



RSA Comments on the draft Immigration Code

March 2023

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Introduction

On 7 March 2023, the Ministry of Migration and Asylum submitted the draft Immigration Code to public consultation.¹ The bill counts a total of 180 articles, yet it was tabled in a truncated one-week consultation, by way of derogation from the general two-week rule laid down in law.² No “sufficiently substantiated grounds” have been put forward for resort to shorter deadlines. Moreover, the Ministry did not offer the possibility of “article-by-article comments” on the bill but only comments per Section, even though certain sections contain up to 40 articles. This has seriously hampered the effectiveness of stakeholder participation in the consultation and the incorporation of their views in legislative work. The Ministry's practice comes as another example of “*kakonomia*” in the Greek law-making process, denounced among other rule of law issues by the Civil Liberties, Justice and Home Affairs (LIBE) Committee of the European Parliament upon completion of a visit to Greece last week.³

Similar to the Immigration Code in force (hereafter “L 4251/2014”), **Article 3(3)(e) and (f)** of the bill excludes beneficiaries of international and temporary protection from the scope of the Code, with the exception of those requesting and qualifying for the “Blue Card” and long-term resident status, as well as legally residing adults who arrived in the country as unaccompanied minors – for its part, **point (g)** of said paragraph is redundant since “international protection” encompasses “subsidiary protection status” in accordance with **Article 4(g)** of the bill.

However, whereas the scope of both L 4251/2014 and L 3386/2005⁴ and of the current bill excludes persons subject to international protection provisions, the instruments contain a range of provisions that are adversely applied against them by the Greek administration and courts, subject to no exception. As a result, persons in need of international protection are treated as irregular migrants and faced with extremely stringent penalties in relation to entry and/or residence in the country.

The exemption from the Immigration Code of people falling under the international and temporary protection regime is justified in light of prescriptive rules on those statuses in the recently adopted **Asylum Code**.⁵ Nevertheless, the bill regulates a number of issues relating to international and temporary protection holders such as residence permits in **Articles 165-167**, in evident contradiction to the aforementioned scope of the Immigration Code and at a risk of overlap and inconsistency with Asylum Code provisions currently in force. At the same time, it fails to incorporate and update other aspects such as family reunification of beneficiaries of international protection, since it refrains from codifying the provisions of **PD 131/2006**,⁶ as maintained in force by Article 139(3) L 4251/2014.

¹ Ministry of Migration and Asylum, *Δημόσια διαβούλευση για τη νομοθετική πρωτοβουλία του Υπουργείου Μετανάστευσης και Ασύλου, υπό τον τίτλο: «Κώδικας Μετανάστευσης»*, 7 March 2023, available at: <https://bit.ly/3J6AnJg>.

² Article 61(2) L 4622/2019, Gov. Gazette A' 133/07.08.2019.

³ European Parliament, ‘MEPs concerned by threats to EU values in Greece’, 8 March 2023, available at: <https://bit.ly/3Jdb3l1>.

⁴ Gov. Gazette A' 212/23.08.2005.

⁵ L 4939/2022, Gov. Gazette A' 111/10.06.2022.

⁶ Gov. Gazette A' 143/13.07.2006.

The fact that "Social Integration" is "removed" from the title and consequently the relevant provisions are not included in the proposed draft law, is indicative of the spirit and the direction of it. These provisions remain, alone and - in any case - few, in the "carcass" of N 4251/2014, despite the announcements and the necessity to promote their elaboration and upgrading.

The drafters of the bill purport to "streamline existing categories of residence permits, by repealing those stemming from national provisions and introducing them under similar categories of residence permits set out in EU law, as well as grouping them based on purpose and relevance..." This, however, not only is not served but on the contrary is deconstructed in the draft law, especially with the proposed articles 134 and 162, in combination with the repeal of the "second-generation" Residence Permit from the proposed draft law. The proposed **Article 134** in particular enacts an exclusion of persons previously channelled into asylum procedures from the possibility to obtain a residence permit on exceptional grounds, thereby introducing impermissible discrimination against people who have created strong ties to the country due to long-term presence. Furthermore, contrary to official announcements, the proposed **Article 162(1)(c)** fails to address the issue of security of status and documentation to children who arrived in Greece as unaccompanied minors and remain in the country. On the contrary, the proposed measures lay down discriminatory exceptions and obstacles in a manner that contravenes constitutional principles and international standards, including the Convention on the Rights of the Child and expose to marginalization children who grew up in Greece and are integrated into Greek society after they reach adulthood.

Part I of this paper sets out brief comments by Refugee Support Aegean (RSA) on the specific repercussions of key provisions of the bill on people in need of international protection, focusing in particular on the humanitarian assistance exception from penalties against carriers, family reunification and residence permits.

Part II reiterates recommendations from civil society, already put forward in the public consultation ahead of the adoption of L 4825/2021,⁷ aimed at ensuring at a minimum the necessary harmonisation of Greek legislation with EU law.⁸ Amending the provisions of the Asylum Code and related legislation is all the more pressing in light of infringement procedures initiated by the European Commission against Greece for incorrect transposition of EU law, namely through letters of formal notice on the **Return Directive** in September 2022 and on the **Reception Conditions Directive** in January 2023.

⁷ Gov. Gazette A' 157/04.09.2021.

⁸ RSA et al., "Deportations and Returns Bill" – Comments from legal organisations, June 2021, <https://bit.ly/40cZh12>.

Part I – Analysis of key provisions of the bill

1. Entry and exit from Greek territory: Articles 5-7

The principle of *non-refoulement*, as provided in **Article 33(1) of the 1951 Refugee Convention**, is undoubtedly the bedrock of international refugee law and the most significant commitment undertaken by signatories to the 1951 Convention for persons falling within its scope. Such persons are protected from *refoulement*, deportation and any form of removal and transfer to a country where their life and freedom are at risk. Crucially, the *non-refoulement* principle protects not only lawful residents, i.e. recognised refugees – already protected under **Article 32(1) of the Convention** – or registered asylum seekers, but mostly those persons entering or staying irregularly. The absolute and unequivocal safeguard of the principle of *non-refoulement* in the most authoritative international human rights instruments has substantially contributed to the protection of people from any form of removal to a territory where they run the risk of fundamental rights violations.⁹ The obligation to comply with the *non-refoulement* principle is also enshrined in founding EU texts and underpins EU law. Furthermore, the 1951 Refugee Convention foresees a specific, exceptional status for people falling within its scope, recognising the need to protect them from risks faced due to their emergency circumstances. Hence it exempts them from penalties imposed for reasons of irregular entry, in conjunction with an express prohibition on their removal. Articles 33(1) and 31(1) of the Refugee Convention thereby lay down a safety net for people in need thereof and entitled thereto on account of threats to their life and freedom in their home countries.

It is worth recalling that **Articles 3(b) and 14 of the Schengen Borders Code** state that its provisions are applied without prejudice to the international and EU legal framework on international protection.

However, whereas the scope of both L 4251/2014 and L 3386/2005¹⁰ and of the current bill excludes persons subject to international protection provisions, the instruments contain a range of provisions that are adversely applied against them by the Greek administration and courts, subject to no exception. As a result, persons in need of international protection are treated as irregular migrants and faced with extremely stringent penalties in relation to entry and/or residence in the country.

For those reasons, RSA recommends the inclusion of an express provision in a **new Article 5** referring to the application of the Immigration Code without prejudice to provisions on international protection.

2. Carrier liability: Article 25

Profit: Article 25(1)

The UN Protocol against Smuggling of Migrants sets out financial or other material benefit as the real objective and a necessary element of *mens rea* for the offence of

⁹ Article 3 Convention against Torture; Article 3 ECHR; Article 19(2) Charter of Fundamental Rights; Article 7 ICCPR; Article II.3 OAU Convention on Refugees; Article 22 ACHR; Part III.5 Cartagena Declaration et al.

¹⁰ Gov. Gazette A' 212/23.08.2005.

smuggling of migrants.¹¹ This is also set out in **Article 1(1)(b) of the Facilitation Directive** in relation to facilitation of illegal stay.

Both the existing L 4251/2014 and **Article 25(1)** of the bill maintain broad criminalisation of acts of transport into Greece, of collection from points of entry, external or internal borders with the aim of onward movement within the country or to a different state, of facilitation of transport or of providing shelter for coverage, without any requirement of action for profit on the part of the carrier – this forms part of the aggravated offence under **point (b)** of the provision. This wording exceeds the limits of the UN Protocol and of the Facilitation Directive and results in unfair criminal penalties against people who act on political or social motives and who should not fall within the framework of the Protocol.

Humanitarian assistance exception: Article 25(6)

Article 1(2) of the Facilitation Directive permits Member States to decide “not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned”. The European Commission has clarified in recent guidance that “Article 1 of the Facilitation Directive must be interpreted as follows: i) humanitarian assistance that is mandated by law cannot and must not be criminalised” and has called on all Member States to fully transpose Article 1(2) of the Directive in their domestic legal orders.¹²

Article 25 of the bill maintains the existing provisions of L 4251/2014 on felony sanctions for transport to Greece, collection at points of arrival, facilitation of transport or provision of shelter to persons who have no right of entry into the country. **Paragraph 6** of the provision maintains the existing exception from the above sanctions “in the cases of rescue of persons at sea, of transport of persons in need of international protection pursuant to the requirements of international law, as well as in the cases of onward movement in the territory of the country or facilitation of transport with the aim of submission to procedures of article 83 of L 3386/2005 (A' 212) or article 42 of L 4939/2022 (A' 111) following notification of the competent police and coast guard authorities.”

In practice, however, this provision has proved severely inadequate in preventing unfair criminalisation and/or imposition of unfair penalties on those who offer humanitarian assistance to people arriving on Greek territory in search of international protection, as demonstrated by a plethora of criminal charges where even refugees themselves are treated as common criminals based on the provisions on carrier liability and face serious charges leading to sentences of hundreds of years. No consideration is paid to the emergency situation and/or particular circumstances faced by refugees, even though these are set out in international, EU and domestic

¹¹ European Commission, *Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*, 2020/C 323/01, 1 October 2020, para 2.1.

¹² European Commission, *Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*, 2020/C 323/01, 1 October 2020, paras 4 and 5.

law with a view to exempting them from said offences and sentences.¹³ Sharp criticism against the current provision of L 4251/2021 has recently been levelled by UN Special Procedures.¹⁴

First, the exception set out in Article 25(6) is considerably narrower to Article 1(2) of the Facilitation Directive insofar as it excludes any forms of humanitarian assistance beyond “rescue of persons at sea”, “transport” and “onward movement inside the territory or facilitation of transport”. Such assistance could take the form *inter alia* of provision of food and water to newly arrived refugees wishing to lodge asylum applications, which has been the subject of unfair criminal prosecution.¹⁵

Second, to the extent that it is strictly applied to “transport of persons in need of international protection pursuant to the requirements of international law”, the wording of the exception results in potential unfair criminalisation of people called – under a restrictive and interpretation – to demonstrate that, at the time humanitarian assistance is provided, recipients thereof qualify for international protection status before their asylum claims have even been lodged and examined by the competent asylum authorities under **Article 1(zg) of the Asylum Code**. Such a reading, however, contravenes international and EU law, as recently highlighted by the Court of Justice of the European Union (CJEU) in C-821/19 *Commission v Hungary*, given that “persons who provide assistance to asylum seekers, irrespective of the capacity in which they operate, cannot be expected to make such an examination before being able to assist a third-country national or a stateless person in making or lodging an application for asylum. Moreover, asylum seekers may have difficulty in relying, as of the stage at which their application is made or lodged, on the relevant evidence which would make them eligible for refugee status.”¹⁶

Therefore, the explicit reference in the exception to persons “in need of international protection” must be complemented to encompass persons in need of other forms of protection e.g. persons with medical conditions, injured persons, minors and others.

Third, under Greek law, all irregularly entering or staying third-country nationals or stateless persons are subject to reception and identification procedures and shall be immediately transferred to Reception and Identification Centres (RIC) or Closed Controlled Access Centres (CCAC) throughout the territory by police and coast guard authorities, under **Articles 38 et seq. of the Asylum Code** – no longer **Article 83 L 3386/2005**. In addition, the Hellenic Police explicitly concedes that “all – almost – foreigners entering our country makes an asylum application during the reception and identification procedure”,¹⁷ thereby leaving little doubt as to the intention of

¹³ See e.g. RSA, ‘One more acquittal shows the dramatic consequences of the criminalisation of refugees entering in EU territory’, 3 June 2022, available at: <https://bit.ly/3mZ3XJH>; Sto Nisi, ‘Καταδίκασαν αγωνιστές της Δημοκρατίας στην Τουρκία ως.... διακινητές!’, 12 April 2022, available at: <https://bit.ly/3mC1Mve>.

¹⁴ UN Special Rapporteur on human rights defenders, ‘Statement on preliminary observations and recommendations following official visit to Greece’, 22 June 2022, available at: <https://bit.ly/3LrIO55>.

¹⁵ Avgi, ‘Χίος / Αθώωθηκε ο πρόσφυγας που έδωσε νερό και τροφή σε συνανθρώπους του’, 16 June 2022, available at: <https://bit.ly/3Falofi>.

¹⁶ CJEU, C-821/19 *Commission v Hungary*, 16 November 2021, paras 129-130.

¹⁷ Directorate of the Hellenic Police, Reply to parliamentary question, 7017/4/25899-γ’, 16 March 2022, available at: <https://bit.ly/3LiIM02>.

entrants to lodge applications for international protection before the competent authorities. In light of this, Article 25(6) should cross-refer not only to **Article 42 of the Asylum Code** which concerns referral of asylum seekers by the Reception and Identification Service (RIS) to the Asylum Service, but to **Articles 38 et seq. of the Asylum Code** which regulate the full set of the reception and identification procedure, including the obligation on authorities to transfer persons irregularly entering or staying in Greece to RIC and CCAC.

3. Family reunification of international protection holders: Articles 83 et seq.

Conditions and procedures for family reunification of beneficiaries of international protection are still regulated in **PD 131/2006**, outside the scope of L 4251/2014.¹⁸ That instrument, however, was adopted and amended prior to wide-ranging legislative and institutional changes in the Greek asylum system, not least the establishment of a Ministry of Migration and Asylum and the operation of an Asylum Service competent for international protection matters, which has already been entrusted with the processing family reunification applications.¹⁹ The prospective adoption of a new Immigration Code is an opportunity for a much needed update of the existing framework. We recall that similar issues were addressed by the Asylum Code, where provisions of PD 80/2006 on temporary protection²⁰ were codified into the main instrument following necessary modifications, particularly as regards responsible authorities.

Scope: Article 83(2) / Article 3(2) PD 131/2006

The **Family Reunification Directive** is not expressly applicable to beneficiaries of subsidiary protection.²¹ However, both CJEU case law²² and European Commission guidance confirm that Member States may regulate family reunification of subsidiary protection holders similar to the procedure applied to refugees. “The Commission considers that the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees, and encourages MSs to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection. The convergence of both protection statuses is also confirmed in the recast Qualification Directive 2011/95/EU”.²³ No distinction is drawn by EU law between the two statuses in relation to maintaining family unity under Article 23 of the Qualification Directive, transposed by Article 22 of the Asylum Code.

It is for those reasons that the overwhelming majority of EU Member States, except Greece, Malta and Cyprus, foresee a right to family reunification for subsidiary protection holders, while in most cases ensuring equal treatment to refugees (e.g.

¹⁸ Article 139(3) L 4251/2014.

¹⁹ Article 29(2)(g) PD 106/2020, Gov. Gazette A' 255/23.12.2020, as amended by Article 10 PD 77/2022, Gov. Gazette A' 212/17.11.2022.

²⁰ Gov. Gazette A' 82/14.04.2006.

²¹ Article 3(1) Family Reunification Directive.

²² CJEU, C-635/17 *E karà Staatssecretaris van Veiligheid en Justitie*, 13 March 2019, paras 32-42.

²³ European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, COM(2014) 210, 3 April 2014, para 6.2.

France, Italy, Netherlands, Belgium, Spain, Sweden, Portugal, Ireland, Romania, Bulgaria, Croatia, Poland).²⁴

In any event, recent jurisprudence of the European Court of Human Rights (ECtHR) confirms that an absolute and unequivocal exclusion of beneficiaries of subsidiary protection from the right to family reunification without the possibility of an individualised assessment of each case contravenes Greece's international obligations, namely the right to family life.²⁵

Inability to submit documentation: Article 14 PD 131/2006

Recital 8 of the Family Reunification Directive states that "Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there" and requires the establishment of more favourable provisions for the exercise of their right to family reunification.

Severe obstacles to the effective implementation of family reunification procedures stems from the requirement under **Article 14(1)(c) PD 131/2006** on refugees to submit an exact copy of their family members' travel documents already upon submission of the family reunification application to the Asylum Service. On the one hand, **point (c)** of Article 14(1) PD 131/2006 does not mirror **point (b)** per which "Where the refugee cannot submit the above documents, the competent authorities shall take into considerations other relevant evidence. The absence of such documentation shall not in itself constitute a ground for rejection of the application." On the other hand, the obligation to submit an exact copy of family members' travel documents as part of the documentation required for the family reunification application before the Asylum Service entails an impermissible barrier and restriction on the right to family reunification in practice, since it deprives refugees – as well as stateless persons – whose family cannot obtain national travel documents from the right to family life. We note, furthermore, that such documents are necessary not for approval of a family reunification application but for travel of family members to Greece. Therefore, where family reunification has been accepted and national travel documents cannot be issued, possibilities include the issuance of temporary travel documents under the International Committee of the Red Cross (ICRC) or *laissez-passer* by the relevant – Greek – authorities.

In addition, Greek administrative courts have held that failure to submit certified copies of family members' travel documents or of other documents not only does not constitute sufficient grounds for rejecting an application for family reunification,²⁶ but points to a duty on the part of the administration to actively identify alternative and practically accessible means for the arrival of family members in Greece. For instance, requiring refugees to refer to the authorities of a third country which has not

²⁴ ECRE, *Not there yet: Family reunification for beneficiaries of international protection*, February 2023, 9, available at: <https://bit.ly/41VzDzh>.

²⁵ ECtHR, *M.A. v. Denmark*, App No 6697/18, 9 July 2021; *M.T. v. Sweden*, App No 22105/18, 20 October 2022.

²⁶ Administrative Court of Athens, No 493/2020, 15 September 2020, para 7, Greek Asylum Case Law Report 1/2021.

granted them refugee status in order to obtain documents has been ruled not to be a viable possibility.²⁷

The European Commission highlights in its guidance on the Family Reunification Directive that Member States “should pay special attention to this particular situation and facilitate the obtaining of travel documents and long-stay visas so that refugees may effectively exercise their right to family reunification. In cases where it is impossible for refugees and their family members to obtain national travel documents and long-stay visas, MSs are encouraged to recognise and accept ICRC emergency travel documents and Convention Travel Documents, issue one-way laissez-passer documents, and offer family members the possibility of being issued a visa upon arrival in the MS.”²⁸

RSA therefore advocates for express reference to cases where family members of refugees are unable to obtain travel documents in their country, with a view to offering clear guidance to competent administrative authorities and to bring practice in line with the case law of administrative courts.

4. Residence permit on humanitarian and exceptional grounds: Article 134

The drafters of the bill purport to “streamline existing categories of residence permits, by repealing those stemming from national provisions and introducing them under similar categories of residence permits set out in EU law, as well as grouping them based on purpose and relevance...” This is directly undermined by **Article 134**, however.

At the outset, the grant of residence permits to victims and essential witnesses of crimes, to victims of domestic violence, to victims of racially motivated crime, to persons suffering from serious health conditions, to work accident victims, to persons following mental addiction treatment programmes, to family members of Greek citizens eligible for self-standing residence permits, is foreseen *ad hoc* and at the discretion of the Minister of Migration and Asylum. Yet, the grant of residence permits in such cases is a binding obligation stemming from other domestic law provisions as well as supranational standards such as the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence, ratified by L 4531/2018.²⁹

The exclusion of persons previously channelled into asylum procedures from the possibility to obtain a residence permit on exceptional grounds is aimed at ‘clearing’ a real class of people who have created strong ties with Greece through long-term stay. This introduces discriminatory treatment contrary to the Constitution, to supranational provisions such as Articles 8 and 14 ECHR, to founding EU law provisions and to the Common European Asylum System, as well as to the spirit and letter of the very provision. The lack of residence permit options for rejected asylum seekers whose return is prohibited due to *non-refoulement* or is otherwise impossible deprives people

²⁷ Administrative Court of Athens, No 861/2022, 20 June 2022, para 8, Greek Asylum Case Law Report 1/2022.

²⁸ European Commission, *Guidance for application of Directive 2003/86/EC on the right to family reunification*, COM(2014) 210, 3 April 2014, para 6.1.2.

²⁹ Gov. Gazette A' 62/05.04.2018.

protected by international and EU law of access to documentation and places them in the margins of society.

The partial reference to child protection institutions and facilities and link between the 'form' of such facilities and the grant of residence permits excludes from access to documents a large number of children that are, in theory, under the protection of the Greek State and introduces discrimination contrary to the Convention on the Rights of the Child.

5. Ten-year residence permits: Article 162(1)(c)

Despite official statements to the contrary, the proposed **Article 162(1)(c)** fails to address the issue of status and documentation security to children who arrived in Greece as unaccompanied minors and remain in the country. On the contrary, the proposed measures lay down discriminatory exceptions and obstacles in a manner that contravenes constitutional principles and international standards, including the Convention on the Rights of the Child.

The requirement of prior possession of a residence title in Greece for the granting of a ten-year residence permit to children – young adults who arrived in Greece as unaccompanied minors excludes the vast majority of children who arrived, grew up and stayed in the country as unaccompanied minors and/or studied or study in Greek school and whose asylum claims have been rejected. These children are left in despair, without residence documents or any viable way out.

Read in conjunction with the exclusion of rejected asylum seekers from residence permits based on seven-year residence as per the proposed **Article 134(3)**, the measure set out in **Article 162(1)(c)** seems to be stripped of any meaningful content.

Furthermore, the cumulative condition of successful completion of at least three Greek school classes prior to reaching the age of 23 and of enrolment in higher education is challenging for those children who frequently face dramatic conditions on account of deficiencies in the Greek child protection system and of the absence of state support.

Finally, the requirement of a 900 € fee to be paid by children struggling to stand on their feet amounts to disproportionate and unfair treatment.

6. Residence permits for international protection holders: Articles 165-167

Articles 165-167 of the bill refer to the grant of residence permits to beneficiaries of refugee status, subsidiary protection and temporary protection. Yet, these categories of third-country nationals and stateless persons are outside the scope of the Immigration Code according to its **Article 3(3)**, on the one hand, and **Articles 23 and 134 of the Asylum Code** already contain more detailed provisions on the matter.

1. **Reception and identification procedures: Article 39 Asylum Code**

Article 40(a) of the Asylum Code imposes a “restriction of liberty” regime on persons undergoing reception and identification procedures, consisting of a prohibition to exit the premises of the RIC. However, in view of the degree of restriction of newly arrived persons’ liberty through the obligation to remain within the RIC, the lack of possibilities to receive visitors outside the facility and the limitation and surveillance of their movements by the authorities,³⁰ the measure amounts to *de facto* detention in the meaning of **Article 2(h) of the Reception Conditions Directive**.

“Restriction of liberty” pursuant to Article 40(a) of the Asylum Code is indiscriminately applied for a maximum of 25 days, for the purpose of completing reception and identification procedures.³¹ The measure does not, however, observe the EU law requirements for detention of asylum seekers under **Articles 8-11 of the Reception Conditions Directive** and **Article 26 of the Asylum Procedures Directive**, notably an individualised assessment of the exhaustive grounds for detention under Article 8(3), of the necessity and proportionality of deprivation of liberty.³² As a result, the domestic law provision contravenes both Directives.

This reading is supported by the **INFR(2022)2156** letter of formal notice sent by the European Commission to the Greek government at the end of January 2023, under an infringement procedure for incorrect transposition of Articles 8, 9 and 11 of the Reception Conditions Directive.³³

2. **Detention of asylum seekers: Article 52 Asylum Code**

Article 52(3) of the Asylum Code incorrectly transposes **Article 11(6)** of the Reception Conditions Directive, as stated in the **INFR(2022)2156** letter of formal notice sent by the European Commission to the Greek government at the end of January 2023.³⁴ EU law limits the possibility for Member States to derogate from the obligation to provide separate accommodation to detained families only vis-à-vis applicants held in “at a border post or in transit zone” outside the context of the border procedure. This requirement is not incorporated in Greek law.

3. **Withdrawal of reception conditions: Articles 46, 55, 61 Asylum Code**

Article 46(c) of the Asylum Code provides for reduction or withdrawal of material reception conditions where an asylum seeker does not comply with a transfer to a different facility for the purpose of completing the reception and identification procedure. The provision runs counter to EU law, since it exceeds the exhaustive grounds for reduction or withdrawal of reception conditions set out in **Article 20(1)-(3)**

³⁰ CJEU, C-924/19 and C-925/19 *FMS*, 14 May 2020, paras 226-227.

³¹ See. RSA, *Registration of asylum applications in the new mainland RIC in Greece*, February 2023, available at: <https://bit.ly/42gcasY>.

³² CJEU, C-924/19 and C-925/19 *FMS*, 14 May 2020, paras 258-259.

³³ European Commission, ‘January Infringements package: key decisions’, INF/23/142, 26 January 2023, available at: <https://bit.ly/3RdzL8n>.

³⁴ *Ibid.*

of the Reception Conditions Directive. Non-compliance on the part of a minor asylum seeker with the obligation to enrol in school or failure to attend classes pursuant to **Article 55(2) of the Asylum Code** equally falls outside the scope of permissible reduction or withdrawal grounds.

Furthermore, the CJEU has clarified that sanctions pursuant to **Article 20(4)** of the Reception Conditions Directive differ from grounds for reducing or withdrawing reception conditions. According to the Court, the Directive does not allow Member States to terminate material reception conditions as a sanction against applicants who violate the house rules of reception centres.³⁵ In light of this, the provisions of **Article 61(4) of the Asylum Code** contravene Article 20(4) of the Directive.

Finally, the Greek legislature has failed to transpose into **Article 61(5) of the Asylum Code** the requirement on the competent authorities to take into consideration the principle of proportionality pursuant to **Article 20(5)** of the Directive.

4. Victims of torture and violence: Article 67 Asylum Code

Article 67 of the Asylum Code provides that victims of torture or violence shall be certified by a “medical report from a public hospital, a military hospital or adequately trained doctors of public health institutions, including forensic services”. The limitation of competent bodies for the issuance of medical reports contravenes EU law, since no such possibility is afforded to Member States by **Article 25(1) of the Reception Conditions Directive** or the Istanbul Protocol. According to the latter, certification of victims of torture requires an interdisciplinary approach involving a social worker and medical, psychological and legal expertise.

Importantly, certification of victims of torture or other forms of violence pursuant to Article 67 of the Asylum Code has never taken place since the entry into force of the provision,³⁶ due to the absence of the necessary means and procedures within the responsible public health institutions.³⁷ Meanwhile, neither the administration nor the courts accept medical reports from entities other than those set out in Article 67 of the Asylum Code.³⁸

As a result, the aforementioned provision renders certification of victims of torture impossible in practice. This jeopardises the Greek authorities' duty to identify and refer torture victims to rehabilitation services even where they have been certified by medical reports of specialised bodies in line with the Istanbul Protocol.

5. Access to documents of the file: Article 76 Asylum Code

³⁵ CJEU, C-233/18 *Haqbin*, 12 November 2019, para 56.

³⁶ Article 23 L 4540/2018, Gov. Gazette A' 91/22.05.2018.

³⁷ See e.g. Metadrasi, *Θύματα βασανιστηρίων: Από την ανίχνευση στην προστασία: Ιστορικό, πρακτικές και συστάσεις για τη βελτίωση της προστασίας των θυμάτων βασανιστηρίων στην Ελλάδα*, 21 December 2021, available at: <https://bit.ly/3170BJQ>; Médecins Sans Frontières, *‘Οι Γιατροί Χωρίς Σύνορα ολοκληρώνουν τη δράση τους στην κλινική για επιζώντες βασανιστηρίων στην Αθήνα’*, 21 December 2021, available: <https://bit.ly/3EBMrOC>.

³⁸ See e.g. 4th Appeals Committee, No 79499/2023, 8 February 2023.

The provision incorrectly transposes **Article 23(1)** of the Asylum Procedures Directive, as recently interpreted by the CJEU,³⁹ given that it fails to “establish in national law procedures guaranteeing that the applicant's rights of defence are respected”, namely by making sources taken into consideration by the determining authority available to lawyers who have undergone a security check.

6. **Guarantees for the examination of the asylum application: Article 79 Asylum Code**

Relating to the obligations of the Asylum Service prior to taking a decision on an asylum application, **Article 79(3) Asylum Code** refers to the collection and keeping of “specific and precise” information related to the country of origin of the applicant. According to **Articles 10(3)(b) and Recitals 39 and 48 of the Asylum Procedures Directive**, however, such information must also be “up-to-date”.⁴⁰

In addition, Greek law has failed to transpose the corollary provision of **Article 12(1)(d)** of the Directive on access of the applicant and/or their representative or legal advisor to the specific sources of information taken into consideration by the determining authority for the purpose of deciding on the application.

7. **Personal interview: Article 82 Asylum Code**

Under **Article 15(3)(c) of the Asylum Procedures Directive**, Member States shall “select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly.” However, Greek legislation incorrectly transposes the provision into **Article 82(12)(b) of the Asylum Code**, which provides that the “interpreter selected shall be able to ensure the necessary communication in a language the applicant understand or is reasonably supposed to understand”.

Domestic law does not meet the clear standards set by EU law to guarantee effective and uninterrupted communication during the personal interview through the use of the language preferred by the applicant, unless there is another language which the applicant in fact understands and in which they are able to clearly communicate. The conduct of the interview in a language the applicant is reasonably supposed to understand does not comply with the requirements of EU law.

8. **Implicit withdrawal: Article 86 Asylum Code**

Points (a) and (b) of Article 28(2) of the Asylum Procedures Directive are incorrectly transposed by **Article 86(2)(b) and (d) of the Asylum Code**, given that domestic law does not allow the asylum seeker to demonstrate within a reasonable timeframe that their failure to attend the personal interview or their departure from their place of

³⁹ CJEU, C-159/21 GM, 22 September 2022.

⁴⁰ See also the term “actualisées” in the French version and “actualizada” in the Spanish version of Article 10(3)(b) of the Directive.

residence is due to circumstances beyond their control. Failure to incorporate this procedural safeguard carries significant consequences in practice, insofar as it results in the discontinuation of the procedure or rejection of the asylum application, as the case may be, coupled with a return decision.⁴¹ This should be read in conjunction with the prohibition on reverting cases from the Appeals Committees back to the Asylum Service for a new personal interview at first instance, even where the procedure is marred by irregularities.⁴²

Furthermore, the indicative list of grounds for declaring an asylum application implicitly withdrawn under **Article 86(2) of the Asylum Code** includes criteria unrelated to the applicant's wish to follow the asylum procedure, such as:

- **point (e)** on non-compliance with obligations set out in Article 83 of the Asylum Code, in particular the obligation to appear in person or to submit a residence certificate no earlier than two or three days prior to the – written – examination of the appeal,⁴³ albeit contradicted by Article 102 of the Code;⁴⁴
- **point (h)** on non-compliance with a transfer to a reception facility, which disregards the spirit of the Reception Conditions Directive and the conditions set by EU law on Member States' power to transfer applicants from one reception centre to another;⁴⁵
- **point (f)** on failure to renew the International Protection Applicant Card on the next working day following its expiry;
- the broad and repetitive reference to non-compliance with the authorities in **point (g)**.

9. Examination procedure: Article 88 Asylum Code

Greek law has failed to transpose **Article 31(6)(a) of the Asylum Procedures Directive**. According to the provision, where the first instance examination of the asylum claim exceeds six months, the authorities shall inform the applicant of the delay.

Additionally, **point (b)** of the same paragraph has not been correctly transposed into **Article 88(6) of the Asylum Code** as domestic law refers to "the maximum time limit in each case" and not to a deadline of six months. This hampers the applicant's unhindered access to the guarantees afforded by the Directive when the processing of the case reaches six months.

Finally, **Article 88(9) of the Asylum Code** on the accelerated procedure exceeds the exhaustive grounds laid down in **Article 31(8) of the Asylum Procedures Directive**. EU law does not permit the use of accelerated procedures where "the applicant refuses to comply with the obligation to have their fingerprints taken pursuant to domestic legislation".

10. Manifestly unfounded applications: Article 93 Asylum Code

⁴¹ Council of State, No 1398/2022, 27 June 2022.

⁴² Article 111 Asylum Code; Council of State, No 689/2021, 30 May 2021, para 15.

⁴³ Article 97(1) IPA.

⁴⁴ Ombudsman, *Παρατηρήσεις στο σχέδιο νόμου «Βελτίωση Μεταναστευτικής Νομοθεσίας»*, 8 May 2020, 6, available at: <https://bit.ly/3vJ4uyx>.

⁴⁵ RSA, *Comments on the International Protection Bill*, 21 October 2019, 4, available at: <https://bit.ly/3x2f1FW>.

We recall again that **Article 32(2) of the Asylum Procedures Directive** allows states to declare an application “manifestly unfounded” only in the cases where the use of an accelerated procedure is permitted under **Article 31(8)** of the Directive. Greek legislation remains incompatible with EU law, given that **Article 93 of the Asylum Code** foresees several grounds for manifest unfoundedness beyond those permitted by the Directive: inadmissible subsequent applications in **para 2(j)** – incorrectly translated in the Greek version of the Directive;⁴⁶ serious violation of the obligation to cooperate in **para 2(k)**; stay on the territory solely for economic reasons under **para 3**.

Furthermore, **Article 102(2) of the Asylum Code** establishes a presumption of abusive lodging of an asylum appeal with the sole aim of delaying or frustrating the execution of a deportation decision. However, failure to appear in person before the Appeals Committee or to submit a residence certificate within two or three days under **Article 83(3) of the Asylum Code** cannot *per se* substantiate such an intention. Appellants are already required to challenge first instance decisions in the form of a written appeal indicating the full appeal grounds under **Article 98 of the Asylum Code**. Compliance with this obligation entails a clear indication of their intention to challenge the first instance decision through the submission of specific arguments to the Appeals Committee. Such an intention is in no way negated by the appellant's inability to meet the strict and disproportionate requirements set by Article 83(3) of the Asylum Code. Nevertheless, widespread use of this provision results in systematic, disproportionate dismissal of asylum appeals by Appeals Committees. Over 1,800 appeals were dismissed on that basis in 2022, depriving applicants of a remedy.

11. Fee for submission of subsequent applications: Article 94 Asylum Code

The “making” of an application in the meaning of **Article 6(1) of the Asylum Procedures Directive**, upon which “asylum seeker” status is acquired, consists in the expression of a person's intention to lodge an application for international protection. The CJEU clarifies that “the act of ‘making’ an application for international protection does not entail any administrative formalities”⁴⁷ and that, whereas “Article 6(3) of that directive allows Member States to require that applications for international protection be lodged at a designated place, it must be noted that no provision of that directive establishes a similar rule regarding the making of applications for international protection”.⁴⁸

Under **Article 94(10) of the Asylum Code**, the making of a second or further subsequent application is conditioned upon payment of a blanket 100 € fee per person. This sets impermissible restrictions on the right to “make” a subsequent asylum claim in direct contravention of **Article 6(1)** of the Directive. For its part, the European Commission has stressed that “the unconditional application of a EUR 100 fee for

⁴⁶ See “not inadmissible” in the English version of the provision, “*n’est pas irrecevable*” in the French version, “*nicht unzulässig ist*” in the German version and “*no sea inadmissible*” in the Spanish version. A contrary interpretation of Article 31(8)(f) Asylum Procedures Directive would lead to inconsistency and undermine *effet utile* insofar as it would allow for subsequent applications without new elements to be dismissed both as inadmissible under Article 33(2)(d) of the Directive and as manifestly unfounded on the merits.

⁴⁷ CJEU, C-36/20 VL v *Ministerio Fiscal*, 25 June 2020, para 93.

⁴⁸ CJEU, C-808/18 *Commission v Hungary*, 17 December 2020, para 96.

second subsequent applications raises issues in terms of effective access to the asylum procedure”.⁴⁹ It has also “signalled that the fee introduced for second subsequent applications was not supported”⁵⁰ and has since “reiterated its concerns on the introduction of the fee at political level”.⁵¹

12. Reception appeals: Article 118 Asylum Code

Article 118(1) of the Asylum Code insufficiently transposes **Article 26(1) of the Reception Conditions Directive**, since it omits the possibility for an applicant to lodge an appeal against decisions relating to the granting of reception conditions. Due to the incorrect transposition of the Directive, asylum seekers have no remedy in fact and law against decisions rejecting their access to reception conditions.

13. Pre-removal detention: Article 97 Asylum Code, Article 30 L 3907/2011

Article 97(4) of the Asylum Code, per which detention in a pre-removal centre shall be ordered, as a rule, following the rejection of an asylum appeal by the Appeals Committee, as well as **Article 30 L 3907/2011** which renders pre-removal detention the default approach to return procedures, establish systematic detention in stark contravention of the state’s duty to follow the “gradation of the measures” set out in the Return Directive for carrying out returns⁵² and to use administrative detention as a last resort, where necessary, following an individualised assessment and on specific grounds, in line with **Article 15(1) of the Return Directive**⁵³ and the fundamental right to liberty. Due to this, the European Commission sent a new letter of formal notice under the **INFR(2014) 2231** infringement procedure against Greece for incorrect transposition of said Directive.⁵⁴

Moreover, as already indicated by the European Commission to Greece,⁵⁵ the EU *acquis* does not permit pre-removal detention on national security grounds.⁵⁶

14. Risk of absconding: Article 18(g) L 3907/2011

Under **Article 3(8) of the Return Directive**, Member States shall lay down in their national law objective criteria, on the basis of which authorities assess the existence of a risk of absconding in the return procedure. Compliance with this obligation requires the enactment of a legislative provision of general application with a view to assessing such a risk in conformity with the principles of certainty, predictability,

⁴⁹ European Commission, Reply to written question E-5103/2021, 25 January 2022.

⁵⁰ European Commission, *Task Force Migration Management Mission Report – Mission to Athens 25-27 October 2021*, Ares(2021)6697895, 29 October 2021, 1.

⁵¹ European Commission, *Task Force Migration Management Mission Report – Greece – Jan/Feb 2022*, Ares(2022)1024324, 11 February 2022, 3.

⁵² CJEU, Case C-61/11 *El Dridi*, 28 April 2011, paras 36-41.

⁵³ See the terms “may only keep in detention” in the English version and “peuvent uniquement placer en rétention” in the French version of the provision.

⁵⁴ Ευρωπαϊκή Επιτροπή, ‘September Infringements package: key decisions’, 29 September 2022, available at: <https://bit.ly/3ZzCYCJ>.

⁵⁵ European Commission, *Letter of Formal Notice – Infringement 2014/2231*, C(2014) 7344, 16 October 2014, 3.

⁵⁶ CJEU, C-357/09 *PPU Kadzoev*, 30 November 2009; Return Handbook, para 14.1.

accessibility and protection from arbitrariness, in line with CJEU case law.⁵⁷ Accordingly, a non-exhaustive list of criteria falls short of the duty to enact objective criteria in domestic legislation and of the requirement of legal certainty.

15. Criminalisation of illegal entry: Article 83 L 3386/2005

Constant CJEU case law holds that EU Member States' criminal law in the area of irregular entry and stay should comply with the **Return Directive** and should not jeopardise the achievement of its objectives.⁵⁸ In light of this, as already stated by the European Commission in its **INFR(2014)2231** letter of formal notice, **Article 83(1) L 3386/2005** contravenes the Directive, as it punishes the misdemeanour of irregular entry by a sentence of imprisonment⁵⁹.

⁵⁷ CJEU, C-528/15 *Al Chodor*, 15 March 2017, paras 40-43.

⁵⁸ CJEU, C-806/18 *JZ*, 17 September 2020, paras 26-27; Case C-329/11 *Achugbabian*, 6 December 2011, para 50.

⁵⁹ European Commission, *Letter of Formal Notice – Infringement 2014/2231*, C(2014) 7344, 16 October 2014, 24. See also Vasileios Papadopoulos, "Ένα νομοσχέδιο με ανομολόγητες προθέσεις – Επαναφορά σε καθεστώς αλλοδαπών πολιτών χωρίς χαρτιά", 25 June 2021, available at: <https://bit.ly/2T5Eaj5>.



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