two legal texts are almost identical except for those related to the properties of each service.

8. According to art. 34 of P.D 113/13, two asylum regimes coexist as of 7.6.2013 until all applications lodged before that date are examined. For applications lodged before 7.6.2013 (backlog) the examination committee composed of police officers remains competent, as well as the second instance committees. After the clearing of the backlog, applications are going to be examined exclusively by the new Asylum Service.

### As regards access to asylum procedure (information and application lodging)

9. According to the law establishing the three new services, third country nationals who express their intention to apply for asylum/international protection during first reception procedure (identification, registration, medical control) are brought in no more than 15 days –or 25 days under special circumstances- to the competent regional asylum office operating in the First Reception Centre or to the nearest regional asylum office (art. 11 of Law 3907/11 and art. 4 of Presidential Decree ("P.D.") 113/13).

10. Applicants are to be provided with free interpretation services and information concerning their rights and the asylum procedure. Free legal aid is not provided automatically; applicants can apply for free legal aid according to a specific procedure (L. 3226/04).

11. Five (5) regional offices of the Asylum Service are already operational and three (3) additional regional offices are expected to become operational by December 2014. One (1) First Reception Centre has become operational (in Fylakio-Orestiada), which can host 240 persons. From 7.6.2013 until 28.2.2014 the total number of asylum applications reached 6.464 from which 12,8% were applications by persons in detention.

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were rejected in a stereotype manner, without stating the reasons of rejection. Finally judicial control of the decision rejecting asylum applications was found to be ineffective.

#### As regards the examination of the asylum applications

12. First instance decisions are rendered by the regional asylum service office on the basis of a) data concerning the political, financial and general situation of the country of origin and b) the applicant's interview. The applicant has the right not to sign the minutes of the interview session and state the reasons for not signing. Applications have to be processed in three months under the fast track procedure and within six months under the standard procedure (art. 6 and 8 P.D. 113/13). UNHCR representatives are entitled to attend the applicants' interview and submit their opinion in order to assist the asylum service. Applicants cannot be interviewed in presence of their lawyers as it was provided under the former legal framework concerning the interview before the first instance committee composed by police officers.

13. Decisions rejecting applications can be challenged before the Appeals Authority. The decisions of the Appeals Authority can be challenged before the Administrative Court of Appeals (art. 28 P.D. 113/13). The applicant is informed thereof by means of a note on the rejecting decision. The judgment of the Administrative Court of Appeals can be challenged before the Council of State.

14. After the rejection of the asylum application by the Appeals Authority the applicant has no *ex lege* right to remain in the country. Therefore, during the procedure before the Administrative Court of Appeals and the Council of State the applicant has to apply for suspension of the execution of the rejecting decision until the said courts render their judgment.

15. The applicants are entitled to lodge a second application, if new facts have taken place after the final decision or new evidence has been submitted (art. 23 P.D. 113/13).

16. According to the information provided, interviews at first instance take place within 17 days after the registration of the applications and the relevant decision is rendered in an average of 49 days. The procedure at second instance lasts about 43 days. 17,8% of decisions rendered on the admissible applications grant refugee status or subsidiary protection. At second instance 10,1% of the decisions grant refugee status or subsidiary protection.

### **B. Summary of communications and main reports**

#### As regards the new asylum regime

17. In their first joint communication of May 2012, ICJ and ECRE were critical of the delays in the implementation of the new asylum regime. In his report on his 2012 visit to Greece, the UN Special Rapporteur on the human rights of migrants encouraged the speedy operationalization of the Asylum Service and the Appeals Authority. He also noted that the established, but not operational at the time, First Reception Centres, if properly implemented, should be able to screen migrants, undertake an individual assessment of whether continued detention is necessary and release all other migrants. Similar observations were made by the Greek Council for Refugees.

18. UNHCR in its report "*Current Issues of Refugee Protection in Greece*" of July 2013 mentioned that the kick-off of the Asylum Service was "*a particularly positive development*". It recommended additional staffing and that regional Asylum Offices start up operating in other areas of the country, so that "*unhindered and efficient access to asylum procedure is ensured in larger parts of the territory*". In addition, specific measures should be adopted to facilitate the submission of asylum applications by unaccompanied minors.

19. In their communication received on 12.11.2013, the Hellenic League for Human Rights ("HLHR") is critical of the new regime of examination of asylum applications. It also contends that the percentage of decisions granting asylum is still low and that the procedure at second instance is in writing.

#### As regards the old asylum regime

20. ICJ and ECRE are sceptical *vis a vis* the results of backlog cases management announced by the authorities: they alleged that on the basis of a calculation (number of backlog cases divided by members of the committees), it was practically impossible for the committees to have examined the number of cases mentioned by the authorities. UNHCR recommended the acceleration of the backlog processing and that police be given the resources to cope with the applications lodged under the old regime falling within their competence. The HLHR mentions that applicants whose applications are processed under the old procedure are not notified about the dates of their interview and, consequently, they are absent. This results in the interruption of the procedure.

#### As regards access to asylum

21. According to ICJ and ECRE most asylum seekers are detained in view of deportation. In view of important shortcomings in information, interpretation services and legal aid, there is a risk for potential asylum seekers to be deported without having been able to file an asylum application.

22. The Hellenic League for Human Rights further contended that access to asylum procedure remains seriously restricted under the new regime, due to the fact that only four departments<sup>2</sup> of the Asylum Service are operational and that no adequate reception conditions exist on the islands, where new migrants arrive. Similar criticism has been raised by the Open Society Justice Initiative.

#### As regards unaccompanied minors

23. In all communications, concern is expressed regarding children and unaccompanied minors. It is noted that no guardians are appointed and no alternatives to detention are sought. There is a need to undertake appropriate age assessment procedures and refrain from detaining children.

### **C. Assessment and information needed from the authorities**

24. The first data concerning the operation of the new asylum regime are noteworthy and encouraging. However, due to the brevity of the period covered (7.6.2013-28.2.2014) thorough conclusions cannot yet be drawn.

25. Against this background, the implementation of measures concerning full access to the asylum procedure and thorough examination of applications could be assessed on the basis of information needed on the issues identified below. The responses to those questions could also facilitate the identification by the Greek authorities of the necessary adjustments to the procedure.

#### **1) As regards access to the new asylum procedure and processing of applications under P.D. 113/13 (applications lodged after 7.6.2013)**

##### First instance

- 1) Developments concerning the scheduled operation of three (3) additional regional offices of the Asylum Service;
- 2) Follow up information on the staffing, training of the staff and operation of the existing five (5) regional offices (in Athens, Didimoticho, Alexandroupoli, Mytilini and Rhodes) and, specifically on their capacity to file asylum applications in relation to the number of individuals who attend the Service with a view to having their applications registered, on provision of information, legal aid and interpretation services;
- 3) The number of applications registered per day, the number of decisions granting asylum/international protection, the percentage of cases in which legal aid has been provided and the percentage of cases in which interpretation services were provided;

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<sup>2</sup> At the time when the communication was submitted.

- 4) The number of asylum applications registered in the operating first reception centre(s) in relation to the number of the new arrivals, as well as the number of registered asylum applications in relation to the number of irregular migrants who were arrested for irregular entry during 2012 and 2013;
- 5) The evaluation procedure for vulnerable persons (unaccompanied minors etc.) and the number of persons assessed as vulnerable in general and especially in the operating first reception centre(s) in relation to the number of new arrivals or arrested migrants;
- 6) The number of cases in which UNHCR representatives participated at first instance;
- 7) The percentage of applications processed in the fast track procedure from the beginning of operation of the Asylum Service and the number of decisions taken in this procedure which grant asylum/international protection;
- 8) The number of cases in which the applicants themselves were served with notice for interview and the number of cases in which the applicants were served with notice for interview by "post and by posting on the door"; among the latter how many did not appear;
- 9) The number of persons arrested for staying irregularly in the country in 2012 as 2013; How many of those lodged an asylum application (accepted –rejected); How many were deported;

#### Second instance

- 1) The number of appeals lodged with the Appeals Authority and the number of decisions granting asylum at second instance;
- 2) The number of interviews at second instance in relation to the number of appeals and the reasons for which they were held;
- 3) The percentage of cases in which interpretation services and legal aid were provided at second instance;
- 4) The number of cases in which UNHCR representatives participated at second instance.

### **2) As regards processing of applications under P.D. 114/10 (applications lodged before 7.6.2013)**

26. Since a large number of pending applications have been lodged before the start of operation of the new Asylum Service (7.6.2013), which are to be examined under the provisions of P.D 114/2010, information is necessary on the following<sup>3</sup>:

- 1) The number of applications examined at first instance from 30.9.2013<sup>4</sup> onwards and the number of decisions granting asylum/international protection;
- 2) The number of appeals lodged with the appeals committees from 30.9.2013 onwards and the number of decisions granting asylum at second instance;

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<sup>3</sup> It is noted that the Court has communicated to the Greek government a number of applications concerning complaints on asylum procedure during the transitional period (*R.T.*, No. 5124/11; *A.Y.* No. 58399/11; *R.A.*, No. 58394/11).

<sup>4</sup> Period covered by the data submitted until 03/04/2014.

- 3) The number of cases in which the applicants themselves were served with notice for interview and the number of cases in which the applicants were served with notice for interview by “post and by posting on the door”; among the latter how many did not appear;
- 4) The number of pending cases at first and at second instance.

**3) As regards access to asylum procedure of unaccompanied minors and examination of asylum applications lodged by minors under P.D. 113/13**

27. In the framework of the execution of *Rahimi* judgment information is needed on the following:

- 1) The number of minors who have lodged an asylum application in relation to the total number of arrested minors;
- 2) The number of asylum applications lodged by minors on their behalf;
- 3) The number of applications lodged by representatives (guardians appointed according to domestic law) on behalf of unaccompanied minors;
- 4) The number of cases in which interpretation services and legal aid were provided to minors – applicants;
- 5) The number of decisions granting asylum/international protection to minors at first and second instance;
- 6) The number of appeals lodged by minors and the number of the cases, in which final decisions rejecting applications were challenged before the courts;
- 7) The procedure followed to determine the age of an allegedly minor and the number of persons for whom this procedure has taken place.

### III. DETENTION

**A. Conditions of detention of asylum seekers, irregular migrants and unaccompanied minors**

28. In the framework of the M.S.S. group of cases, conditions of detention of asylum seekers and irregular migrants are jointly examined as they require identical execution measures. In the 15 cases<sup>5</sup> of the group, the Court found that the conditions of detention of the applicants violated Article 3 (severe overcrowding, lack of beds and/or mattresses, insufficient ventilation, no regular access to toilets and sanitary facilities, lack of outdoor exercise).

29. It is recalled that information had been provided by the Greek authorities regarding refurbishment and extension of certain border guard stations and holding facilities, projects for new detention facilities as well as about staffing. As noted in CM/inf/DH (2012)19 and in the Notes of the 1164<sup>th</sup> meeting, according to the action plan and subsequent information provided, detention of persons who intend to apply for asylum should not exceed 25 days (time frame set out by law in order to start processing asylum applications upon the reception of the new arrivals). Registered asylum seekers can be detained up to eighteen months on the basis of article 18 of the Directive 2005/85/EC (art. 13 of P.D 113/2013). Irregular migrants can be detained up to eighteen months on the basis of art. 76 of L.3386/2005 or on the basis of art. 30 of L. 3907/2011. The key relevant actors (CPT, UNHCR, European Commission, Greek National Commission for Human Rights, NGOs that submitted communications) concur in that asylum-seekers and irregular migrants are detained for prolonged periods in various establishments (police stations, border guard stations and coast guard facilities), not suitable for long-term detention. The conditions of detention (even in detention centres designed specifically for migration) are described as substandard and falling short of Article 3 (flagrant

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<sup>5</sup>Judgments that became final until 03/04/2014 for classification at the 1201st DH meeting.

overcrowding, detention of minors with adults, lack of subsistence means, inadequate medical treatment).

30. In light of the above, it is now essential to receive without further delay information on a comprehensive strategy for the improvement of conditions of detention. To this effect, it could be useful to draw inspiration from the recommendations of Council of Europe's specialised bodies (see the 2011 [CPT Public Statement concerning Greece](#)) and other relevant actors and to inform the Committee of Ministers thereof. Information is further needed on:

- the number of persons who were detained after lodging an asylum application on the basis of art. 13 P.D 114/10 for the period 2012-2013.
- the number of irregular migrants who were detained for the period 2012-2013.
- the number of all detention facilities, where asylum seekers and irregular migrants are detained;
- the average number of hosted detainees per day for the period 2012-2013;
- the personal space of each detainee (cell surface /number of detainees);
- the existing sanitary facilities;
- the existence of space for outdoors exercise;
- the provision of food and personal hygiene materials;
- the medical treatment provided;

31. As far as *detention of unaccompanied minors* is concerned, it is recalled that according to national legislation minors are subject to detention only in exceptional circumstances and in separate detention facilities. In view of the above, information is needed regarding the measures taken to implement this legislation, as well as on the conditions of detention of vulnerable groups in general<sup>6</sup>. In addition, information regarding measures guarantying that unaccompanied minors are not registered as accompanied is awaited<sup>7</sup>.

## **B. Effective remedy to challenge conditions of detention**

32. It is recalled that in *R.U.* and *Rahimi*, the Court found that there had been no remedies available to the applicants which they should have used in order to complain about their conditions of detention before lodging their complaint with the Court. The Court reiterated this conclusion in *Ahmade*<sup>8</sup>.

33. In CM/Inf/DH (2012)19, it was noted that according to the Greek authorities the combination of two relevant provisions constitute an effective remedy permitting complaints against conditions of detention as well as the legality of the detention:

- Article 76 of Law No. 3386/2005 regarding expulsion of irregular migrants as amended provides that in case a complaint is lodged by a foreigner, the competent judge shall decide on the legality of the detention or its prolongation;
- Article 30 of Law No. 3907/2011 provides –*inter alia* – that when deciding on ordering the detention of a third-country national with a view to expulsion or its prolongation, the competent authorities<sup>9</sup> shall take into consideration the availability of proper detention facilities, as well as the ability to guarantee decent living conditions to the detainees. The existence of the requirements for detention shall be examined *ex officio*, each trimester, by the authority ordering the detention.

34. The Greek authorities argue that conditions of detention is part of the lawfulness of detention and they can be challenged through the same legal avenue, that is the 'objections' provided in art. 76 of Law No. 3386/2005.

35. However national case law is ambiguous in that respect: for example the Administrative Court of Komotini had granted the objections introduced on detention conditions whilst other national administrative courts rarely take into account detention conditions or reject the relevant objection as

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<sup>6</sup> See *Housein*, §§77-78.

<sup>7</sup> See CM/Inf/DH (2012)19, §§ 30-31.

<sup>8</sup> See paras 59-61 in *R.U.*; *Rahimi*, paras. 74-80; *Ahmade*, §§ 83-90.

<sup>9</sup> It appears that the police authorities are competent to decide on the detention and its prolongation with a view to expulsion. The prolongation decision is reviewed by a judge.



inadmissible (see *Housein*, § 83 and the Notes of the Order of Business of the 1164th meeting, June 2013). Information is necessary on the existence of well-established case law with respect to the remedy or on ongoing reflections regarding additional measures envisaged since the European Court still does not find the above remedies to be effective (see also communication by HLHR, DH-DD(2013)1277, p. 10). It is recalled that the issue of the lawfulness of the detention of both asylum seekers and irregular migrants is examined under the group *S.D and Others*.

36. As regards the question of complaints made by unaccompanied minors, after their release, about the conditions in which they were detained, the Court considered recently that a national remedy aiming exclusively at obtaining compensation should be exhausted before lodging an application before it<sup>10</sup>.

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<sup>10</sup> *Housein*, §§ 57-63.