

Rights denied during Greek asylum procedure suspension

RSA's analysis of the impact of Greece's decision to suspend access to asylum in March 2020 on the rights of asylum seekers and on redress mechanisms at domestic and European level.

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Introduction

On 2 March 2020, the Greek government adopted an emergency legislative decree (*Πράξη Νομοθετικού Περιεχομένου*, hereinafter “Decree”) stripping persons arriving undocumented in the country of the right to seek asylum during that month.¹ This act, subsequently rubberstamped by Parliament,² was adopted as part of a response to the Turkish announcements that Turkey would no longer be preventing refugees and migrants from crossing its borders with Greece.³

The Decree suspended the registration of asylum applications for one month and foresaw immediate deportation for those entering the Greek territory, without registration, to their countries of origin or to Turkey. As a result of the Decree, individuals who entered Greece with the aim of seeking international protection in March 2020 were automatically and indiscriminately detained for the purpose of return and were denied access to the asylum procedure and a series of rights provided by national, European and international legislation.

The controversial suspension of access to the asylum procedure amounts to a clear violation of domestic, European Union (EU) and international law, as has been stressed by the United Nations High Commissioner for Refugees (UNHCR) and more tacitly pointed out the European Commission.⁴ So far the Commission has declined to share its legal analysis of the Decree.⁵

The Decree ceased to produce legal effects at the end of March 2020. However, it has had highly damaging effects on a significant number of people in need of protection. According to UNHCR statistics, 2,927 persons entered Greece via land and sea in the course of that month.⁶ These persons were automatically and arbitrarily placed in detention under abhorrent conditions and continue to remain in closed facilities without effective judicial protection, despite ultimately being allowed to express the intention to lodge an asylum application with the Asylum Service. Asylum applications have not yet been registered, however. Harm from inhuman detention conditions is compounded by serious, even life-threatening, health risks stemming from the outbreak of the COVID-19 pandemic which have regrettably not led to a reconsideration of detention policy in Greece.

In this Legal Note, Refugee Support Aegean (RSA) examines the administrative treatment and policy of detention applied to persons falling within the scope of the Decree, the conditions in which they have been detained and the response adopted thus far from the different fora approached by individuals in search of judicial redress at domestic and European level. The analysis is based on cases

¹ Government Decree on “suspension of the submission of asylum applications”, Gov. Gazette A’ 45/2.3.2020, available in Greek at: <https://bit.ly/2XF5Mvb>.

² Law 4681/2020, Gov. Gazette A’ 74/27.3.2020, available in Greek at: <https://bit.ly/2XI2Lvk>.

³ Al Jazeera, ‘Greece on the defensive as Turkey opens border to refugees’, 1 March 2020, available at: <https://bit.ly/2RHYP3B>; AMNA, ‘ΚΥΣΕΑ: Στο μέγιστο επίπεδο τα μέτρα φύλαξης των συνόρων της χώρας’, 1 March 2020, available in Greek at: <https://bit.ly/2VgYvl7>.

⁴ UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://bit.ly/3bhsM8D>; The Guardian, ‘Greece warned by EU it must uphold the right to asylum’, 12 March 2020, available at: <https://bit.ly/3aePdKn>.

⁵ EU Observer, ‘EU commission keeps asylum report on Greece secret’, 21 April 2020, available at: <https://bit.ly/3blDgUF>.

⁶ UNHCR, *Mediterranean Situation: Greece*, available at: <https://bit.ly/2KbyVY9>. Note that government statistics refer to 9,061 arrivals during the same period: Ministry of Migration and Asylum, ‘Μηνιαίο Ενημερωτικό Σημείωμα Υπουργείου Μετανάστευσης και Ασύλου (Μάρτιος)’, 14 April 2020, available in Greek at: <https://bit.ly/2RKSj2n>.

represented and followed up by RSA before national and European courts, concerning applicants entering Greece through the island of Lesbos, including three families from Syria (of which two include pregnant women), two families from Afghanistan, one Syrian single woman, one Palestinian single man and two unaccompanied children from Syria.

Arbitrary detention en route to and in new detention facilities

The Decree triggered a policy of blanket detention. Asylum seekers arriving by sea during the period of effect of the Decree were initially held under inhuman conditions in various unofficial detention sites on the islands. These included approximately 100 persons detained next to the Coast Guard premises on Samos and 250 around the Coast Guard station on Leros, and 450 persons initially held in a fenced area of the Port of Mytilene prior to being detained in the Rhodes Hellenic Navy vessel, many of them since the beginning of the month.⁷

As of mid-March 2020, people were moved to two new detention facilities set up on the mainland specifically for that purpose, with a view to their return to Turkey.⁸ The two facilities were established in Kleidi, Serres and Malakasa, north of Athens.⁹ Transport of persons arriving on the islands – mainly Lesbos, where most arrivals were recorded – was carried out on navy vessels, with the Rhodes vessel transporting hundreds of persons to the mainland.¹⁰

Deprivation of liberty has been imposed arbitrarily and in clear dereliction of legal standards in these cases. First, under EU and domestic law, persons expressing the intention to seek international protection benefit from asylum seeker status and corollary rights and entitlements from the moment they express such intent, regardless of registration.¹¹ These include the right to material reception conditions¹² and freedom from detention.¹³ Deprivation of liberty is permissible only in exceptional cases where one of the grounds for detention of asylum seekers is established, where necessity so requires and where less coercive alternatives are not applicable. Second, where detention is used for the purpose of effecting return, as implied by the Decree, it may only be lawfully ordered if there is a reasonable prospect of removal

⁷ Efsyn, 'Κράτηση υπό απάνθρωπες συνθήκες', 12 March 2020, available in Greek at: <https://bit.ly/3biRTlc>; Human Rights Watch, 'Greece/EU: Allow New Arrivals to Claim Asylum', 10 March 2020, available at: <https://bit.ly/2yqfyYD>; Amnesty International, *Caught in a political game: Asylum-seekers and migrants on the Greece/Turkey border pay the price for Europe's failures*, March 2020, 13, available at: <https://bit.ly/2VrJc8U>.

⁸ Ministry of Migration and Asylum, 'Από σήμερα, ξεκινάμε τις μεταφορές σε κλειστές δομές στις Σέρρες και τη Μαλακάσα όσων παραβίασαν τα εθνικά σύνορα από 1η Μαρτίου', 14 March 2020, available in Greek at: <https://bit.ly/3aiN9RE>.

⁹ See also Joint Ministerial Decision 2945/2020, Gov. Gazette B' 1016/24.3.2020, available in Greek at: <https://bit.ly/3ev59eM>. The detention facility is distinct from the existing open reception facility in Malakasa. The two are often referred to as "new" and "old" facility respectively. However, the status and managing authorities of the discrete facilities are not clear in the above Joint Ministerial Decision.

¹⁰ Ministry of Migration and Asylum, 'Μεταφορά 436 μεταναστών στην κλειστή δομή της Μαλακάσας', 15 March 2020, available in Greek at: <https://bit.ly/2yhslau>; Efsyn, 'Απέπλευσε από το λιμάνι της Μυτιλήνης το αρματαγωγό «Ρόδος」', 14 March 2020, available in Greek at: <https://bit.ly/3be8HQ7>.

¹¹ Article 2(c) Law 4636/2019 ("International Protection Act"), Gov. Gazette A' 169/1.11.2019, available in Greek at: <https://bit.ly/3es5rU0>; Article 2(b) 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 ("Reception Conditions Directive") [2013] OJ L180/96.

¹² Article 55 International Protection Act; Article 17 Reception Conditions Directive.

¹³ Article 46 International Protection Act; Article 8 Reception Conditions Directive.

and a risk of the individual's absconding has been established or the person is not cooperating with return proceedings or poses a threat to national security.¹⁴

None of the above procedural guarantees seems to have been followed by the Greek state in practice. The authorities automatically and indiscriminately placed under custody all individuals arriving in March 2020 on the Eastern Aegean islands and issued deportation and detention orders against them. None of the persons underwent the reception and identification procedures prescribed by law for all undocumented arrivals, including an assessment of vulnerability.¹⁵

The Lesvos Police Directorate issued uniform "deportation decisions based on readmission procedures to Turkey" (απόφαση απέλασης αλλοδαπού βάσει διαδικασίας επανεισδοχής) in conjunction with detention orders on the basis of irregular entry contrary to Article 83 of Law 3386/2005.¹⁶ In addition to the latter, the decisions cited the Greece-Turkey bilateral readmission agreement (suspended in 2018 according to Turkey)¹⁷ and the EU-Turkey deal,¹⁸ while they mentioned that the persons were at risk of absconding. However, they made no reference to any individual circumstances, to the International Protection Act, to the fact that the intention to lodge an asylum application had been expressed, or to the Decree. They were notified to the applicants in Greek with no interpreter present.

The police orders failed to establish the exceptional grounds required under national law for the imposition of detention and lacked any individualised assessment. Deportation was even ordered vis-à-vis unaccompanied children and pregnant women who are expressly protected from removal according to Greek law.¹⁹

It should be stressed that the individuals remained in pre-removal detention despite the fact that readmissions to Turkey had been suspended since mid-March 2020, presumably due to the COVID-19 outbreak.²⁰

Moreover, the Greek authorities have been informed by Frontex that the Agency "does not, and will not, support the return of third-country nationals who arrived in Greece during the temporarily suspension of the asylum procedures. The possible support of Frontex in returning these specific migrants may be granted only in case Greece will resume their right to have access to the asylum procedure and ensure individual assessments when issuing return decisions."²¹

¹⁴ Article 30 Law 3907/2011, Gov. Gazette A' 7/26.01.2011; Article 15 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ("Return Directive") [2008] OJ L348/98.

¹⁵ Article 39 International Protection Act.

¹⁶ Gov. Gazette A' 212/23.8.2005, available in Greek at: <https://bit.ly/2xrqzIZ>.

¹⁷ Reuters, 'Turkey suspends migrant readmission deal with Greece: Anadolu', 7 June 2018, available at: <https://reut.rs/2VM0BII>.

¹⁸ Note that the EU-Turkey deal has not been ratified as an agreement with legally binding effect in Greece.

¹⁹ Article 79(1)(e) Law 3386/2005; Article 41 Law 3907/2011.

²⁰ Correspondence from the Directorate of Migration Management of the Hellenic Police dated 30 March 2020 stated that "readmission operations to Turkey have been suspended for an indefinite period of time", as well as reports of closure of the land border and interruption of air, rail and road connections to Turkey in the aftermath of the COVID-19 outbreak: Kathimerini, 'Η Τουρκία κλείνει τα σύνορα με Ελλάδα και Βουλγαρία', 18 March 2020, available in Greek at: <https://bit.ly/2ylaYLn>; CNN, 'Κορωνοϊός: Τέλος οι πτήσεις από Βρετανία και Τουρκία', 23 March 2020, available in Greek at: <https://bit.ly/2XHJUdL>.

²¹ Frontex, Letter by Fabrice Leggeri, Executive Director, to RSA, ORD/ECRet/DiToAI/4007/2020, 27 April 2020, on file with the author.

In early April 2020, after the effect of the Decree came to an end, the authorities started to register the detained persons' intention to seek international protection. On 7 April 2020, the Aliens Directorate of Attica of the Hellenic Police handed several individuals detained in the 'new' Malakasa facility referral notes (*παραπεμπτικό σημείωμα*) to appear before the Asylum Service to register their asylum applications. These notes mention that the individuals in question "were released" from detention. Until the end of the month, however, no one was permitted to exit the facility under any circumstances, while the facility is under police guard. The same situation prevails in Serres for approximately 700 persons, according to reports of asylum seekers detained therein.²² According to the Ministry of Migration and Asylum, both Malakasa and Serres continue to operate as closed centres after the suspension of the asylum procedure came to an end.²³

Conditions of detention

Hundreds of persons wishing to seek international protection have been detained in the two facilities under the March 2020 policy. To the knowledge of RSA, people in the 'new' tent facility of Malakasa are held in conditions of severe overcrowding in living units, which render necessary social distancing and health precautions impossible: each tent accommodates approximately ten persons sleeping on gym mattresses and sleeping bags on the floor; there is no access to heating; access to water is not ensured without interruption in daytime and stops at night; hygienic items were only granted after several weeks; and access to medical care is limited, including for pregnant women and infants, as the nearest hospital is more than half an hour drive away. The facility contains no dedicated space for unaccompanied children to separate them from adults and foresees no recreational activities for minor detainees.

Unions of police officers in Attica have referred to hygienic conditions in Malakasa as a "ticking bomb" and denounced the complete lack of health and safety measures, against the backdrop of the COVID-19 pandemic.²⁴ Living conditions in the facility of Serres have equally been described by police officials as wholly inappropriate for residents, without space for outdoor activities.²⁵

The limits of legal challenge against detention

Persons subject to asylum and immigration detention in Greece can legally challenge their deportation decision through an administrative appeal (*ενδικοφανής προσφυγή*)²⁶ before the competent Police Directorate and their deprivation of liberty through an appeal against detention, known as "objections procedure" (*αντιρρήσεις*

²² The Press Project, '«Δεν μπορούμε ούτε να βράσουμε νερό για το γάλα των μωρών μας»: Ανοικτή επιστολή αιτούντων άσυλο από τις Σέρρες', 26 April 2020, available in Greek at: <https://bit.ly/2Ybr0ST>.

²³ Ministry of Migration and Asylum, 'Κλειστές παραμένουν οι δομές Μαλακάσας και Σιντικής Σερρών-Επιστροφές όσων εισήλθαν στη χώρα το Μάρτιο και δε δικαιούνται διεθνούς προστασίας', 7 April 2020, available in Greek at: <https://bit.ly/2wJIGLa>.

²⁴ Unions of Police Officers of Athens, North-Eastern Attica and Western Attica, 'Καταγγελία Ενώσεων Αστυνομικών Υπαλλήλων για την Κλειστή Δομή Μαλακάσας', 26 March 2020, available in Greek at: <https://bit.ly/2VIEtip>; Kathimerini, 'Υγειονομική βόμβα η κλειστή δομή Μαλακάσας καταγγέλλει η Ένωση Αστυνομικών', 26 March 2020, available in Greek at: <https://bit.ly/3eloTl4>. See also Human Rights Watch, 'Greek Vessel Takes Syrians, Afghans to Closed Camp', 16 March 2020, available at: <https://bit.ly/2Vha2Ro>.

²⁵ Efsyn, 'Το Κλειδί της πρώτης κόλασης', 23 March 2020, available in Greek at: <https://bit.ly/2Vt6V7G>.

²⁶ Article 77 Law 3386/2005.

κατά κράτησης), before the President of the Administrative Court.²⁷ Several bodies, including the European Court of Human Rights (ECtHR), have consistently criticised the objections procedure as ineffective,²⁸ as well as inaccessible due to the fact that detention orders tend to be standardised and available only in Greek.²⁹ Detention decisions – both initial and prolongation – issued to persons subject to the Decree made reference to the available remedies but were exclusively written in Greek and were not properly notified to them with interpretation in a language they understood. In some cases, it was reported to RSA that the authorities refused to provide the document of the decision to the applicants when they requested an interpreter to explain its contents. Yet, the decisions incorrectly stated that the individuals concerned had been informed of the reasons for their detention in a language they understood.³⁰

1. Administrative appeal before the Police

RSA lodged administrative appeals against deportation decisions taken by the Lesvos Police Directorate in 12 cases concerning persons detained on Lesvos prior to their transfer to the Malakasa detention facility. The Northern Aegean Regional Police Directorate rejected all 12 appeals through identical decisions, initially on the ground that they had not been submitted within the requisite time limits, despite the fact that in several cases notification had never taken place and that the 5-day deadline to lodge the appeal had not expired.³¹ Following the Ombudsman's intervention, the Police Directorate reviewed their negative decisions and re-examined the appeals, only to reject them again on 7 April 2020.³² None of the decisions issued conducted an individualised assessment of the circumstances of each case and the lawfulness of either deportation or detention. The decisions merely stated that the persons in question were arrested for irregularly entering the territory pursuant to domestic legislation and that "the Director of the Lesvos Police Directorate acted lawfully upon issuing the [contested] act and in line with the provisions in force."³³ It should be noted that, contrary to the deportation and detention decisions, the Regional Police Directorate decisions on the appeals cited the Decree, albeit without further explanation.

2. Appeal ("Objections") against detention before the Administrative Court

A number of appeals against detention have been submitted before the Administrative Court of Athens on behalf of the asylum seekers detained initially in Lesvos and later in Malakasa in light of the Decree. In cases represented by RSA, concerning nationals of Syria and of Afghanistan, among whom pregnant women and young children, the Administrative Court of Athens upheld the detention orders through identical judgments.

The rulings made a highly objectionable interpretation of the legal status of the Decree and its effect on Greece's obligations to guarantee access to asylum under EU and international law. In three cases, The Court reasoned that the Decree was

²⁷ Article 76(3) et seq. Law 3386/2005; Article 46(6) International Protection Act.

²⁸ See e.g. ECtHR, *Rahimi v. Greece*, Application No 8687/08, 5 April 2011; *R.U. v. Greece*, Application No 2237/08, 7 June 2011; *C.D. v. Greece*, Application No 33468/10, 19 March 2014.

²⁹ ECtHR, *O.S.A. v. Greece*, Application No 39065/16, 21 March 2019.

³⁰ See e.g. Administrative Court of Athens, Decision 358/2020, 7 April 2020, para 2.

³¹ Given that a general suspension on all administrative deadlines was imposed on 11 March 2020 due to the COVID-19 pandemic.

³² Northern Aegean Regional Police Directorate, Decisions 9760/20/4/1002-a-1 to 9760/20/4/1007-β-1, 7 April 2020.

³³ Unofficial translation from the author.

issued under an “extraordinarily urgent and unforeseeable need to respond to an asymmetrical threat to the security of the country which supersedes the underlying international and EU law rules on the asylum procedure, coupled with absolute and objective inability to process in reasonable time the asylum applications which would have resulted from illegal mass influx into the country.” It added that the adoption of the Decree found “basis in the sovereign right and constitutional duty of the Hellenic Republic to safeguard its integrity.”³⁴

With regard to the legality of the detention orders in question, the Court found that the applicants’ allegation of risks of *refoulement* under Article 33(1) of the 1951 Refugee Convention and Article 3 of the European Convention on Human Rights (ECHR) related to the legality of the authorities’ failure to register their asylum claims rather than that of the detention orders. Regarding the latter, it noted that the applicants posed a risk of absconding given that they (i) did not hold identity documents and (ii) entered the country irregularly amid an “extraordinarily urgent and unforeseeable” situation unfolding since the beginning of March.³⁵

Regrettably, the Court failed to assess the legality of detention and to examine the compliance of the authorities’ decisions with national and European law. First, the Court did not examine whether the deprivation of liberty of the applicants satisfies the criteria and conditions set by national law. It erroneously failed to engage with the applicants’ status as “asylum seekers” and thereby examined the lawfulness of the detention orders solely through the prism of return legislation, despite acknowledging that they had expressed the intention to seek international protection; an act triggering the applicability of asylum provisions, as stated above. Second, it did not engage with risks of *refoulement* contrary to the Refugee Convention and the ECHR raised by the applicants. Third, the Court made no assessment of clear obstacles to a reasonable prospect of return to Turkey, not least due to the constraints posed by the COVID-19 pandemic, and disregarded evidence put forward by the applicants to that effect.³⁶ It thus refrained from observing that the continuation of the applicants’ deprivation of liberty did not serve the purpose for which it had been imposed, and refrained from examining its necessity and proportionality. Fourth, it wrongly relied *inter alia* on lack of documentation to establish a risk of absconding, since in some cases the applicants had presented valid identity documents to the authorities. Finally, it entirely disregarded certain applicants’ acute vulnerability due to conditions such as 8.5 months’ pregnancy, in dereliction of express prohibitions on expelling pregnant women under domestic legislation.³⁷ Crucially, in doing so the Court ran counter to the reasoning of the Council of State, which granted an interim order (*προσωρινή διαταγή*) to suspend deportation in the case of two mothers facing removal pursuant to the Decree, on the basis of their vulnerability.³⁸

³⁴ Administrative Court of Athens, Decisions 358/2020, 359/2020 and 360/2020, 7 April 2020, para 4. Unofficial translation from the author.

³⁵ *Ibid.*

³⁶ The applications quoted correspondence from the Directorate of Migration Management of the Hellenic Police dated 30 March 2020, which stated that “readmission operations to Turkey have been suspended for an indefinite period of time”, as well as reports of closure of the land border and interruption of air, rail and road connections to Turkey in the aftermath of the COVID-19 outbreak: Kathimerini, ‘Η Τουρκία κλείνει τα σύνορα με Ελλάδα και Βουλγαρία’, 18 March 2020, available in Greek at: <https://bit.ly/2ylaYLn>; CNN, ‘Κορωνοϊός: Τέλος οι πτήσεις από Βρετανία και Τουρκία’, 23 March 2020, available in Greek at: <https://bit.ly/2XHxUdL>.

³⁷ Article 79(1)(e) Law 3386/2005; Article 41 Law 3907/2011.

³⁸ Greek Council for Refugees, ‘Σχόλιο του ΕΣΠ σχετικά με την προσωρινή διαταγή του ΣΤΕ’, 31 March 2020, available in Greek at: <https://bit.ly/2KmlNe9>.

As for the conditions of detention in Malakasa, the Court rejected the applicants' submissions on the ground that the conditions described earlier did not exceed the "inevitable level of hardship" attached to deprivation liberty so as to amount to inhuman or degrading treatment, and found the detention conditions appropriate even for two women in advanced pregnancy. It also dismissed alleged risks of exposure to COVID-19 as unsubstantiated.³⁹

In two rulings concerning women in advanced pregnancy and their spouses, Administrative Court of Athens held that it was more appropriate for the applicants to remain detained in the detention facility where they were held, in order to receive food and to benefit from medical observation and psychosocial support – although no such evidence existed or was put forward by the authorities – rather than being released and transferred to other forms of accommodation.⁴⁰ In both cases, the Court based its decision to dismiss the appeal on the fact that the appellants had arrived undocumented through Turkey, that they lacked travel documents, that they were "accommodated in accommodation facilities in Malakasa", that they "had never declared that they suffered from a serious medical problem" – despite evidence submitted to the opposite – that they were never hospitalized in a hospital or had asked for permission to a medical centre, and that they had not submitted annulment applications against the rejection of their appeals against the deportation orders. Lastly, the Court added that it took into account the availability of appropriate accommodation facilities and the possibility of securing dignified living conditions in existing facilities, without providing any further explanation.⁴¹ In all cases, the Court regrettably failed to conduct a thorough examination of the detention conditions and their suitability for the applicants needs and situation.

In another case concerning an Afghan family with an 8-month child, due to the fact that the applicants had been issued an order by the Aliens Directorate of Attica terminating their detention decision on 7 April 2020, the Administrative Court of Athens dismissed the objections against their detention.⁴² The family nevertheless remains in the facility at the time of writing.

To RSA's knowledge, objections against detention lodged by persons detained in Serres have also been rejected.

3. Application before the European Court of Human Rights

Two cases regarding the legality of detention of minors detained in the framework of the March Decree were also brought by RSA before the ECtHR to indicate interim measures. In particular the ECtHR was seized in the case of R.H. and R.A., two unaccompanied children from Syria, who arrived in Greece after the entry into force of the Decree and were detained initially in the Port of Mytilene and subsequently in the Rhodes vessel and the Malakasa detention centre. Until the end of March 2020, the National Centre for Social Solidarity (Εθνικό Κέντρο Κοινωνικής Αλληλεγγύης, EKKA) had received no official information on steps to transfer the children to a specialised accommodation shelter for minors.⁴³

³⁹ Administrative Court of Athens, Decisions 358/2020, 359/2020 and 360/2020, 7 April 2020, para 4. Unofficial translation from the author.

⁴⁰ Administrative Court of Athens, Decision 356/2020, 3 April 2020, para 5; Decision 357/2020, 3 April 2020, para 5.

⁴¹ *Ibid.*

⁴² Administrative Court of Athens, Decision 367/2020, 9 April 2020.

⁴³ Information provided by EKKA via email, 31 March 2020.

On 27 March 2020, RSA applied before the ECtHR and requested interim measures under Rule 39 of the Rules of Court to secure the release of the two children from the Malakasa facility and their transfer to suitable reception facilities.⁴⁴

The Strasbourg Court requested the Greek authorities to clarify the conditions of the applicants' detention in Malakasa, taking into account their age and the COVID-19 pandemic, and to specify whether steps had been taken for the appointment of a guardian, their access to the asylum procedure and their transfer to other facilities. The questions of the Court were as follows:

1. Is the applicants' physical or psychological integrity at serious risk, taking into account the authorities' obligations under Article 3 of the Convention? In particular, what are the exact conditions of the applicants' detention in Malakasa? Are minors detained separately in "a safe zone"? Are there recreational and other activities planned for minors? Have the authorities taken concrete measures for the applicants' transfer? If so, when are the applicants to be transferred to an adequate reception facility?
2. Have any concrete measures been taken concerning the appointment of a guardian for each of the applicants? Have the authorities assessed the applicants' best interests?
3. Are the applicants in risk of removal to Turkey? Did the applicants have the opportunity to register their asylum applications? If not, why not?
4. Which measures have been taken or are planned to be put in place in immigration detention centers in relation to the COVID-19 risk, in particular for vulnerable people like the applicants?

It is worth noting that, following reports from RSA and other organisations, the Ombudsman also wrote to the authorities to inquire into the situation of unaccompanied children detained during the period of effect of the Decree.⁴⁵

In its observations of 6 April 2020, the government responded to the ECtHR's questions as follows:

- While areas of the facility are not separated, "due to the small number of hosted persons, minors' safety is not at stake given that adequate provision has been made for the delimitation of the space reserved for them and there is sufficient staff to protect them." The government also stated that the children "will soon be transferred to an accommodation structure suitable for longstanding housing" with the involvement of EKA, without providing information on any concrete arrangements made.
- The government only stated that, from that point on, "a legal guardianship will be appointed". No further details were provided.
- With regard to risks of removal and access to asylum, the government invoked the Decree as an exceptional measure "to manage an extremely urgent and unpredictable threat against the country due to massive attempts of unauthorized entry by foreigners". It noted that the Decree has ceased to apply and that, from that point on, the applicants "will have the right to submit an asylum application". It added that the children are not at risk of removal due to their belonging to a vulnerable group and to the fact that they have the right to submit an asylum claim.
- As regards measures to prevent the spread of COVID-19 in immigration detention centres, the government referred to provisional measures adopted for Reception and Identification Centres. No reference is made to regulations governing detention facilities.

⁴⁴ ECtHR, *R.H. and R.A. v. Greece*, Application No 15463/20.

⁴⁵ Ombudsman, Letter to the Ministry of Migration and Asylum and the Hellenic Police, Ref. No 40, 30 March 2020.

Similar to other cases, as described above, the applicants received on 7 April 2020 a decision terminating their detention and a referral note to appear before the Asylum Service for the purpose of registering their asylum applications. However, no actions were arranged with a view to appointing them a guardian⁴⁶ and no steps were taken to ensure their transfer out of Malakasa.

On 15 April 2020, the ECtHR decided not to grant interim measures, on the ground that the government had already made commitments to ensure that the applicants would receive treatment in accordance with Article 3 ECHR. At the time of writing, however, the applicants remained in the facility of Malakasa among adults.

While the case remains to be examined by the Court, the refusal to indicate interim measures under Rule 39 appears to pay undue deference to the government's stated readiness to secure Article 3-compliant treatment to persons affected by the Decree, despite the absence of concrete indications that it is following up on its declared commitments. The two children continue to run a real risk of irreparable harm on account of the persisting living conditions prevailing in Malakasa which are inhuman, precarious and inappropriate for minors. Moreover, as no guardian has been appointed to them, they have no access to domestic remedies.

RSA lawyers lodged a fresh request for interim measures on 23 April 2020. The Court has requested the Greek authorities to detail "what concrete measures have been taken for the applicants' transfer, as well as for the appointment of a guardian" by 4 May 2020 before it takes a decision on interim measures.

Conclusion

The decision to suspend access to the Greek asylum systems throughout March 2020 has been treated by domestic authorities and courts as a permissible, time-limited exceptionality. Yet, the repercussions of so flagrant a violation of fundamental refugee and human rights law principles outlive the Decree, with affected asylum seekers remaining in arbitrary detention under conditions in no way suitable to guarantee their life and dignity. They set a dangerous precedent for the credibility of international law and the integrity of asylum procedures in Greece and beyond.

Safeguarding them requires just as effective and robust redress from the judiciary as it does sound, lawful and principled responses from policymakers. While acknowledging the state's sovereign power under international law to regulate the entry of non-nationals, it should remain evident that any decision to prevent people from seeking asylum from persecution contravenes a ubiquitous right and the non-derogable principles of *non-refoulement* and the prohibition on torture and other inhuman and degrading treatment.

⁴⁶ Pursuant to national law, the Public Prosecutor of Athens is appointed as a temporary guardian for the children in this case.



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