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For info: Chrysa Hatzi  
Tel: 210-7289638  
Kalliope Stefanaki  
Tel. 210- 7289626

To the Director  
Aliens' Directorate  
Ministry of Public Order  
P. Kanellopoulou 4  
101 77 Athens

SUBJECT: Lawyers' access to detention centers of aliens who entered illegally into the country

IN RE: Your document with Protocol Reg. No 4591/13-558437/13-5-2002

Dear Sir,

The Ombudsman has received a number of individual complaints by lawyers (T.S. 11895/10-6-2002) and human rights organizations (Amnesty International 16822/27-8-2002), raising the issue of the prevention of lawyers' access to detention centers of aliens who have entered illegally into the country.

More specifically, according to the first complaint, the Police Directorate of Lakonia did not allow an attorney-at-law from Athens access to 6 detainees of Indian nationality, who arrived by ship, among a mass arrival of 350 aliens, in Gytheio, last April. According to the complaint, their relatives in India had assigned to an Indian national residing in Greece to contact a lawyer so as to offer them legal assistance. However, in order to allow access for the lawyer, the competent Police Directorate requested a power of attorney from the detainees' relatives.

In the second case, Amnesty International asked on 24-7-02 the Samos Bar Association to visit 4 Iranian detainees, who, according to information provided by their relatives, wished to apply for asylum because they were persecuted by the Iranian government for their political opinions. The Samos Police Directorate denied access to representatives from the local Bar Association, alleging instructions issued by the Ministry and the Asylum Department stated that to be granted access, a lawyer should be in possession of a prior authorization by the detainee in person. Amnesty International expressed the fear that two out of the four Iranians, who did not finally submit an asylum application might have stated that they came to Greece in search of work and signed the relevant document, concealing thus their political persecutions, either due to fear or to ignorance (E.H. son of A. and N. B. son of M.). In the case upon investigation, the Ombudsman is in no position to judge whether the aliens' statements were untruthful, nor can we put in doubt the trustworthiness of the procedure of recording their statements by the competent police authorities. We note, however, the opinion expressed by Amnesty International is its complaint: «*In any*

*case, it is their inalienable right to contact a lawyer and representatives or persons collaborating with non-governmental organizations dealing with refugees».*

The above-mentioned complaints raise a more general issue: whether aliens detained for illegal entry into the country have the right to contact a lawyer and under what conditions.

On this issue, we examined carefully your opinions, referred in detail in your document, dated 13-5-2002, (with Protocol reference number 4591/13-558437) and addressed to the National Commission for Human Rights, where the Ombudsman is a member.

In the above-mentioned document, you confirm that Greek Police facilitates legal assistance to whoever applies for asylum in our country, mainly through the U.N. High Commissioner. You refer however to article 10 of the Athens Bar Association Code of Conduct, which prohibits a lawyer to try and obtain clients by acts that do not conform with the dignity of the attorney's office, to visit in police detention areas and prisons persons who have not solicited his services and to undertake actions without a mandate by his client.

You also mention the following: *«The case is often observed that certain lawyers or NGOs interfere with our services, invoking the right to legal counseling, on behalf of aliens who either have not, till that moment, expressed in person the intention to apply for asylum or who, in certain cases, are still in a neighboring country. Unfortunately, this fact, in conjunction with the above, forces us to deny legal assistance in the asylum procedure for the said cases because, in this way, we create asylum seekers and violate, at the same time, the relevant provisions of P.D. 61/99»*

We wish to stress that legal assistance in places of mass detention of illegally entering aliens is indeed linked to the objective of ensuring that the asylum procedure is respected. The solution, however, and the right balance between safeguarding this objective, on the one side, and avoiding circumventing it on the other side, cannot be found in the above mentioned Code of Conduct, which, in any case, lacks compulsive character, but rather in the Lawyers' Code (L.D.3026/1954, valid till now) and, by analogy, because of the detention factor, in the Criminal Procedures Code and the Prisons' Code, combined with the relevant national and international provisions on the political asylum.

More specifically, the above mentioned Athens Bar Association Code of Conduct is adopted by decision of the Executive Board of this association (decision dated 4.1.1980, C. Le.T. 34(1986) p.481) and includes rules of mere professional conduct, which bind the members of the Association alone and whose infringement leads only to possible disciplinary sanctions by the competent Disciplinary Council of the Athens Bar Association. Given that these rules of conduct are *interna corpora* of the ABA, they cannot be invoked by a third party – whether an organ of the State Administration or any other authority – because they only represent rules of professional ethics, limited to the Bar Association members and, of course, without regulatory force to modify the legislative provisions on the lawyers' powers of representation. In this respect, the relevant provisions of the Law are clear:

According to the Civil Code (articles 217-235, and in particular art. 217), power of attorney is given by means of a declaration and it is subject to the form required for the completion of the deed to which the power of attorney refers. This

means that the lawyer is obliged to produce the power of attorney deed only in case this deed is required by Law for the act the lawyer undertakes (e.g. a waiver of right); otherwise representation is presumed to have been conferred. For this reason, the Lawyers' Code (L.D.3026/1954, article 45) stipulates that lawyers have free access to public services, simply by producing their Identity Card; they need not, hence, any power of attorney or other kind of representation from their mandators. The relevant procedural provisions allow, even, representation before a Court simply with an presumed power of attorney, while a written form of representation – or representation by notarial deed - is only necessary before certain Courts and by virtue only of specific provisions (e.g. articles 96 and foll. Civil Procedure Code). The Ombudsman had already observed in other cases (to OAED, reports 8772,8592/2001) *«A de facto mistrust of the attending lawyer goes against not only the assumed, in principle, existence of the power of attorney to undertake certain acts before authorities and courts but results, finally, in offending, in its very substance, the professional dignity of attorneys-at-law and puts in doubt the ensuing, by the very nature of their office, aim to ensure the lawful interests of their mandators.*

Besides the assumed, according to the above-mentioned, power of representation before public authorities, in what concerns more particularly detention by police authorities the relevant, by analogy, provisions of the Criminal Procedure Code (CPC), on the preliminary proceedings before a criminal court of Law, as well as the provisions of the Prisons Code are essential. In case of preliminary inquiries, main inquiries (articles 96, 100, 104, 271 CPC), and even in case of offences committed in flagrante delicto (article 105 CPC) and provisional detention (art. 283 CPC), the C.P. Code stipulates that a lawyer may have access to the detainee without prior authorization to this objective (not only by virtue of article 6 para. 1 of the European Convention of Human Rights but also as a result of the practical impossibility for the detainee to seek an attorney himself), but only by means of a declaration issued on the spot – a case also occurring for the appointment of a defense lawyer during the trial (article 340 CPC). Given, therefore, that during the entire preliminary proceedings of the criminal case, the accused may receive the visit of a lawyer without prior authorization, why would the police obstruct free access of a lawyer to a person merely detained for an administrative infringement since the Public Prosecutor refrains from instituting criminal proceedings and only an order of deportation for illegal entry into the country is pending against this person? The mere assumption that this might lead to abuse of rights from the part of the accused is a very shaky justification for the Rule of Law, especially whilst the relevant Prisons Code provisions guarantee free communication and access to a lawyer (art.51 para.1, 53 para.2 L. 2776/1999). These provisions should apply, by analogy, in this case as well, taking also into account the fact you often refer to in your document and which has been repeatedly pointed by the Ombudsman: mass arrivals of illegal immigrants have transformed police stations (or even other premises, arranged ad hoc, since the relevant provision of article 48 of Law 2910/01 for the setting up of special reception centers remains not enforced) into detention centers, for up to three months, of a large number of aliens, notwithstanding the fact that these premises lack the infrastructure and organization of prisons, resulting thus to the worsening of the living conditions and the individual rights of detainees.

A balancing out, in the CPC and the Prisons Code, of the lawful interests at stake, results in favor of ensuring the lawyer free access and counseling for the

prisoner; the more so this result should apply in case of an administrative detention for deportation. Another interpretation would lead to practical difficulties that would reduce or even cancel out any kind of access to a lawyer for these detainees. Even a mere deed of representation (given that power of attorney by notarial deed is evidently disproportionate, according to the above mentioned procedural provisions) from the prisoner's relatives is too difficult to achieve, when these latter are residing in another country or even another continent, as was the case of the Indian detainee in the a/m case 11895/2002. Furthermore, requiring prior deed of representation by the detainees in person would be absurd, since it would imply that the competent police or port police authorities that detain those who enter illegally into the country, should allow lawyers access to the detainees for them to confer power of representation. For a detainee to be able to contact –even orally – a lawyer, all premises where illegally entered aliens are detained, should be equipped with telephones and free access of detainees to them should be guaranteed; this does not happen in the cases under review by the Ombudsman, even though, as we have pointed out, telephone contact is a fundamental right of all detainees.

One understands the preoccupation that free access of lawyers might allow exploitation of these aliens by various networks of smugglers that might use lawyers to this objective. It is surprising, though, that you refer to these cases in conjunction with the requests for visit or legal assistance by Non-Governmental Organizations (NGOs). The Ombudsman opines that Greek Police should leave no room for misunderstanding that it views the activities of illegal smuggling networks and the legal action of NGOs under the same light. NGOs acting in the field of human rights have the lawful interest, by their very remit, to intervene in mass detention centers for aliens, whenever it is alleged (by anyone) that problems arise concerning the living conditions, the protection of political refugees etc. The more general issue of NGO access to aliens' detention centers being investigated by the Ombudsman in parallel and in the context of other complaints, we will refer, to this separately.

In the present letter, though, concerning the access of lawyers to these premises, we wish to point out that, to our opinion, access should be granted to lawyers found by NGOs and mandated to legally assist specific detainees, as in the a/m case (complaint 16822/2002) of representatives by the Samos Bar Association, sent by Amnesty International in order to verify whether the Iranians in question were aware of their rights concerning access to the asylum procedure. NGOs, in such cases, do not have the task to act as substitutes for, but rather to ensure the in person submission of an asylum application to, those that sincerely have such intent. It should be stressed, in this point, that Greece is obliged to allow access to premises where aliens who express the intention to apply for asylum are detained, not only to the U.N. High Commissioner but also to organizations contracted by UNHCR, such as the Greek Council for Refugees (GCR) and the lawyers mandated by the latter, in the case of Greece. The E.U. Council of Ministers Resolution of June 20, 1995 (OJ C 274,19.9.1996), expressly allows, in paragraph 13 for the possibility of access to persons mandated to offer legal assistance on behalf of the High Commissioner. This clarification, concerning the contractual obligation of legal assistance undertaken by GCR to the High Commissioner, is necessary, taking into consideration document 5401/1-552564 /29-6-2002 sent by the Public Order and Security Division to the Ombudsman, which, in page 4, refers to GCR as simply one of several NGOs active in the refugees field without mentioning the contractual link between the former and

the High Commissioner. The refusal of police authorities to allow access of GCR lawyers to detained asylum seekers – as it has been referred to the Ombudsman, in particular concerning detained asylum seekers in the Evros region (complaint 13965/8-7-2002) - is therefore unlawful.

Concerning the illegal aliens smuggling networks, which may use, among others, lawyers as well as the risk of client soliciting by individual lawyers, the Ombudsman considers that such risks equally arise in all cases of detention or imprisonment. Even in cases of arrests in the act, of judicial inquiries and temporary detention pending trial, it is not to be excluded that the lawyer appearing for the accused may have been nominated by the detainee's accessory rather than by his relatives; this risk however does not constitute, according to the CPC, a valid reason for the competent authorities to refuse legal assistance. It suffices, in such cases as well as in order to deter client-soliciting by lawyers unrelated to the case, for the police authorities to make sure that the lawyer appearing knows the name of the detainee s/he comes to assist.

It is obvious that the objective of legal assistance offered by lawyers requesting access to the aliens in question is to inform them of their rights and to guarantee their access to the asylum procedure. The relevant provisions of P.D. 61/99 do indeed mention that an asylum application must be submitted "in person". It should be noted, though, that a person needs not – either according to the terms of article 1 para. 1 of P.D. 61/1999 or to the Community legislation – to have submitted in written an asylum application in order to be considered as an "asylum seeker" and benefit of the relating rights. More concretely, according to the above mentioned provisions *"an alien who declares, in written or oral form ... that s/he is requesting asylum in our country, or in any other way, asks not to be deported to a country, on the grounds of fear of persecution ... is considered as an asylum seeker...."*.

To the same effect, it is also worth noting the following phrase from the 'explanatory memorandum – comments on articles' (article 4 para. 2) of the Council Draft Directive (COM 2000 578 final): *"Any statement signalling a person's wish to obtain protection from persecution, or any manifestation or expression of the person indicating that he fears to be returned to his country, should therefore be treated as an application for asylum"*. The Ombudsman understands the practical difficulties faced by the competent police authorities in conducting speedy interviews and in examining asylum applications confronted, frequently, with cases of mass arrivals, in islands, of illegal immigrants together with persons falling under the definition of refugees according to the Geneva Convention provisions. The observed delay, however, often exceeding 2 months (Rhodes, complaint 5776/20-3-02, Syros, complaint 10798/27-5-02, Kos, complaint 6023/16-5-02) in recording asylum applications is such premises of mass detention, raises questions as to the complete and adequate information and/or understanding by interested aliens of the asylum procedure. Lawyers' contribution, as well as that of individual aliens or NGO lawyers is, in our experience, very helpful for aliens who wish to apply for asylum; it should thus be considered by competent authorities as a positive input, in harmony with the existing international, Community and national provisions guaranteeing access to the asylum.

The Ombudsman had, already in the past, the occasion to stress to the Ministry of Public Order that the danger of abusive submission of asylum applications cannot be deterred by refusing to receive them (nor can this be avoided by the non-recording of relevant oral requests) because no State where Rule of Law applies can admit that a

person in immediate risk of life or personal security in his/her country for his/her political opinions may risk being deported as an economic refugee. First of all, the existing legal framework permits to deal with potential abusive asylum claims in another way: in particular P.D.61/99, art.4 provides for the accelerated procedure for the examination of applications submitted at points of entry into the country. This procedure should, in our opinion, immediately apply in case of mass arrivals of immigrants and potential political refugees, by the by now experienced in asylum and aliens matters, police staff. One cannot but underline, in this point, the decisive contribution of NGO lawyers who, based on their experience, assist local police authorities in identify genuine cases of persons in need of international protection as refugees. Another measure, of paramount importance in order to avoid abusive asylum applications, consists in further sensitizing the competent personnel – whose significance is also stressed by you in your document - through permanent training and information; this policy would allow them to be able to ask the proper questions so as to identify these persons that may be in need of international protection.

For the above reasons, we consider that access of lawyers is of paramount importance in order to fulfill the relevant legislative provisions on asylum. The requirement of prior authorization for access to detention centers for mass arrivals of aliens does not seem to be supported by existing legislative provisions and exceeds the reasonable measure for their lawful implementation.

We therefore kindly ask you to reconsider, based on the above, the issue of lawyers' access to the detention areas of aliens that entered illegally into the country. Thanking you in advance for the cooperation.

Yours truly  
Giorgos Kaminis  
Deputy Ombudsman

For information:  
M .D. Eustathiadis  
Secretary General  
Ministry of Public Order  
P.Kanellopoulou 4  
101 77 Athens

Amnesty International  
Att. Ms Tzeferakou  
Sina 30  
106 72 Athens

Greek Council for Refugees  
Solomou 25  
106 82 Athens

Mr.T.S.  
Attorney-at-law  
.....

Athens Bar Association  
Akadimias 60  
106 79 ? thens

Samos Bar Association  
Samos Courts Building  
831 00 Samos

National Commission for Human Rights  
Att. Mr Sitaropoulos  
Stathatos Building  
Irodotou 1  
106 74 ? thens

Samos Police Directorate  
Them. Sofouli 129  
831 00 Samos

Lakonia Police Directorate  
Cheilonos 8  
231 00 Sparta