

RSA Comments

on the

Reform of the International Protection Act

Improvement of Migration Legislation, amendment of provisions of laws 4636/2019 (A' 169), 4375/2016 (A' 51), 4251/2014 (A' 80) and other provisions.

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Summary of positions

1. **Registration:** The inclusion of Regional Reception and Identification Services as “responsible receiving authorities” for the lodging of asylum claims should be resisted, given that the Asylum Service retains sole responsibility for the issuance of documents such as the international protection applicant card and PAAYP number, and the conduct of Dublin procedures. RSA also recommends extending interview guarantees such as audio-recording to the stage of registration.
2. **Interpretation:** Article 11, allowing for the omission of personal interviews where the applicant does not wish to have the procedure conducted in official language of their country of origin, should be deleted. Expanding the grounds for omitting personal interviews undermines the guarantees afforded by the Asylum Procedures Directive by unduly restricting asylum seekers’ right to be heard and the quality of first-instance procedures.
3. **Legal assistance:** The introduction of a “merits test” will deprive the majority of appellants of the right to legal assistance and will add burden to already overstretched Appeals Committees, as they will be required to examine legal aid applications prior to assessing applicants’ right to remain on the territory and to processing appeals on the merits. RSA also urges for the repeal of problematic provisions in force relating to the condition of certified signature for power of attorney and to the automatic appointment of lawyers as representatives *ad litem*.
4. **Implicit withdrawal:** Albeit improved, the proposed formulation of Article 81(1) IPA remains incompatible with Article 28(1) of the Asylum Procedures Directive, since it still makes no provision on the possibility for the determining authority to discontinue the examination of the application. This leaves legal uncertainty as to the process the Asylum Service should follow when a claim is implicitly withdrawn and may not be rejected as unfounded. RSA recommends inserting the possibility to discontinue the procedure upon implicit withdrawal.
5. **Prioritisation:** RSA recommends reinstating vulnerable persons and manifestly well-founded cases within the categories of cases eligible for prioritisation, in line with the spirit of the Asylum Procedures Directive and established practice of the Asylum Service.
6. **Safe third country:** RSA recommends a consultation with a view to developing legislative measures to properly transpose the methodology rules required for the use of the “safe third country” concept under Article 38(2) of the Asylum Procedures Directive, as interpreted by the CJEU in *LH*. Until such rules are enacted, the “safe third country” concept under Greek law is contrary to EU law and should not be applied based on the IPA.
7. **Appeals:** RSA reiterates its recommendation to repeal derogations from applicants’ right to remain on the territory during the appeal procedure, bearing in mind serious difficulties raised during the implementation of the IPA.

8. **Detention of asylum seekers:** RSA recommends deletion of Article 21(2) which imposes detention in a pre-removal centre upon rejection of the appeal and thereby amounts to a flagrant violation of Greece's duty to resort to detention only as a last resort and the right to an effective remedy.

9. **Age assessment:** RSA recommends reinstating the benefit of the doubt principle during age assessment procedures, in line with international and EU law.

Introduction

On 10 April 2020, the Ministry of Migration and Asylum submitted a bill entitled “Improvement of migration legislation” to public consultation.¹ The reform of the legislative framework of international protection in Greece comes only three months following the entry into force of the overhaul of asylum legislation, brought about by the International Protection Act (L 4636/2019, IPA) adopted on 1 November 2019.

In the explanatory memorandum to the bill, the Ministry details that the amendment of the IPA aims at speeding up asylum procedures and at “responding to practical challenges in the implementation of the law”, as well as bringing several textual improvements thereto.² The rationale behind the reform gives pause, given that the new legislative provisions have been applied for a very short period of time and the proposed amendments do not bring about substantial improvements thereto. Against this backdrop, Refugee Support Aegean (RSA) continues to express deep concern about the government’s hasty adoption of legal modification and further restriction of procedural guarantees in asylum procedures, without prior evaluation of existing rules or a coherent plan to improve the Greek asylum system.³

At the same time, the launch of yet another reform in the area of international protection presents an opportunity to improve the existing framework, both in terms technical corrections – proposed in various parts of the text by the Ministry of Migration and Asylum – and of sounder transposition of European Union (EU) law and conformity with international standards. Accordingly, RSA comments on the articles submitted to public consultation contain concrete recommendations with a view to improving current legislation.

This note focuses on RSA observations on the provisions relating to asylum legislation. A more detailed analysis of RSA’s positions, including suggested amendments, is available in Greek.

Analysis of key provisions

1. Registration of asylum applications

Article 5(1) of the bill inserts a second sentence to the definition of “responsible receiving authorities” in Article 63(d) IPA, stating that competent authorities for the lodging of applications include Regional Reception and Identification Services.

It should be noted that, pursuant to a recent Joint Ministerial Decision (JMD), 28 temporary accommodation facilities across the Greek mainland have been

¹ Ministry of Migration and Asylum, *Draft Law: Improvement of migration legislation*, 10 April 2020, available in Greek at: <https://bit.ly/3b48srt>.

² Ministry of Migration and Asylum, *Draft Law: Improvement of migration legislation – Explanatory Memorandum*, 10 April 2020, 1, available in Greek at: <https://bit.ly/2VhH3eZ>.

³ Βλ. RSA, *Παρατηρήσεις επί του Σχεδίου Νόμου περί Διεθνούς Προστασίας*, October 2019, available at: <https://bit.ly/2XuMZUs>.

designated as regional branches of the Reception and Identification Service (RIS).⁴ Under the proposed provision, read in conjunction with the amendment of **Article 65(7) IPA** by **Article 6(3)** of the bill, it will be possible following registration of a claim by the Asylum Service for an applicant to undergo registration in a Reception and Identification Centre or a reception facility.

RSA voices serious concerns regarding the entrusting of registration duties to Regional Reception and Identification Services. Under national law, the RIS and the Asylum Service fall under different Directorates-General of the Ministry of Migration and Asylum and have discrete responsibilities. In particular, the Asylum Service retains sole responsibility for the issuance of the international protection applicant card and Foreigners' Temporary Insurance and Health Care Number (PAAYPA) upon registration of an asylum claim.⁵ The suggested amendment is liable to create protection gaps, as asylum seekers may not be granted the necessary documentation following the completion of registration. In such situations, their access to medical care and protection from arrest and arbitrary detention and deportation will not be guaranteed.

In addition, registration triggers time limits such as the deadlines for Dublin procedures, which remain under the responsibility of the Asylum Service. The reform may therefore exacerbate obstacles in family reunification of asylum seekers with family members in the EU, as it will require coordination between the registration authorities and the Dublin Unit of the Asylum Service with a view to timely submission of "take charge" requests to other Member States.

RSA also highlights that the registration process forms a core part of international protection⁶ and should thereby be entrusted to specialised authorities competent to conduct refugee status determination.⁷ Yet, the Regional Reception and Identification Services do not guarantee by the necessary safeguards for the accurate recording of applicants' personal information and the detailed reasons for which they seek protection. For those reasons, it is necessary both to maintain the exclusive competence of the Asylum Service to conduct registration of applications and to introduce guarantees to ensure the process is properly conducted; see below on the amendment of Article 6(1).

2. Procedural safeguards

2.1. Interpretation

The bill includes a series of provisions bringing about severe restrictions to asylum seekers' right to interpretation in the asylum procedure:

- Mandatory declaration of the language in which the applicant wishes to have his or her claim processed

⁴ Article 1 JMD 2945/2020, Gov. Gazette B' 1016/24.03.2020, available in Greek at: <https://bit.ly/2Vro2Xk>.

⁵ Article 1(1)(e) Law 4375/2016; Article 55(2) IPA.

⁶ BL. UNHCR, *Handbook for Registration: Procedures and Standards for Registration, Population Data Management and Documentation*, September 2003, available at: <https://bit.ly/2w1wNuC>.

⁷ European Council on Refugees and Exiles (ECRE), *Access to protection in Europe: The registration of asylum application*, October 2018, 30, available at: <https://bit.ly/3bsx5hK>.

Article 6(1) adds the applicant's email address, if any, and the language in which he or she wishes to have the application processed in the personal details to be provided upon the lodging of the claim pursuant to **Article 65(1) IPA**. For its part, **Article 6(2)** adds the language in which the asylum procedure should be conducted in the mandatory elements to be collected at the stage of basic registration under **Article 65(2) IPA**.

- Interpretation in the official language of the country of origin in cases of established impossibility to provide interpretation in the applicant's desired language

Article 7(1) of the bill complements **Article 69(3) IPA** to provide that, where it has been established that interpretation in the applicant's selected language is impossible, interpretation shall be provided in the official language of the applicant's country of origin.

- Omission of the personal interview where the applicant does not wish to benefit from interpretation in the official language of the country of origin

Article 11 amends **Article 77(7) IPA** with the aim of expressly allowing the authorities to omit the personal interview where it has been established that interpretation in the applicant's desired language is impossible and the applicant does not wish to benefit from interpretation in the official language of his or her country of origin.

RSA stresses that Greek law still contains no framework regulating the role, duties and requisite qualifications of interpreters in the asylum procedures, despite successive legislative reforms in recent years. This constitutes a critical gap in the quality of the procedure and the provision of safeguards bestowed upon applicants by **Article 69(2) IPA**.

Registering the language in which the applicant wishes to have his or her claim processed *per se* has merit from the perspective of administrative efficiency. It may better equip the Asylum Service to prepare caseworkers for interviews and to enlist the necessary interpretation services in a timely manner. It should be stressed, nevertheless, that the official language of an asylum seeker's country of origin is not necessarily a language which he or she understands or should reasonably be expected to understand.

However, requiring the applicant to declare a binding language for the procedure upon registration, without guaranteeing the necessary conditions for accurate registration of information e.g. audio recording of interviews, creates risks of mistaken registration of the language they understand. Such errors are liable to result in postponement of interviews or to be construed against the applicant as indications of lack of credibility or cooperation.

The linkage between the state's inability to secure interpretation in the applicant's desired language and the omission of the personal interview is worrying, and has

already attracted warnings from the European Commission.⁸ EU law allows authorities to forgo the personal interview in well-defined circumstances. Those involving objective difficulties solely cover cases where “the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control”.⁹ The suggested modification of Article 77(7) IPA effectively lays down an additional ground for omitting the personal interview, beyond those permitted by the Asylum Procedures Directive.¹⁰

As per the Explanatory Memorandum to the bill, the above amendments, read in conjunction, seek to reduce delays in the procedure without affecting asylum seekers' right to interpretation.¹¹ However, by broadening the scope of cases where omission of the personal interview is permissible, the reform runs counter to the spirit of the Directive by disproportionately restricting individuals' right to be heard. It is also liable to damage the quality of the first-instance procedure by exacerbating risks of erroneous decisions and inevitably adding pressure to the workload of Independent Appeals Committees at second instance. RSA highlights that guidance from the European Asylum Support Office (EASO) refers to steps such as postponement of the interview, recourse to remote interpretation means – as already set out in the IPA – and cooperation with other Member States' authorities to respond to interpretation needs in particular cases where interpreters are not readily available.¹²

2.2. Legal assistance

Article 9 of the bill introduces two critical changes to the rules on legal aid for asylum appeals, largely running counter to the recently published JMD governing the legal aid scheme.¹³ The explanatory memorandum provides no justification for these amendments.

The modification of **Article 71(3) IPA** restricts the granting of legal aid to asylum seekers to appeals likely to succeed, thereby codifying a “merits test” in Greek legislation. The “merits test” requires the applicant to persuade the Appeals Committee, without any legal support, legal knowledge or familiarity with the language of the country, that his or her appeal is likely to be accepted if examined. It is worth recalling that, as a rule, the procedure before the Appeals Committees is a written procedure.

This measure raises a number of concerns. First, the “merits test” renders the exercise of the right to an effective remedy enshrined in Article 46 of the Asylum Procedures Directive and Article 47 of the Charter of Fundamental Rights extremely difficult for protection seekers, bearing in mind their inherently vulnerable position in the asylum

⁸ European Commission, Reply of Commissioner Johansson to parliamentary question, P-004017/2019, 5 February 2020, available at: <https://bit.ly/3a2pXqj>.

⁹ Article 14(2) Asylum Procedures Directive.

¹⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [OJ] 2013 L180/60.

¹¹ Ministry of Migration and Asylum, *Draft Law: Improvement of migration legislation – Explanatory Memorandum*, 10 April 2020, 4.

¹² EASO, *Guidance on asylum procedure: operational standards and indicators*, September 19, available at: <https://bit.ly/2RoSlgj>.

¹³ JMD 3686/2020, Gov. Gazette B' 1009/24.03.2020.

process,¹⁴ their lack of familiarity with the local language and legal system, as well as the risk of irreparable harm in case of incorrect denial of their claim.¹⁵ In practice, such a rule is liable to deprive the majority of appellants of the right to legal assistance. By way of example, in Cyprus, where a “merits test” is applied to legal aid in asylum cases, the number of successful legal aid applications was 0 in 2018 and 1 in 2019.¹⁶

Second, “merits testing” amounts to an additional procedural layer in the examination of asylum claims at second instance. As such, it increases complexity and administrative burden on already overstretched appeal bodies. The Appeals Committees will be required to examine legal aid applications, in addition to deciding upon applicants’ right to remain on Greek territory and separately processing appeals on the merits. Moreover, Administrative Courts will bear the task of processing appeals against Appeals Committee decisions refusing legal aid, in line with the Asylum Procedures Directive.¹⁷ Accordingly, the suggested amendment will also result in substantial difficulties for national authorities.

RSA urges the government to maintain the provision of legal aid, already marred by numerous difficulties in practice, free of “merits testing” to guarantee asylum seekers’ effective access to a remedy.¹⁸ RSA recalls that countries such as the Netherlands, Sweden, Austria, Denmark, Spain, Malta and Slovakia do not foresee a “merits test” for legal aid in asylum cases in their domestic legislation.¹⁹

Moreover, Article 9 of the bill imposes on asylum seekers the obligation to submit a legal aid request within 2 days of notification of the first-instance decision. This provision seems to contradict the time limits set out in the JMD, requiring applicants to submit a legal aid application no later than 10 days prior to the examination of the appeal in the regular procedure, 5 days in the accelerated procedure and 3 days in the border procedure.²⁰ Given the aforementioned barriers facing asylum seekers in the procedure, a 2-day deadline to prepare and present the reasons for which they should benefit from the assistance of a lawyer is disproportionately short. Appellants should be given at least half of the appeal deadline to submit a legal aid request.²¹

Finally, the reform of Article 71 IPA offers the legislature an opportunity to cater for significant difficulties in access to legal assistance arising from the entry into force of the IPA provisions requiring applicants to certify their signature to give power of

¹⁴ European Court of Human Rights (ECtHR), *M.S.S. v. Belgium and Greece*, Application No 30696/09, 21 January 2011, para 251.

¹⁵ ECRE/ELENA, *Legal Note on access to legal aid in Europe*, November 2017, 10, available at: <https://bit.ly/34rSUv6>, ECRE, *Information Note on the Asylum Procedures Directive*, December 2014, 26, available at: <https://bit.ly/3b10Ju4>.

¹⁶ Asylum Information Database, *Country Report Cyprus, 2019 Update*, April 2020, 39, available at: <https://bit.ly/2RvfDRE>.

¹⁷ Article 20(3) second sub-paragraph Asylum Procedures Directive.

¹⁸ Article 20(3) third sub-paragraph Asylum Procedures Directive.

¹⁹ ECRE/ELENA, *Legal Note on access to legal aid in Europe*, November 2017, 6.

²⁰ Article 3 JMD 3686/2020, Gov. Gazette B’ 1009/24.03.2020.

²¹ France applies such a rule, whereby legal aid requests need be submitted within 15 days of notification of the first-instance decision under a 30-day appeal deadline: Asylum Information Database, *Country Report France, 2019 Update*, March 2020, 42, available at: <https://bit.ly/2Vny3EV>.

attorney and automatically appointing lawyers as representatives *ad litem*.²² The implementation of the law in practice has shown that the additional obligation on individuals to certify their signature before a public authority has deprived people of the possibility to benefit from legal representation, as well as increasing administrative burden for authorities. Obstacles affect rejected asylum seekers in particular, who are unable to certify their signature before public authorities or Citizen Service Centres (KEP) given that the validity of their international protection applicant cards ceases automatically.

2.3. Age assessment

Article 1(4) of the bill deletes, without justification, the express reference to the benefit of the doubt principle underlying age assessment procedures under **Article 39(5)(f) IPA**. The amendment thus removes a crucial guarantee for children's rights enshrined in international law²³ and expressly laid down in the Asylum Procedures Directive.²⁴ RSA stresses that EASO guidance advises Member States to avoid age assessments and to broadly interpret the benefit of the doubt principle in the context of registration.²⁵

3. Examination of applications at first instance

3.1. Implicit withdrawal

Article 14 of the bill brings about a welcome correction to **Article 81(1) IPA**. It specifies that, where an application is deemed to be implicitly withdrawn, the competent authorities conduct a sufficient examination of the application and issue a negative decision only where they establish that the claim is unfounded on the basis of available evidence.

Albeit improved, the new formulation of Article 81(1) remains incompatible with Article 28(1) of the Asylum Procedures Directive. As regards cases of implicit withdrawal, the Directive requires Member States to ensure that the determining authority has the power to either suspend the processing of the claim or to reject it where it is determined to be unfounded based on available evidence.²⁶ The mandatory provision of both types of procedures through a "shall" clause is reasonably required by the EU legislature, since it is possible that determining authorities do not hold sufficient evidence to conclude that an implicitly withdrawn application is unfounded so as to reject it.

²² As an automatically appointed representative *ad litem* pursuant to Article 77(7) IPA, the lawyer is notified of decisions on behalf of the applicant. Where the lawyer is employed by an organisation, the organisation is appointed as representative.

²³ Committee on the Rights of the Child, General Comment 6 (2005). See also Council of Europe, *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, September 2017, available at: <https://bit.ly/3arENaC>.

²⁴ Article 25(5) Asylum Procedures Directive.

²⁵ EASO, *Practical guide on the best interests of the child in asylum procedures*, 2019, 20, available at: <https://bit.ly/2ywzWYg>.

²⁶ Article 28(1) Asylum Procedures Directive: "Member States shall ensure that the determining authority takes a decision either to discontinue the examination or... to reject the application" (emphasis added).

RSA recalls that, following the suspension of the procedure, the Directive safeguards asylum seekers' right to appear before the authorities and request the reopening of the application, without the request being considered a subsequent application.²⁷

However, Article 81 IPA still does not foresee the possibility for the Asylum Service to suspend the examination of an application, thereby leaving legal ambiguity as to the steps the authority should take when a claim is implicitly withdrawn and cannot be rejected as unfounded. The law therefore infringes applicants' right to request the continuation of their asylum procedure and has led to incorrect negative decisions, as illustrated in the practice of Regional Asylum Offices so far.

Furthermore, **Article 5(2)** of the bill amends the definition of "subsequent application", with the ostensible aim of aligning domestic legislation to the Asylum Procedures Directive.²⁸ RSA notes, however, that the current definition in **Article 63(h) IPA** is a literal transposition of Article 3(q) of the Directive. The amendment is not useful, as it is liable to create greater confusion around the application of the provisions on subsequent applications.

3.2. Prioritised examination and accelerated procedure

Article 16 of the bill foresees changes to **Article 83(7) and (9) IPA** relating to prioritised examination and to the accelerated procedure. First, it reduces the 20-day processing deadline for absolute priority cases – for applications made during reception and identification procedures and from detention – to 15 days.²⁹

Second, through what is presented as a partial reordering of the categories of claims subject to prioritised examination³⁰ and without due motivation, the bill repeals vulnerable persons and manifestly well-founded cases from the scope of prioritised processing. RSA reiterates that the objective of Article 31(7) of the Asylum Procedures Directive is to quickly determine applications by vulnerable persons and claims likely to be well-founded so as to safeguard asylum authorities' administrative resources. Rapid grants of status to persons deemed to fulfil the criteria for international protection serves both the administration and applicants. It also follows established practice of the Asylum Service, namely the "Syria Fast Track" procedure for Syrian nationals.³¹

It should nevertheless be noted that the prioritisation of claims by vulnerable persons should not come at the expense of fundamental guarantees such as identification of vulnerability or medical screening. The authorities should ensure that asylum seekers' specific needs are duly assessed so as to enable them to put forward and substantiate their claim.

²⁷ Article 28(2) Asylum Procedures Directive. Member States may lay down a time limit of at least 9 months for applicants to request the continuation of the procedure.

²⁸ Ministry of Migration and Asylum, *Draft Law: Improvement of migration legislation – Explanatory Memorandum*, 10 April 2020, 4.

²⁹ Note that the initial International Protection Bill submitted to public consultation by the Ministry of Citizen Protection foresaw a 15-day deadline for such applications. See RSA, *Παρατηρήσεις επί του Σχεδίου Νόμου περί Διεθνούς Προστασίας*, October 2019, 19.

³⁰ Ministry of Migration and Asylum, *Draft Law: Improvement of migration legislation – Explanatory Memorandum*, 10 April 2020, 6.

³¹ RSA, *Παρατηρήσεις επί του Σχεδίου Νόμου περί Διεθνούς Προστασίας*, October 2019, 19.

Third, the bill repeals **Article 83(9)(I) IPA**, i.e. vulnerability as a ground for applying the accelerated procedure. Already during the negotiations on the International Protection Bill, RSA had already drew the attention of the legislature to the incompatibility of this provision with EU law.³² The amendment is therefore welcome.

Finally, RSA takes the opportunity of the reform of Article 83 IPA to reiterate the need to introduce an express, unequivocal prohibition on channelling unaccompanied children into accelerated procedures. Subjecting them to lower procedural safeguards, namely truncated deadlines and derogations from the right to remain on the territory during appeals procedures, cannot be deemed in line with the best interests of the child.

3.3. Manifestly unfounded applications

Article 18 of the bill considerably broadens the scope of **Article 88(2) IPA** on manifestly unfounded applications, well exceeding the boundaries set by Article 32(2) of the Asylum Procedures Directive.

First, the bill inserts gross violations of the applicant's duty to cooperate with the authorities as a ground for manifest unfoundedness. Second, the new **Article 88(3) IPA** provides that an application may be rejected as manifestly unfounded where it is evident from the circumstances of the case that the applicant is remaining on the territory solely for economic reasons or to avoid a generalised situation of emergency.

RSA stresses that Article 32(2) of the Directive allows Member States to declare an application manifestly unfounded only where one of the grounds for applying the accelerated procedure is met.³³ The Directive sets out 10 exhaustive criteria for that purpose, all of which have already been transposed in Greek legislation by Article 88(2) IPA. However, none of the additional circumstances provided in the bill is in line with the grounds permitted by the Directive. Accordingly, the suggested amendment is contrary to EU law.

4. Safe third country

Article 17 of the bill makes technical adjustments to **Article 86 IPA** on the “safe third country” concept. RSA reiterates its concerns that this provision is an insufficient and incorrect application of the concept.³⁴ These concerns are all the more relevant given that the concept is increasingly applied in practice since the entry into force of the IPA.³⁵

³² *Ibid.*, 21.

³³ Article 32(2) Asylum Procedures Directive, citing Article 31(8). The latter has been transposed in Greek legislation by Article 83(9) IPA.

³⁴ RSA, *Παρατηρήσεις επί του Σχεδίου Νόμου περί Διεθνούς Προστασίας*, October 2019, 22-25.

³⁵ The Asylum Service has dismissed 415 applications as inadmissible on the basis of the “safe third country” concept in the first two months of 2020, compared to no more than 240 cases in the entire year 2019: Asylum Service, *Statistical data*, February 2020, 3, available in Greek at: <https://bit.ly/39Ucykw>.

Connection criterion

As regards the criteria for the determination of a connection between the applicant and a third country, based on which it would be reasonable for him or her to be returned there, Article 86(1)(f) IPA provides that transit, in conjunction with specific circumstances, may substantiate such a connection.³⁶ Nevertheless, the Court of Justice of the European Union (CJEU) has clarified in recent case law that transit through a third country cannot in itself constitute a criterion for the existence of a connection between the applicant and that country.³⁷ Although it refers to a number of personal circumstances, many of which are not conducive to a personal connection to a third country, domestic legislation currently in force maintains transit as the cornerstone of criteria for the determination of a sufficient connection, contrary to the position of the CJEU in the *LH* ruling.

Methodology

As already highlighted by RSA in its observations on the International Protection Bill, Article 86(2) IPA makes no provision on the methodology to be followed by the authorities in order to assess whether a country qualifies as a “safe third country” for an individual applicant, i.e. the rules on the basis of which the authorities examine whether the safety and connection criteria apply in his or her particular case. In the *LH* judgment, the CJEU held that Member States must lay down in their national legislation rules on the methodology to be applied by their authorities in the context of individualised examination of the “safe third country” criteria.³⁸

Accordingly, to ensure compliance with Article 38 of the Asylum Procedures Directive, it is necessary for the reform to carry out an in-depth amendment of Article 86 IPA to elaborate the process and steps to be followed by the determining authority so as to assess whether the asylum system and practice of a third country fulfils the criteria of Article 38 of the Asylum Procedures Directive both in general terms and in the individual circumstances of the applicant. Moreover, methodology rules encompass the reliable sources of information on the basis of which the determining authority should assess whether or not the “safe third country” criteria are fulfilled in the individual circumstances of the applicant. These sources should include reports of reputable human rights organisations on the situation of asylum seekers in the third country in question, in line with Strasbourg jurisprudence.³⁹

The *LH* ruling therefore specifies that the use of the “safe third country” concept in refugee status determination under the Directive requires the establishment of a process under a national regulatory act. In the absence of such legislation at domestic level, the application of the concept is contrary to EU law. The interpretation of the Directive in *LH* echoes the Court’s case law on the prior requirement of regulatory measures for the application of the “safe country of origin”⁴⁰ concept under Article 36

³⁶ See also Council of State, Decision 2347/2017, 22 September 2019, para 61.

³⁷ CJEU, Case C-564/18 *LH v Bevándorlási és Menekültügyi Hivatal*, 19 March 2020, paras 45-50.

³⁸ *Ibid*, para 48.

³⁹ ECtHR, *Ilias and Ahmed against Hungary* [Grand Chamber], Application No 47287/15, 21 November 2019, paras 99, 235.

⁴⁰ CJEU, Case C-404/17 *A v Migrationsverket*, 25 July 2018.

of the Directive and the “significant risk of absconding” under Articles 2 and 28 of the Dublin Regulation.⁴¹

5. Appeals

5.1. Right to remain on the territory

Article 28 of the bill amends the rules pertaining to asylum seekers' right to remain on the territory during the examination of their appeal under **Article 104 IPA**. RSA recalls its serious reservations about derogations from automatic suspensive effect of appeals, particularly in light of problematic application thereof since the entry into force of the Act.

First, the law leaves significant legal uncertainty on the practical application of Article 104(2) IPA in cases covered by Article 104(3) providing for a right to remain where the applicant does not benefit from legal assistance. The reform of Article 71(3) adds further ambiguity, since legal aid applications may be rejected where they are deemed not to have a tangible prospect of success. Second, the requirement of a separate application to remain on the territory pending the outcome of the appeal poses an additional and unnecessary step in a second-instance procedure already subject to very tight timeframes, at the expense of Appeals Committees' administrative resources. In an illustrative example of recent practice, Committees have issued decisions on the merits of appeals prior to delivering a negative decision on the applicant's right to remain during the appeal procedure.

For those reasons, RSA recommends repealing the exceptions to asylum seekers' right to remain during appeal procedures.

5.2. Referral to the first instance authority

Article 29 of the bill amends **Article 105 IPA** with the aim of detailing the prohibition on Appeals Committees' referring of cases back to the Asylum Service. This measure strips one instance of the asylum process and has particularly detrimental impact where the Asylum Service has omitted the personal interview.

6. Obligations of applicants and notification of decisions

6.1. Appearance in person

Article 12(1)-(2) of the bill modifies **Article 78(3) IPA** relating to asylum seekers' duty to appear before the Appeals Authority in person. RSA notes that the implementation of this provision since the beginning of 2020 has given rise to serious concerns in practice. The duty to appear in person has unduly restricted appellants' access to remedies. It has also created additional administrative burden for Appeals Committees, given that KEP in areas such as Lesbos are neither able to issue certificates of “appearance in

⁴¹ CJEU, Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor*, 15 March 2017.

person" nor equipped with the necessary interpretation services to communicate with applicants.

6.2. Notification

Article 15 of the bill amends **Article 82 IPA** on the rules governing the notification of decisions and other acts in the procedure. The amendment seeks *inter alia* to introduce a legal basis for additional forms of 'fictitious notification' of acts to asylum seekers, namely via email at a declared address and via transmission to the manager of the reception or detention centre where the applicant is placed. In these cases, notification is deemed to have taken place within 48 hours of the sending of an email and within 3 days of production of an act of receipt from the facility respectively.

Broadening the scope of 'fictitious notification' carries serious risks in practice. The use of emails for the notification of decisions on applications for international protection faces constraints from the perspective of both data protection considerations and infrastructural limitations of the Greek administration. It is therefore liable to severely restrict applicants' access to information on the course of their cases and their effective possibility to lodge appeals within the requisite deadlines. RSA recalls that similar attempts to introduce 'fictitious notification' in countries such as Italy have proven counter-productive due to complex technical difficulties facing national authorities during their implementation.⁴²

7. Detention of asylum seekers

Article 2 of the bill modifies parts of **Article 46 IPA** on detention of asylum seekers. With this opportunity, RSA repeats its serious concerns as to the compatibility of the provision in force with international and EU law, including the Reception Conditions Directive⁴³ and the Charter of Fundamental Rights, under which detention must be used as a measure of last resort.

Article 3 of the bill repeals **Article 48(2) IPA**, which allowed for a 20-day prolongation of detention of unaccompanied children where no referral to a reception facility was possible. RSA welcomes this legislative improvement, which goes in the direction of ensuring Greece's compliance with the duty to avoid deprivation of liberty.

Beyond amendments to Articles 46 and 48 IPA, **Article 21** of the bill inserts a new **Article 92(4) IPA**, which provides for mandatory detention in pre-removal centres upon rejection of an asylum appeal by the Independent Appeals Committees. Through this provision, the bill attempts to entrench blanket detention as a step ensuing the second-instance procedure. This amounts to a flagrant violation of Greece's obligation to resort to detention only as a matter of last resort, based on an individualised examination, for specified grounds and where it is deemed necessary; see **Article 46(2) and (3) IPA**. For

⁴² Asylum Information Database, *Country Report Italy, 2018 Update*, April 2019, 35-36, available at: <https://bit.ly/2XRwJx8>. Among other obstacles, due to technical difficulties in the connection of the asylum applications database (*Vestanet*) and the reception system database (*SGA*) receipts of decisions were not recognised by *Vestanet*.

⁴³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [OJ] 2013 L180/96.

those reasons, the suggested provision is contrary to the right to liberty,⁴⁴ and problematic from a legislative design perspective.

Finally, **Article 33** of the bill amends **Article 8(4) L 4375/2016** to add the creation of Closed Controlled Island Centres (*Κλειστές Ελεγχόμενες Δομές Νήσων*, KEDN) to the responsibilities of the RIS. Reception and Identification Centres, Closed Temporary Reception Centres and pre-removal detention centres may operate within those facilities. However, the reform leaves significant ambiguity as to the regime applicable to persons residing in those facilities; restriction of liberty or deprivation thereof. It also creates confusion around the authorities responsible for their management (RIS, Hellenic Police).

⁴⁴ Article 5 European Convention on Human Rights; Article 6 Charter of Fundamental Rights.



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