

## The right to asylum in the context of “instrumentalisation” – Lessons from Greece

In October 2021, following developments in Poland, Lithuania and Latvia, EU leaders adopted the following Conclusions: “The European Council will not accept any attempt by third countries to instrumentalise migrants for political purposes. It condemns all hybrid attacks at the EU’s borders and will respond accordingly. The European Council invites the Commission to propose any necessary changes to the EU’s legal framework and concrete measures underpinned by adequate financial support to ensure an immediate and appropriate response in line with EU law and international obligations, including the fundamental rights.”<sup>1</sup> The European Council Conclusions echo the 7 October 2021 request from 12 Member States, including Greece, Cyprus, Hungary, Poland, Latvia and Lithuania, for “adaptation of the EU legal framework to new realities” through changes to the Schengen Borders Code to allow for responses to “hybrid attacks” and for “physical barriers” at borders.

A few weeks later, events unfolding at the Poland-Belarus border and Cyprus’ request to suspend its asylum procedure<sup>2</sup> have led to parallels being drawn with the March 2020 events in Greece and to the dangerous establishment of Greek policy as a precedent for the continent. Illustratively, the respective statements of the President of the European Commission in these incidents have made no mention of the right to asylum.<sup>3</sup> Yet, policies devised in response to proclaimed “instrumentalisation” of migration, in Greece as elsewhere, have severely and directly undermined Article 18 of the EU Charter and other fundamental rights (Articles 4, 7, 19, 47), as well as the rule of law.

### 1. Dismantling of asylum systems

On 2 March 2020, in response to Turkish announcements that Turkey would no longer prevent people from crossing its western borders, Greece adopted an Emergency Decree (*Πράξη Νομοθετικού Περιεχομένου*) which 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.<sup>4</sup> The authorities thereby refused to register any asylum claim made by people entering the country during that period and ordered their immediate deportation to Turkey, until the effects of the Decree wore off at the end of March 2020. The suspension had wide-ranging impact on policy and practice:

**Blanket detention in inhuman conditions:** People arriving in Greece in March 2020 were deprived of their liberty in inhuman conditions in various unofficial sites on the islands, then in a Hellenic Navy vessel, then in newly established sites in Serres and Malakasa,<sup>5</sup> without undergoing screening procedures.<sup>6</sup> The authorities imposed detention amid the COVID-19 pandemic as the sole approach to people erroneously deemed not to hold asylum seeker status. Greek courts upheld detention orders, while some incorrectly

<sup>1</sup> European Council, *Conclusions 21-22 October 2021*, EUCO 17/21, paras 19-20.

<sup>2</sup> Cypriot Public Information Office, ‘Ο Πρόεδρος της Δημοκρατίας προήδρευσε ευρείας σύσκεψης για το Μεταναστευτικό’, 10 November 2021, available at: <https://bit.ly/2YFA5WJ>.

<sup>3</sup> European Commission, ‘Statement by President von der Leyen on the situation at the border between Poland and Belarus’, STATEMENT/21/5867, 8 November 2021; ‘Remarks by President von der Leyen at the joint press conference with Kyriakos Mitsotakis’, STATEMENT/20/380, 3 March 2020.

<sup>4</sup> Government Decree on “suspension of the submission of asylum applications”, Gov. Gazette A’ 45/2.3.2020.

<sup>5</sup> RSA, *Rights denied during Greek asylum procedure suspension*, April 2020, 3-4, available at: <https://bit.ly/3D2AJMQ>.

<sup>6</sup> CPT, *Report on the visit to Greece*, 19 November 2020, para 49, available at: <https://bit.ly/3o50aag>.

ruled on the existence of 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”.<sup>7</sup> The compatibility of the policy with Article 3 ECHR is being assessed by the European Court of Human Rights (ECtHR).<sup>8</sup>

**Blanket deportation orders:** Police authorities automatically issued new arrivals deportation orders to Turkey under the Decree, without any assessment of the risk of *non-refoulement*,<sup>9</sup> including for Turkish nationals fleeing their country of origin. Judicial review applications against the deportation orders issued in March 2020 have still not been ruled upon by the Administrative Court of Mytilene. The ECtHR is set to assess whether this practice too violates Article 3 ECHR.<sup>10</sup> In addition, the Greek Council of State granted temporary relief two two applicants who requested suspension of deportation decisions issued under in their cases under the Decree.<sup>11</sup>

**Criminal prosecution for irregular entry:** After the period of effect of the Decree came to an end, public prosecutors pressed charges for illegal entry against individuals who arrived on the islands during March 2020. Several of the 850 asylum seekers faced with criminal charges on account of illegal entry on Lesbos have appealed convictions and sentences to years in prison by the Court of Mytilene, while others are awaiting trial.<sup>12</sup>

**Delayed access to asylum:** After the period of effect of the Decree ended, affected persons received referral notes in early April 2020 to appear before the Asylum Service for the registration of their asylum claims. However, some people were registered as late as May 2021, i.e. more than one year after they had expressed the intention to seek protection.

**Exclusion from family reunification:** Refusal to register the asylum applications of persons arriving in March 2020 resulted in the lapse of deadlines for sending “take charge” requests under the Dublin Regulation. Accordingly, people were arbitrarily deprived of the right to reunite with family members in other EU countries. The assessment of the effects of this practice on the right to family life has been raised by the Ombudsman<sup>13</sup> and is also pending at the Strasbourg Court.<sup>14</sup>

**Targeting of civil society:** Organisations assisting refugees and migrants have increasingly been faced with criminalisation, hostile discourse, attacks and violence since March 2020.<sup>15</sup>

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<sup>7</sup> RSA et al., *New Pact on Migration and Asylum: Interpretation of relevant provisions in the case law of the Greek administrative courts*, 22 April 2021, 4, available at: <https://bit.ly/30ezwnF>.

<sup>8</sup> ECtHR, *M.Y. and others v. Greece*, App No 59180/19, Communicated 9 October 2020. See also Applications No 39924/20, 39926/20 and 43784/20.

<sup>9</sup> RSA, *Rights denied during Greek asylum procedure suspension*, April 2020, 4 and 6.

<sup>10</sup> ECtHR, *M.Y. and others v. Greece*, App No 59180/19, Communicated 9 October 2020.

<sup>11</sup> GCR, ‘Σχόλιο του ΕΣΠ σχετικά με την προσωρινή διαταγή του ΣτΕ’, available at: <https://bit.ly/3DG3GyN>.

<sup>12</sup> HIAS Greece, ‘Criminal charges pressed against the asylum seekers who arrived in Lesbos in March 2020’, 6 July 2020, available at: <https://bit.ly/2ZRZjBw>; EASO, *Asylum Report 2021*, 157, June 2021, available at: <https://bit.ly/3BTBVkh>.

<sup>13</sup> Greek Ombudsman, *Επίγουσα καταγραφή αιτήσεων διεθνούς προστασίας λόγω κινδύνου παράλευσης προθεσμιών Κανονισμού (ΕΕ) αριθ. 604/2013*, 280722/1/23.6.2020. App No 40725/20.

<sup>14</sup> App No 40725/20.

<sup>15</sup> GCR et al., ‘Illegal pushbacks, Lives at risk, NGOs under prosecution: Investigations on pushbacks at the EU level, targeting of those highlighting them in Greece’, 16 March 2021, available at: <https://bit.ly/30uK8i6>.

**Elusive response from EU institutions:** The European Commission has refrained from replying to parliamentary questions on the compatibility of the Decree with EU law, though it “welcome[d] Greece’s decision to end the suspension of asylum applications”.<sup>16</sup> Frontex informed the Greek authorities of its opposition to assisting in the implementation of returns ordered under the Decree.<sup>17</sup>

## 2. Deflection of mounting criticism against push backs

Insistence on the part of Greece and other Member States on amending the EU *acquis* to respond to irregular arrivals is inextricably linked to international uproar at the mounting evidence of violent push backs of refugees at European borders. While many state officials deny such expulsions are taking place, others attempt to justify push backs through wrong interpretation of legal standards.

**Misuse of Strasbourg jurisprudence:** Governments, including Greece, consistently make an incorrect reading of the *N.D. & N.T. v. Spain* ruling of the Grand Chamber of the ECtHR to suggest that states are permitted to remove asylum seekers from their soil without due process.<sup>18</sup> They also read *N.D. & N.T.* in a vacuum, without consideration of applicable EU law guarantees to people seeking asylum.<sup>19</sup>

**Misreading of the *acquis* in force:** Member States pushing for new EU rules as described above strive to cultivate an image of the existing *acquis* as insufficient to meet current challenges. However, in its finding of Hungarian legislation – which allowed Hungarian police to push individuals back to the Serbian border – as incompatible with EU law, the Court of Justice of the European Union (CJEU) agreed with the Commission that the EU legislature had already catered for public order and security concerns in the Asylum Directives and the Return Directive.<sup>20</sup> Importantly, it added that “the mere circumstance that a revision of Directive 2008/115 is envisaged is not sufficient to demonstrate that the provisions of that directive currently in force did not duly take into account the Member States’ responsibilities in the matters referred to in Article 72 TFEU”.<sup>21</sup> There are no grounds for the Commission to depart from this position without having evaluated the implementation of existing legal instruments.

## 3. Denial of the consequences of EU externalisation policy

In its September 2020 proposal for a Crisis Regulation, the Commission read the “political crisis” at the Greek-Turkish border in March 2020 as a “hybrid attack” and a case of *force majeure*, even though the underlying factors and circumstances were neither unforeseeable nor impossible to avoid with the exercise of due diligence.<sup>22</sup> Construing the Turkish government’s acting upon a repeated threat of repudiating the EU-Turkey deal as circumstances outside the control of Greece “is as inaccurate an interpretation of *force majeure* as it is dangerous for the integrity of the CEAS. It

<sup>16</sup> European Commission, Reply to parliamentary question E-001547/2020, 16 June 2020; Reply to parliamentary question P-001342/2020, 19 June 2020.

<sup>17</sup> Frontex, Letter by Fabrice Leggeri, Executive Director, to RSA, ORD/ECRet/DiToAI/4007/2020, 27 April 2020.

<sup>18</sup> See e.g. CNN, 5 November 2021, available at: <https://bit.ly/3H7m2dM>.

<sup>19</sup> See further ECRE, *Across borders: The impact of N.D. and N.T. v. Spain in Europe*, June 2021, available at: <https://bit.ly/3qlyG2Y>.

<sup>20</sup> CJEU, Case C-808/18 *Commission v Hungary*, 17 December 2020, paras 221-225, 263.

<sup>21</sup> *Ibid*, para 265.

<sup>22</sup> RSA, *Comments on the Commission proposal for a Crisis Regulation*, October 2020, 3, available at: <https://bit.ly/3ww6hsk>.

misrepresents the inherent political risks of capture of EU external relations by interior policies of externalisation of responsibility".<sup>23</sup>

The situation at the Greek-Turkish border in March 2020, as well as current events in Poland, Lithuania and Latvia, are a predictable and avoidable consequence of the EU's fixation on externalisation of its protection duties to third countries.

#### 4. Recommendations

##### European Commission

- ❖ Refrain from proposing further amendments to the EU *acquis* in response to "instrumentalisation" in the context of migration;
- ❖ Deliver the reports on the implementation of existing *acquis*, namely the Asylum Procedures Directive, the Reception Conditions Directive and the Return Directive;
- ❖ Initiate infringement proceedings against Greece for non-compliance with the EU *acquis*, namely the Asylum Procedures Directive, the Reception Conditions Directive and the Return Directive, and against other Member States as relevant;
- ❖ Respond promptly and appropriately to questions from Members of the European Parliament on matters of compliance of national legislation and/or practice with the EU *acquis*;

##### Member States

- ❖ Refrain from and phase out legislative measures or policies denying individuals access to their asylum procedures;
- ❖ Refrain from endorsing derogations from immediate access to asylum procedures in the Council mandate on the Crisis Regulation proposal or other related legislative instruments;

##### Frontex

- ❖ Refrain from involvement and/or support in returns of asylum seekers who have not had access to an asylum procedure and a determination of their claim in line with the EU asylum *acquis*.



<sup>23</sup> Minos Mouzourakis, 'More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status' (2021) 26:3-4 ELJ 171-180.