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Comments on the Bill by the Ministry for Citizen Protection: "Establishment of Asylum Service and First Reception Service, adjustment of Greek legislation to the provisions of Directive 2008/115/EC 'on common standards and procedures in Member States for returning illegally staying third-country nationals' and other provisions"[1]

(summary in English)

I. Introduction

The National Commission for Human Rights (NCHR) welcomes the current legislative initiative by the Ministry of Citizen Protection which demonstrates the State's political will to confront in a responsible, organized and comprehensive manner the issues arising from the massive influx of third-country nationals.

The bill includes three main chapters: a) the establishment of the Asylum Service, b) the establishment of the First Reception Service and c) the adaptation of the Greek legislation to the provisions of the Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally residing third-country nationals." The fourth chapter amends some provisions of Law 3386/2005 "Entry and residence of third country nationals on Greek territory". The NCHR notes that the first two chapters constitute the outcome of the work of the Committees of Experts, which was established by the Ministry in November 2009, and in which the NCHR was actively involved. The NCHR also participated in the drafting law committee for asylum issues.

[1] *Adopted unanimously by the Plenary of the GNCHR at its session of December 2010. Rapporteurs, Angeliki Argyropoulou-Chryssochoidou, 1st Vice-President of the GNCHR, Representative of the Greek Council for Refugees, Lydia Bolani and Tina Stavrinaki, Legal Officers of GNCHR*

The NCHR has made recommendations to the State several times regarding the issues the current bill addresses and has severely criticized the relevant practices. With the current bill the State is taking measures so as to ensure that third-country nationals, who enter the country in an irregular manner, are treated with respect of their rights –in the framework of the relevant procedures- as required by European and international law. NCHR needs to underline, however, that it is very difficult for Greece to fully correspond to its obligations due to the large influx of aliens, as long as the EU does not adopt a policy of burden sharing and does not actually realize that this is a European and not exclusively Greek issue. Consequently, the full reform of the Dublin Regulation II and the development of a new European immigration policy are *sine qua non* conditions for the effectiveness of Greece's efforts, without this implying that the latter is relieved from its obligations.

The NCHR needs to express its dissatisfaction for the difficulties in accessing the newest version of the bill, -after the public consultation- despite the fact that the Plenary convened urgently in order to comment upon the bill. The NCHR would like to note that the positive process of the public consultation does not relieve the State from its obligation to facilitate the work of the Commission by providing it with every information or documents necessary for the fulfillment of its mission, according to article 6 of Law 2267/1998.

As regards the provisions of the bill, the NCHR has made the following comments:

II. First Chapter: Establishment of Asylum Service

Article 1: Establishment-Mission

Par. 1: Article 1 of the bill establishes an autonomous Asylum Service staffed with civilian personnel (see also article 2 of the bill), a standing demand of many actors, including the NCHR. The NCHR has emphasized repeatedly that the Police Force should not be responsible for both the

interception of irregular migrants and the examination of asylum applications, given that in practice the two categories –that of 'migrants' and 'refugees'– are interwoven. Therefore, it would be appropriate for the Asylum Service to come under a Ministry different from the one that deals with issues of security and public order. It should come under the Ministry of Interior which has services dealing with migrants' issues.

Par. 3: This provision regulates the establishment of Regional Asylum Offices. The possibility of setting up units operating in the premises of First Reception Centers (hereafter FRC) or participating in mobile or temporary First Reception Units is a positive measure, which should not undermine, though, the staffing of the Regional Asylum Offices, given that the latter will have the onus of the asylum procedure. Also, it should be made clear that these units belong to the Asylum Service and not the First Reception Service. Although both services may be interlocked to some extent, for example when an asylum seeker is interviewed inside a FRC, their roles and competences are distinct. Moreover, given that the Regional Asylum Offices are set up in areas where a large number of incoming third country nationals is observed and where the FRCs will in all probability also be established, it would be better if the setting up of units is decided by the Director of Asylum Service -who will be cognizant of the arising needs- and not by the Minister. That way, the process of their establishment will be speedier.

Par. 4: This provision regulates the structure of the Headquarters of the Asylum Service and differs from the proposal of the draft committee. The most essential change is that it places the interpreters under the Department of Coordination. The NCHR takes the view that the interpreters and all related issues should come under the Human Resources and Quality of Services Department. Interpretation is inextricably linked to the quality of the asylum granting procedure.

Article 2: Staff

Par. 4: The provision stating that 60 out of the 90 positions of specialized scientific personnel are filled by persons recruited on a renewable fixed contract for three years has been omitted. The NCHR realises that due to the financial crisis, there are limits to the recruitment of new staff. Nevertheless, the asylum procedure may not be assigned to officers that do not have the necessary special qualifications. The drafting committee took the view that the recruitment of specialized personnel constitutes a safeguard for the quality of the asylum procedure. The reform of the asylum procedure in Greece may not be achieved without the employment of proper staff. Therefore, it is necessary for the provision to be amended accordingly.

Par. 9: According to this provision functions of the Regional Asylum Offices may be assigned to civil society actors, who fulfil certain quality and security standards defined by ministerial decision. The NCHR is concerned regarding this provision. Civil society actors have an important role to play in assisting asylum seekers, which should be distinct from the one of the State. Therefore, the following issues arise: a) the selection process of civil society actors, b) the dependence of the assignment possibility on the lack of sufficient and appropriate staff or the excessive number of submitted applications, and not on any emergent circumstances. Given the economic crisis and the large number of asylum applications that the new Asylum Service will be required to handle, the need to resort to this possibility is very likely. Nevertheless, the asylum procedure remains a State function to which it has to respond adequately and responsibly. Thus, it needs to be clear that the assignment of functions may not include the interview of the applicant which is part of the hard core of the asylum procedure.

III. Second Chapter: Establishment of the First Reception Service

Article 6: Establishment and Mission

According to this provision, a specialised autonomous First Reception Service is established in the Ministry of Citizen Protection. The phrasing of

the provision does not fully correspond to the mission of the new Service, as it refers only to the 'effective handling of the illegal influx of third-country nationals into the country.' No reference is made to the identification of persons who need international protection or belong to vulnerable groups, which is a key component of the FRCs' function. The Explanatory Report itself states that 'the main problems created by the existing legal framework are: a) the lack of procedures [...] for the detection of people in real need of international protection'. Therefore, the provision needs to be redrafted so as to include expressly the identification of those who are in need of international protection or belong to vulnerable groups.

Article 7: Procedures of First Reception

This provision regulates the procedures of first reception. The identification of minors which had been proposed by the Committee of Experts and is crucial for the legal procedures to be followed next –i.e. appointment of temporary guardian– has been omitted. It needs to be included. Element (d) should also include explicitly legal aid.

Element (e) should expressly refer to the identification of those who are in need of international protection or seek international protection and those who belong to vulnerable groups. The fact that the aforementioned is omitted is a major oversight that nullifies the very essence of the so-called screening process.

Article 8: Organization-function

Par. 4: The ministerial decision establishing the FRCs should be issued jointly with the Minister of Health & Social Solidarity given that one of the key processes of first reception is the medical screening and the provision of necessary medical care and psychosocial support, which fall under the competence of the Ministry of Health & Social Solidarity and not that of the Ministry of Citizen Protection.

Par. 5: The idea of emergent or mobile units of First Reception is positive, as the rationale behind this is the satisfaction of emergency needs. However, this requires speed and flexibility. The establishment of an emergent or mobile First Reception Unit by ministerial decision will, by definition, be time consuming. The establishment of emergent or mobile First Reception Unit, as well as the settlement of all operational issues should be decided by the Director of the Central Service, who will be fully supervising the operation and needs of FRCs.

Par. 12: The NCHR would like to stress that it is necessary for the regulatory acts to be issued on the basis of this bill to adopt the proposals of the Committee of Experts regarding the modus operandi of the FRCs and the procedures of first reception. The report of the Committee of Experts convened by the Ministry itself was the outcome of the work and cooperation of state bodies (ministries, Ombudsman, NCHR), the UNHCR, and civil society actors with a deep knowledge of the issues, needs and best practices in other countries.

Article 9: Staffing

Par. 3: The First Reception Service and especially the FRCs need to be adequately staffed with qualified personnel in order to be effective. Therefore, the provision should be redrafted as follows: 'The First Reception Service is staffed with qualified personnel commensurate with the tasks to be performed within the frame of the Central Service and the First Reception Centers [...]'.

Par. 5: This provision provides for the assignment of first reception procedures to civil society actors who meet the appropriate quality and safety standards established by Joint Ministerial Decision. The NCHR believes that civil society actors may play an important and supportive role within the framework of reception procedures. It reiterates, however, that their role is distinct from that of the state and that their actions should

complement and not substitute those by the state and it expresses its aforementioned concerns.

Article 10: Administration and structure of the Regional First Reception Centres

Par. 2: It is not clear what the 'functionally distinct units' are going to be. The bill needs to define the various units, their general competences and the experts who must staff them. Once more the absence of reference to the screening of those in international of protection or vulnerable groups constitutes a significant omission. The existence of a relevant unit (a screening committee) is necessary. According to the Committee of Experts the screening unit should consists of a social worker, a lawyer, a psychologist, a doctor, and a specialist for children (if there are minors), while the decision of the unit should be binding for the Director as to the categorisation of the person concerned and his/her further treatment.

Article 11: Screening and Referral

Par. 2: The identification of persons belonging to vulnerable groups should be made by the screening unit, which must have adequate and qualified personnel and this is why we insist on the endorsement of the proposal by the Committee of Experts. Also, in the category of vulnerable groups minors –and not only unaccompanied minors– should be added and/or families–not only single parents–with minor children.

Par. 3: The reference to third country nationals' stay in the FRCs until they are returned without further clarification raises concerns. An explicit reference should be made to Law 3030/2002 (OG A' 163) which regulates the readmission procedure under the Protocol signed with Turkey. It should also be stated that aliens who qualify for the readmission process and those under deportation will be transferred to other facilities.

Article 13: Detention in First Reception Centres

Par. 2: This provision provides that those who are subject to the procedure of first reception are under restriction of their liberty, meaning that they are in fact detained, as they are obliged to remain in the premises in which they are kept for 15 to 25 days. Although their personal freedom is restricted no remedy against the relevant administrative decision is provided for. As it had been pointed out by the Committee of Experts, 'the administrative decision on the restriction should be reviewed for its legality by a Court (in pursuance of the relevant jurisprudence of the ECtHR), as any decision restricting personal liberty. In order for this provision to be in compliance with the Constitution and article 5 of ECHR a remedy should be provided for.

Par. 3: It should also be provided that a) the information provided to aliens is made in a language they comprehend, b) that they have the right to legal representation (and not just to legal advice), and c) that they have the right to communicate with the UNHCR and other agencies and organizations.

Article 14: Facilities

Par. 1: The possibility of assigning the external guarding of FRCs to specialized private companies providing security services raises serious concerns. The NCHR is not aware of any private company in Greece specializing in guarding detention facilities. Moreover, there is an essential qualitative difference between the guard of a bank, for example, and a detention facility. Various issues are raised, such as whether the employees of the private company will have to follow the orders of the police for custody issues, what weaponry they are going to have, if they are subject to any

Code of Conduct etc. Given that for police officers there is a Code of Conduct and applicable disciplinary law, whereas in the case of private guards there is a lacuna, the assignment of the external guarding of FRCs to them is not considered to be appropriate.

Article 15: Transitional Provisions

Par. 2: It is clear that the existing facilities for aliens' detention do not meet the international standards. The simple change of use of the existing facilities from detention facilities of aliens to FRCs does not solve any problems as to the appropriateness of the facilities. If the Ministry chooses to maintain this provision, it has at least to be reworded as following: *'either as First Reception Centers after appropriate adjustment'*.

At this point, the NCHR would like to note that the legal framework for the operation of the so-called 'Special Holding Facilities for Migrants' (hereafter SHFI) is almost inexistent. According to article 81 par. 1 of Law 3386/2005 an alien under deportation remains in special premises until the completion of the deportation procedure, which are established by a joint decision by the Ministers of Interior, Public Administration and Decentralization, of Economy and Finance, of Health and Social Solidarity and of Citizen Protection. Also, according to Circular no. 38 (23 December 2005) of the Ministry of Interior titled "Implementation of the provisions of the Law 3386/2005 (OG A' 212)" it is noted that 'the detention of migrants is made in accordance with the plans *Posidonio* and *Balkanio* in special holding facilities for illegal migrants, the responsibility for the operation of which have the Prefectures".

It is noted that the ministerial decision for the establishment of SHFI has not been adopted until now. The fact that there is no decision for their establishment and regulation of their function, which is problematic in itself, has been pointed out repeatedly by CPT. Furthermore, the fragmentation of various responsibilities regarding the operation of SHFI

between the Police and the Prefectures (now Regions) creates serious problems. Hence, the issuing of the relevant Ministerial Decision is urgent.

III. Third Chapter: Adaptation of Greek legislation to the provisions of Directive 2008/115/EC

Introductory Remarks

The Directive 2008/115/EC on common rules and procedures in member states for returning illegally staying third-country nationals, which Chapter C aims to incorporate into national legislation, has met strong reactions during its adoption, especially within the civil society. The safeguards have been criticized as being weak while certain measures, such as the possibility of entry ban for up to 5 years, have been considered as highly restrictive. Reactions have also been arisen with regard to the possibility of detention of third-country nationals, who are under removal, for up to 18 months especially concerning the duration and the consequent impact on conditions of detention for a large number of people.

It should be noted that on the other hand the Directive 2008/115/EC explicitly stipulates the respect for the principle of proportionality and includes procedural safeguards regarding the form of the return decision and the conditions of detention. The full and effective compliance with these safeguards reinforces the respect for the rights of a third-country national within the frame of the inherently bad procedure of removal.

For these reasons, the NCHR strongly denounced the absence of these safeguards in the adoption of Law 3772/2009 (OG A' 112), which elevated the possibility of criminal prosecution of the foreigner to a presumption of dangerousness for public order and safety, leading to his/her deportation and lengthening the detention period of foreigners, who are under deportation, suspected of absconding or conceived as dangerous for public order and safety, from the maximum of three months, as it had been developed by Law 2910/2001, to six months in principle,

extendable up to twelve additional months (article 76 par. 1 (c) and par. 3 Law 3386/2005).

The NCHR notes that these safeguards are lied under the condition of a just and effective asylum system, which fully respects the principle of non-refoulement in practice (§8 of the Preamble of Directive 2008/115/EC). In addition, the safeguards incorporated by this bill will be effectively implemented only in the light of specific provisions for the protection of human rights, the jurisprudence of the competent supranational courts and recommendations of international and European institutions in the field of personal freedom, detention conditions and non-refoulement. Finally, the NCHR notes that the incorporation and implementation of the Directive 2008/115/EC should be linked with the national legislation and practice, so as a fairer and more transparent procedure for removal and treatment of illegally staying third-country nationals can be ensured.

Article 17: Scope

Article 17 par. 2 (a) exempts from the scope third-country nationals who are apprehended or intercepted by the competent authorities in connection with the irregular crossing of the external borders by land, sea or air. The report states that '[...] within its scope fall only the illegally staying within the member states third-country nationals who had the right or title of legal residence.'

Accordingly, thousands of asylum seekers whose claim is rejected or who did not manage to renew their residence permits come under the scope. However, the legitimacy of the return is subject to the application of a fair and efficient asylum system which will fully respect the non-refoulement principle (par. 8 of the Preamble of Directive 2008/115/EC). Serious questions of legality are therefore raised regarding the return of the until now 'rejected' asylum seekers because of the universally acknowledged inefficiency of the Greek asylum system. Besides, the

NCHR notes that the effectiveness of the developing system should be seen in practice.

Article 18: Definitions

Par. 1 (g): Indicative criteria for the risk of absconding, which are not mentioned in the text of the directive, are possibly aimed at the clarification of the concept. However, they leave a great discretion to the competent authorities. The obligation of the competent authority to justify specifically and in detail the risk of absconding and to implement strictly the principle of proportionality to a case-by-case basis should be pointed out for a greater safety.

The bill indicates that the reasonable assumption of the risk of absconding is based on a *concurrence of objective criteria*. Thus, while the satisfaction of one of the above mentioned criteria is not sufficient, the conjunction of the two of them may be considered to be enough. The NCHR notes the concern of the Greek Council for Refugees that most asylum seekers will be suspected of absconding and that they will be under detention, as they are devoid of travel or other declaratory documents and in some cases they cannot comply with the existing ban entry because of the situation in the country of origin. Similarly, the UNHCR proposes the deletion of the criterion for the same reason and further indicates the lack of logical connection with the 'risk of absconding'. Besides that, the NCHR shares its reservations with the UNHCR and proposes to remove the criteria of non compliance with the requirement for voluntary departure and the one related to false information, as they are not clear enough to allow a safe reference to them.

Article 19: More favourable provisions

Par. 2: The possibility of favorable provisions refers to the set of rules applicable to Greek law as interpreted by the relevant courts and bodies (including ECtHR and EUCJ).

Par. 3: The NCHR recommends that free legal assistance and protective provisions for minors (articles 25 and 32 with the proposed amendments) should be added to these guarantees.

Article 20: Non-refoulement, best interest of the child, family life and state of health.

Par. 1: According to article 3 par. 1 of the Convention on the Rights of the Child, the authorities must take into account primarily the best interests of the child. The replacement of the term 'properly' by the term 'primarily' is recommended.

Article 21: Return decision

Par.3: The possibility of not issuing a return decision for a third-country national, who is taken back under bilateral agreements or arrangements by another member state responsible for the issuing and implementation of the return decision, needs further clarification. It is unclear whether a third-country national returns via another member state. It seems, however, that Greek authorities are not obliged to monitor the compliance with the non-refoulement principle if another member state is involved.

Article 22: Voluntary departure

Par.4: The NCHR welcomes that the process and deposit of financial guarantee is provided after by Joint Ministerial Decision (by the Ministers of Finance and Citizen Protection) after public consultation in the newer version of the bill, but it highlights the need for its rapid

adoption in order to be judged on the merits and in relation to the intended purpose.

Par. 7: The confirmation of voluntary departure is linked to the implementation of other 'unfavourable' provisions (article 23 par. 1 (b))– removal and ban entry (article 26) – and it should not be left abstract to anyone who can provide relevant information. Moreover, a practical impossibility of voluntary departure should be taken under consideration.

Article 23: Removal

Par. 3: It should be clear from the text of the law the exact competent authority to declare a breach of obligations resulting from the return; is it the authority which issued the return decision or even the competent police authorities?

Article 14: Postponement of removal

Par. 3: The possibility of understanding and perceiving the conditions of postponement of removal by people with problems of mental retardation and mental health should be taken under consideration. Imposing burdensome caveats would be disproportionate and punitive while these people deserve special protection.

Article 25: Return and removal of unaccompanied minors

Par. 2: The NCHR stresses that the verification that the minor will be returned to a member of his/her family is not sufficient; it must be further ensured that his/her family is not involved in his/her transportation. Each case should be investigated individually and each child should not be returned unless his/her delivery to a nominated guardian and to a safe family environment has been ensured. Moreover, the NCHR considers that the reference to 'adequate reception facilities for

minors in the state of return' is not sufficient. The criteria for the suitability of these facilities should be specified.

Article 26: Entry ban

Par. 1: An entry ban is required in cases where a period of voluntary departure is not granted (due to risk of absconding, see article 22 par. 5). Therefore, given the above mentioned criteria for the risk of absconding {see article 18 par. 1 (g)}, most third-country nationals will be subject to this entry ban regardless of their real need of protection.

Article 27: Press

Par. 2: The NCHR recommends the omission of the phrase 'it is supposed that (s)he understands'. It must be ensured that the third-country national actually understands, while at the same time it is particularly unclear who and in what criteria may assume that a third-country national has actually understood information of such gravity.

Article 28: Safeguards pending return

The NCHR has proposed a wider access to health services, so as care can be provided in cases of emergency not only until the stabilization of immigrants' health, but also until the restoration of it. In the face of the return it must be checked if the third-country national is able to travel and that there is no risk to public health during the process of his/her return.

Article 30: Detention

Par. 1: The NCHR recommends the replacement of the first paragraph of the bill ('Nationals ....of national security') with the corresponding par. 1 of article 15 of Directive 2008/115/EC, as from the

last it is clear that the seeking of less coercive measures is of prime importance comparatively to the measure of detention, whereas the wording of the bill designates that of detention.

Par. 2: The NCHR stresses the need to provide strictly for the possibility of checking the return decision, on which the decision for detention is based, so as the requirements of article 5 par. 4 ECHR for complete control are met.

Par. 3: A third-country national should be aware of the review of detention and should have the right to submit proposals.

Par. 4: For the interpretation of the term 'reasonable prospect of removal', on which non detention and release of a detainee depend, the interpretation of the ECJ (Case C-357/09 PPU, Request for issuing a preliminary decision: Administrativen sad Sofia-grad - Bulgaria decision. 30.9.2009, par. 67) should be taken into account.

Par. 5 and 6: The importance of the provision requires a further clarification of the phrasing. It is not clear if the entire duration of detention is not exceeding 12 months in total or if the extension of it reaches the maximum of 12 months (meaning 18 months in total).

The NCHR has already expressed the view that the prolongation of detention of third-country nationals by national legislation to the maximum limit as provisioned by the directive raises serious concerns in respect of the compatibility with the provisions of the Constitution, because it equates the illegally staying third-country nationals with those who are on remand for serious crimes and it raises issues of fairness and proportionality. Also, especially problematic are the reasons that justify this extension in accordance with the bill, as it is not guaranteed by the system as a whole that a third-country national bears no liability for the refusal to cooperate with the authorities. Besides, it is also clear that in most cases, while a third-country national is not responsible for the delay of his/her documents, (s)he will be sanctioned through the prolongation of detention.

The NCHR reiterates that the special circumstances, under which the current bill will be applied, should be taken under consideration and in particular: a) the large number of people falling within the scope of this provision, b) the inadequacy of existing structures, c) the link between the legitimacy of the whole system of returns and the effectiveness of the asylum system, d) the recommendations made by all the relevant institutions, which have criticized the conditions of detention in Greece, and the relevant sentences from ECtHR. The reduction of the length of detention of par. 5 is recommended, so as a maximum period of 3 months can be provisioned.

As for the duration of detention of asylum seekers it should be noted that according to EUCJ, if the applicant is kept for the purpose of removal and while processes of asylum requests are progressed, the time of his/her detention should be considered for the calculation of the time spent in detention pending removal.

Article 31: Conditions of detention

Par. 1: Following the above considerations (article 30) it should be clarified in what exactly facilities third-country nationals will be kept 'separately from the common-law prisoners'. Also, the NCHR notes that women should be separated from men, except in cases where there are close family ties.

Article 32: Detention of minors and families

The NCHR has expressed its skepticism about any kind of institutional treatment of children whose deprivation of liberty must not be allowed. With regard to unaccompanied minors the NCHR reiterates its reservations on the suitability of accommodation structures as well as on the sufficient number of specialized staff. The NCHR suggests the explicit

omission of the measure of detention for pregnant women and people with disabilities.

IV. Fourth Chapter: Other provisions

Article 36: Protection from return

Par. 1: The prohibition of return of a minor is recommended to be added explicitly, as long as the application process of legal residence or consideration for asylum for parents or persons being in charge of him is pending.

Article 37: Amendments of Law 3386/2005

Par. 1: The NCHR is satisfied by the widening of the categories of third-country nationals, for which the granting of residence permit is provided on humanitarian grounds (article 44 par. 1-3 Law 3386/2005). Similarly, the addition of the category of those third-country nationals undergoing programs of detoxification has been proposed, so as they can be able to complete them.

Par. 2: A third-country national, who applies for a residence permit for exceptional reasons, is exempted from the submission of visa or residence permit (even if they have expired) exceptionally, if (s)he proves with firm chronological documents the actual fact of his residence in the country for at least twelve consecutive years. The NCHR considers the period of twelve years as being too long and proposes its significant reduction.

Article 76 par. 1 (c) Law 3386/2005

The NCHR reminds the commitment of the state to abrogate the amendment of article 76 par. 1 (c) of Law 3386/2005 by article 48 par. 1 of Law 3772/2009, whereby 'a foreigner is considered to be dangerous to

public order or safety if (s)he has been prosecuted for an offense punishable by imprisonment of at least three (3) months'. The NCHR recommends the addition of a clear provision to the bill which will set aside that provision (see the above comments on paragraphs 5 and 6 of article 30). The addition of the proposed provision in the under examination bill would be reasonable on the merits and in terms of legal correctness.

Athens, 15 December 2010