



**Submission by the Office of the United Nations High Commissioner for Refugees in the case of
J. R and Others v. Greece (Appl. No 22696/16) before the European Court of Human Rights**

1. Introduction*

1.1 UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for the problem of refugees.¹ Moreover, UNHCR is responsible for supervising the application of international conventions for the protection of refugees.² UNHCR welcomes the opportunity to intervene in this case, upon invitation by the European Court of Human Rights ('the Court') by its letter of 8 November 2016.

1.2. In this submission, UNHCR provides its interpretation of the relevant principles of international refugee and human rights law governing these issues in order to assist the assessment of the Court (Part 2). It also addresses the domestic legislative framework and practice applicable to asylum-seekers who are held in the Reception and Identification Centres (RIC) (Part 3).

2. Principles of international refugee and human rights law regarding the detention of asylum-seekers

2.1. International refugee law

2.1.1. The 1951 Convention and its 1967 Protocol, to which Greece is a State party, is grounded in Article 14(1) of the Universal Declaration of Human Rights 1948, which recognizes the right to seek and enjoy asylum from persecution.³ Seeking asylum is, therefore, not an unlawful act.⁴

2.1.2. Article 31 of the 1951 Convention provides that asylum-seekers shall not be penalised for their illegal entry or stay.⁵ In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation. These factors, as well as the fact that asylum-seekers have often experienced traumatic events, need to be taken into account in determining any restrictions on freedom of movement based on irregular entry or presence.⁶

2.1.3. The drafters of the 1951 Convention were aware of, and sought in the Convention's text to address, such difficulties.⁷

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

² *Ibid.* para. 8(a).

³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

⁴ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (hereafter 'UNHCR Detention Guidelines') 2012, Guideline 1, para. 11, <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>. The Detention Guidelines reflect the state of international law on detention for immigration-related purposes of asylum-seekers and other persons seeking international protection.

⁵ Article 31 of the 1951 Convention reads as follows:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

⁶ UNHCR Detention Guidelines, Guideline 1, para. 11.

⁷ UNHCR intervention before the European Court of Human Rights in the case of *Saadi v. United Kingdom*, 30 March 2007, Application No. 13229/03, para. 25, <http://www.refworld.org/docid/47c520722.html>

The Executive Committee of the High Commissioner's Programme (hereafter "ExCom")⁸ has subsequently itself recognised "the importance" of provisions or measures "to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens".⁹

2.1.4. Article 31 of the 1951 Convention specifically provides for the non-penalisation of refugees having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay.¹⁰ Regarding the material scope of Article 31, it is generally accepted that the term "penalties" referred to in this provision includes administrative detention in the immigration context.¹¹ There is also agreement that restrictions on movement shall not be applied to such refugees other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country. Article 26 of the 1951 Convention further provides for the freedom of movement and choice of residence for refugees lawfully in the territory.¹² Asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision.¹³

2.1.5 The detention of refugees and asylum-seekers, for immigration related purposes, can only be justified on a limited number of grounds, namely public order,¹⁴ public health or national security¹⁵, and only where it is necessary, reasonable and proportionate.¹⁶ This requires authorities to consider whether there are less coercive or intrusive measures to achieve these goals. Failure to do so could render detention arbitrary.¹⁷

2.1.6. The consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case is part of the overall assessment of the necessity, reasonableness and proportionality of detention. Alternatives to detention, which are widely used in some countries, may include, among others, reporting requirements, structured community supervision and/or case management programmes.¹⁸ Such consideration of alternatives ensures that detention of refugees and asylum-seekers is a measure of last resort.¹⁹

2.1.7. UNHCR's Guidelines on Detention also provide that the justification initially invoked for the person's detention, should remain valid throughout the detention period, irrespective of its nature. Maximum limits on detention need to be established

⁸ The Executive Committee of the High Commissioner's Programme was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions; the latter includes issuing Conclusions on International Protection (referred to as "ExCom Conclusions"). ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 98 States are Members of the Executive Committee, including Greece which has been a member since its creation in 1958.

⁹ ExCom Conclusion No. 42 (XXXVII) 1986, Accession to International Instruments and their Implementation, para. (j); ExCom Conclusion No 44 (XXXVII) 1986, Detention of Refugees and Asylum-Seekers, para. (d), <http://www.unhcr.org/excom/exconc/3ae68c43c0/detention-refugees-asylum-seekers.html>

¹⁰ The safeguards provided under Article 31 are also applicable to asylum-seekers given this provision applies to refugees physically in or lawfully in the territory of the concerned State as well as the declaratory nature of the refugee status determination, given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition. See: UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/IP/4/ENG/REV. 3, <http://www.refworld.org/docid/4f33c8d92.html> at para. 28.

¹¹ UNHCR, Detention Guidelines, Guideline 4.1.4 para. 32. See also, UN Working Group on Arbitrary Detention, *Report to the Seventh Session of the Human Rights Council*, A/HRC/7/4/, 10 January 2008, which states: "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention." At para. 53, <http://www.unhcr.org/refworld/docid/502e0eb02.html>.

¹² Article 26 of the 1951 Convention provides: "Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances."

¹³ UNHCR, "Lawfully Staying" – A Note on Interpretation, 1988, <http://www.unhcr.org/refworld/pdfid/42ad93304.pdf>; UNHCR Global Consultations: Reception of Asylum-Seekers, above note 25, para. 3, <http://www.unhcr.org/refworld/docid/3bfa81864.html>.

¹⁴ More particularly, the notion of "public order" encompasses the following purposes: To prevent absconding and/or in cases of likelihood of non-cooperation; in connection with accelerated procedures for manifestly unfounded or clearly abusive claims; for initial identity and/or security verification; and in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention. UNHCR Detention Guidelines, Guideline 4.1.

¹⁵ UNHCR Detention Guidelines, Guideline 4.1 para. 21.

¹⁶ UNHCR Detention Guidelines, Guideline 4 para. 18.

¹⁷ UNHCR Detention Guidelines, Guideline 4 para. 18.

¹⁸ For further examples of alternatives to detention, their rationale and impact, see, UNHCR, *Alternatives to Detention of Asylum Seekers and Refugees*, April 2006, POLAS/2006/03, <http://www.refworld.org/docid/4472e8b84.html>; UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, <http://www.refworld.org/docid/5523e8d94.html>; UNHCR, *Options Paper 2: Options for governments on open reception and alternatives to detention*, 2015, <http://www.refworld.org/docid/5523e9024.html>

¹⁹ UNHCR Detention Guidelines, Guideline 4 para. 3. See also, Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, para. 416 (Dec. 30, 2010), which stated that "detention should be the exception."

in law to protect the individual from arbitrary detention,²⁰ while decisions to detain or to extend detention must be subject to minimum procedural safeguards.²¹

2.1.8. If faced with the prospect of being detained, as well as during detention, asylum-seekers are entitled to minimum procedural safeguards including:

- The right to be informed at the time of arrest or detention of the reasons for their detention, and their rights in connection with the order, including review procedures, in a language and in terms which they understand;
- The right to be informed of the right to legal counsel. Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting;
- The right to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release;
- Following the initial review of detention, the right to benefit from a regular periodic review before a court or an independent body of the necessity for the continuation of detention, which the asylum-seeker and his/her representative would have the right to attend and at which she or he has a right to be heard;
- The right to challenge the lawfulness of detention before a court of law at any time. In this regard, the authorities need to establish that there is a legal basis for the detention in question; that the detention is justified according to the principles of necessity, reasonableness and proportionality; and that other, less intrusive means of achieving the same objectives have been considered in the individual case; and
- The right to contact and be contacted by UNHCR.

2.1.9. These safeguards also include access to a fair and efficient asylum procedure²² in order to ensure that persons in need of international protection are properly identified in a timely manner. Access to asylum procedures must be effective and realistically available, including timeframes for lodging supporting evidence and other materials which are appropriate for someone in detention. Access to legal and linguistic assistance should be made available. It is also important that asylum-seekers in detention be provided with accurate legal information about the asylum process and their rights.²³

2.1.10. Furthermore, in light of existing international and European human rights standards outlined below, detention conditions should be humane and dignified.²⁴ Detention may also undermine the ability of the person concerned to pursue and to substantiate his/her claim.²⁵ Inappropriate conditions and excessive prolongation of detention may have an impact on the decision of asylum-seekers to withdraw their claims, thereby undermining the principle of non-refoulement.

2.1.11. More generally, irrespective of the conditions, detention *per se* can and has been shown to aggravate and even cause, among asylum-seekers, psychological illness, trauma, depression, anxiety, aggression, and other physical, psychological and emotional consequences.²⁶

2.2. International human rights law

²⁰ UNHCR Detention Guidelines, Guideline 6.

²¹ UNHCR Detention Guidelines, Guideline 7 para. 47.

²² UNHCR Detention Guidelines, Guideline 7, para. 47(vi). The Court also highlighted that “above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.” ECtHR, *Amuur v. France*, para. 43; *Abdolkhani and Karimnia v. Turkey*, 30471/08, European Court of Human Rights, 22 September 2009, <http://www.refworld.org/docid/4ab8a1a42.html>.

²³ UNHCR Detention Guidelines, Guideline 7, para. 47(vi).

²⁴ UNHCR Detention Guidelines, Guideline 8, para 48. Asylum-seekers should be treated with dignity and in accordance with international standards. See: UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, General Assembly resolution 43/173 of 9 December 1988: <http://www.unhcr.org/refworld/docid/3b00f219c.html>; UN Standard Minimum Rules for the Treatment of Prisoners, 1955: <http://www.unhcr.org/refworld/docid/3ae6b36e8.html>; UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990, A/RES/45/113, 14 December 1990: <http://www.unhcr.org/refworld/docid/3b00f18628.html>.

²⁵ UK Lesbian & Gay Immigration Group and Stonewall, *No Safe Refuge: Experiences of LGBT asylum seekers in detention*, October 2016 http://www.stonewall.org.uk/sites/default/files/no_safe_refuge.pdf.

²⁶ UNHCR Detention Guidelines, Guideline 9, paras 49-50. Jesuit Refugee Service, European Regional Office, *Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project)*, June 2010, <http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29338/20111014ATT29338EN.pdf>; Cleveland, J and Rousseau, C (2013) “Psychiatric symptoms associated with brief detention of adult asylum seekers in Canada”, *Canadian Journal of Psychiatry*, 58(7), 409-41.

2.2.1. The fundamental rights to liberty and security of person²⁷ and freedom of movement²⁸ are expressed in all major international and regional human rights instruments, and are essential components of legal systems built on the rule of law. The liberty of the person is a fundamental right proclaimed in the Universal Declaration of Human Rights (UDHR). Its importance is underpinned by the guarantee enshrined in three specific provisions in the UDHR, namely Article 3 (right to life, liberty and security); Article 9 (right against arbitrary arrest, detention or exile); and Article 13 (right to freedom of movement and residence). These fundamental rights are also guaranteed in Articles 9 and 12 of the *International Covenant on Civil and Political Rights* (ICCPR).²⁹ In its General Comment No. 8 (1982) on Article 9, the Human Rights Committee (HRC) made it clear that Article 9(1) “is applicable to all deprivations of liberty, whether in criminal cases or in others cases such as ... **immigration control** etc.”³⁰ [emphasis added]

2.2.2. The Human Rights Committee considered the application of Article 9 in *A v. Australia* (1997). The case concerned the prolonged detention of an asylum-seeker. The HRC held that:

“the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context”.³¹

2.2.3. The HRC, while agreeing that it is not *per se* arbitrary to detain individuals requesting asylum, observed that “the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal”.³²

2.3. Relevant EU standards

2.3.1. Article 18 of the Charter of Fundamental Rights of the European Union (the Charter)³³ provides for the right to asylum. Article 6 emphasises that “everyone has the right to liberty and security of person” while Article 52 specifies the necessity and proportionality requirements applicable in relation to “any limitation on the exercise of the rights and freedoms recognised by this Charter”.³⁴ Article 52(3) further provides that “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, *the meaning and scope of those rights shall be the same as those laid down by the said Convention*”³⁵ while this provision “shall not prevent Union

²⁷ See, for example, Articles 3 and 9, *Universal Declaration of Human Rights*, 1948 (UDHR); Article 9, *International Covenant on Civil and Political Rights*, 1966 (ICCPR); Articles 1 and 25, *American Declaration of the Rights and Duties of Man*, 1948 (ADRDM); Article 6, *African Charter on Human and Peoples’ Rights*, 1981 (ACHPR); Article 7, *American Convention on Human Rights*, 1969 (ACHR); Article 5, *Convention for the Protection of Human Rights and Fundamental Freedoms* (as amended), 1950 (ECHR); Article 6, *Charter of Fundamental Rights of the European Union*, 2000, (CFREU).

²⁸ See, for example, Article 12, ICCPR, covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one’s own. See, also, Article 12, ACHPR; Article 22, ACHR; Article 2, ECHR; Article 2, Protocol No. 4 to the ECHR, *Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and the First Protocol Thereto*, 1963; Article 45, CFREU.

²⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.refworld.org/docid/3ae6b3aa0.html>. Article 9(1) ICCPR, provides that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.” Article 12 ICCPR provides that “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

³⁰ UN Human Rights Committee (HRC), *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, No. 8, para. 1, <http://www.refworld.org/docid/4538840110.html>.

³¹ *A v. Australia*, CCPR/C/59/D/560/1993 (1997), para. 9.2., <http://www.refworld.org/docid/3ae6b71a0.html>.

³² See: *C. v. Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, <http://www.refworld.org/docid/3f588ef00.html>; *Samba Jalloh v. Netherlands*, CCPR/C/74/D/794/1998, UN Human Rights Committee (HRC), 15 April 2002, <http://www.refworld.org/docid/3f588ef3a.html>; *Omar Sharif Baban v. Australia*, CCPR/C/78/D/1014/2001, UN Human Rights Committee (HRC), 18 September 2003, <http://www.refworld.org/docid/404887ee3.html>; *Danyal Shafiq v. Australia*, CCPR/C/88/D/1324/2004, UN Human Rights Committee (HRC), 13 November 2006, <http://www.refworld.org/docid/47975af921.html>.

³³ http://www.europarl.europa.eu/charter/pdf/text_en.pdf

³⁴ Article 52 of the Charter Fundamental Rights of the European Union provides that:

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. (...)

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

³⁵ Article 52(3) of the Charter. Emphasis added.

law providing more extensive protection”.

2.3.2. Under EU asylum law, the detention of asylum-seekers is governed by Articles 8, 9 and 10 of the Reception Conditions Directive (recast) (RCD (recast))³⁶ which provide in particular the following:

- Member States shall not hold a person in detention for the sole reason that he or she is an asylum-seeker;
- When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively;
- A limited list of detention grounds that shall be laid down in national law;³⁷
- Guarantees for detained persons including the obligation to detain an asylum-seeker for the shortest possible time and only as long as the relevant grounds are applicable, while delays in the administrative procedure that cannot be attributed to the applicant shall not justify a continuation of detention;
- the obligation to issue a formal legal order for detention, in a written decision reasoned in fact and law;
- the obligation to provide for a speedy judicial review of the lawfulness of the detention ordered by administrative authorities, and thereafter for a judicial review at reasonable intervals;
- the obligation to inform applicants in writing, in a language which they understand or are reasonably supposed to understand, of the reasons of detention and the procedures for challenging the detention order;
- free legal assistance and representation by suitably qualified persons under certain conditions;
- Specific detention conditions which take account of the special situation of asylum-seekers and which include access to open-air spaces, as well as access to the means of communication, in conditions that respect privacy, with UNHCR, legal advisors or counsellors and persons representing relevant NGOs; and systematic information about the applicants’ rights and the rules of the facility.

2.3.3. The Court of Justice of the EU (CJEU) further emphasised the importance of the principles of proportionality and necessity in applying the above provisions of the RCD (recast), with reference notably to UNHCR’s Guidelines on Detention.³⁸

2.4. Relevant ECHR standards

2.4.1. Before highlighting the various standards relating to the protection from unlawful and arbitrary detention stemming from Article 5 ECHR, UNHCR recalls that, according to the Court, such standards should be interpreted “in harmony with other rules of international law of which it forms part”,³⁹ particularly where such other rules are found in human rights treaties (such as the 1951 Geneva Convention and the ICCPR).

2.4.2. The above standards in international refugee and human rights are broadly reflected in the relevant case law of the ECtHR notably relating to Article 5(1) and Article 5(2) ECHR.

2.4.3. In *Amuur v. France*,⁴⁰ the Court recognised that holding asylum-seekers in the transit zone of an airport is “acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations”⁴¹, particularly the 1951 Convention and the ECHR, highlighting that “States’ legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions”.⁴²

2.4.4. The Court further held that such practice should not be prolonged excessively, as it may turn a mere restriction on liberty, into a deprivation of liberty. The Court recognised the need to take into account the specific situation of asylum-

³⁶ RCD (recast), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=en>.

³⁷ See Article 8(3) of the RCD(recast).

³⁸ CJEU, *J.N., C-601/15*, 15 February 2016, paras. 54, 56 and 63.

³⁹ *Al-Adsani v. The United Kingdom*, 35763/97, European Court of Human Rights, 21 November 2001, para. 55, <http://www.refworld.org/docid/3fe6c7b54.html>; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31(3)(c), <http://www.refworld.org/docid/3ae6b3a10.html>; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 53, <http://www.refworld.org/docid/3ae6b3b04.html>.

⁴⁰ *Amuur v. France*, 19776/92, European Court of Human Rights, 25 June 1996, <http://www.refworld.org/docid/3ae6b76710.html>.

⁴¹ *Ibid*, para. 43.

⁴² *Ibid*.

seekers who, “often fearing for their lives, have fled from their own country”.⁴³

2.4.5. In *Saadi v. United Kingdom*, the Court emphasised that “detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion.”⁴⁴ The Court further recalled the following general principles applicable to detention, irrespective of the ground at stake:⁴⁵

- The detention will be “arbitrary” where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities;
- Both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1);
- There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.

2.4.6. With regard more specifically to the detention based on Article 5(1)(f), the Court held that “to avoid being branded as arbitrary, [...] detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate [...] and the length of the detention should not exceed that reasonably required for the purpose pursued”.⁴⁶

2.4.7. Regarding alternatives to detention, the Court in *Yoh-Ekale Mwanje v. Belgium* ruled that, in certain compelling circumstances, the authorities’ failure to consider a less severe measure other than detention was in breach of Article 5(1) ECHR.⁴⁷ More particularly, the Court failed to see the connection between the prolongation of the pre-removal detention of a foreigner for seven additional weeks (instead of an alternative to detention) and the aim pursued by the respondent Government.⁴⁸

2.4.8. With regard to Article 5(2) ECHR and the State’s obligation to inform promptly the person concerned, in a language they understand, and of the reasons for their arrest, the Court held notably that informing the applicant seventy-six hours after the beginning of the detention was not sufficiently prompt⁴⁹ and that the detainee must be informed at least about the essential legal and factual basis for detention.⁵⁰ Finally, the Court has repeatedly found that detention of asylum-seekers without providing access to speedy and effective judicial review violates the right to liberty under article 5(4) ECHR.⁵¹

3. Legislative framework and practice in Greece regarding the treatment of asylum-seekers held in the Reception Centres in Chios.

3.1. This section focuses on the specific period relevant to the underlying case, from 20 March 2016 onwards, in the main Reception and Identification Centres (RICs) on the Greek islands, in particular VIAL on Chios. In light of the observations below, it appears that the situation in practice fell short of the important safeguards contained in the relevant legislation, in particular regarding the duration and conditions of the detention, the information to be provided to persons concerned as well as the procedural guarantees in terms of remedies.

3.1. Relevant legislative framework

⁴³ *Ibid*, para. 43 and 48.

⁴⁴ *Saadi v. The United Kingdom*, 13229/03, ECtHR, 11 July 2006, para. 66, <http://www.refworld.org/docid/44dc70a34.html>.

⁴⁵ *Ibid*, para. 69.

⁴⁶ *Ibid*, para. 74.

⁴⁷ *Yoh-Ekale Mwanje v. Belgium* 10486/10, European Court of Human Rights, 20 December 2011, paras. 123-125, <http://www.refworld.org/docid/520a18c64.html>.

⁴⁸ *Ibid*, para. 124.

⁴⁹ *Saadi v. The United Kingdom*, 13229/03, ECtHR, 11 July 2006, para. 66, <http://www.refworld.org/docid/44dc70a34.html>

⁵⁰ *Fox v. United Kingdom*, 12244/86; 12245/86; 12383/86; 1244/86, European Court of Human Rights, 30 August 1990, para.40, <http://www.refworld.org/docid/3ae6b6f90.html>.

⁵¹ See *Suso Musa v. Malta*, ECtHR, App. No. 42337/12, para. 60 (2013); *Abdolkhani v. Turkey*, ECtHR, App. No. 30471/08, para. 142 (2009). The Inter-American Court of Human Rights has reached the same conclusion with respect to migrants generally. See *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Inter-American Court of Human Rights (IACrHR), 19 August 2014, <http://www.refworld.org/docid/54129c854.html>, paras. 191–198 (Aug. 13, 2014) (stating that detained migrants “must be brought promptly before a judge or other official authorized [by] law to exercise judicial functions”); *Dorzema v. Dominican Rep.*, Inter-Am. Ct. H.R. (ser. C) No. 251, para. 140 (Oct.24, 2012) (stating that the “authority that must decide the legality of the arrest or detention must be a judge or court”).

3.1.1. In January 2016 Chios was formally established as a First Reception Centre (FRC) by a Ministerial Decision⁵² under the framework of Law 3907/2011, which was applicable until 2 April 2016. Following the adoption of a new law on 3 April 2016 (L.4375/2016), procedures applied in these first reception centres were further rationalized, and additional guarantees were provided.

Law 3907/2011⁵³

3.1.2. According to the relevant provisions of Art. 7 L. 3907/2011, all third country nationals who are arrested while entering the country irregularly shall be subject to first reception procedures.⁵⁴ According to Art.13 L. 3907/2011, persons subject to first reception procedures, shall be detained in guarded premises, either in a First Reception Centre (FRC) or in other suitable facilities where mobile First Reception Service (FRS) Units operate. If they remain in a FRC, they may leave the premises only upon specific written authorization of the Head of the Centre. The restriction of liberty for the purposes of the completion of the first reception procedures in a FRC, applies for up to 15 days. An extension up to 10 days is allowed in exceptional circumstances and with proper justification.⁵⁵ The Head and staff of the FRC shall ensure that third country nationals have access to a series of safeguards and services.⁵⁶

3.1.3. According to Art. 13 par. 4 of L.3907/2011, the administrative decision on the restriction of liberty is issued by the Head of the FRC and shall contain a legal and factual justification. The third-country national subject to the restriction of liberty has the right to request the review of the decision before the President of the First Instance Administrative Court, through the procedure of “objections”, as provided for in Art. 76 of L.3386/2005⁵⁷. No free legal assistance is provided for in L.3907/2011 to third-country nationals who challenge the administrative procedures in the FRC, unless they have also applied for asylum where other rules regarding legal assistance apply.

3.1.4. According to Art. 11 L. 3907/2011, FRS shall inform third-country nationals of their rights and obligations. At each stage of the First Reception procedure, those applying for asylum shall be referred to the competent Regional Asylum Office and separated from other third country nationals. If, at the end of the 25 days, the examination of the asylum claim has not been completed, the Regional Asylum Office shall either 1) issue the applicant an asylum-seeker special identity card and shall refer him/her to the appropriate accommodation structures operating under the authority of the Ministry of Health and Social Solidarity or, 2) refer the applicant to the Police for further administrative detention in Police-run facilities, if detention is further justified on other grounds (see below para. 2.1.6.).⁵⁸ If an application and the appeal thereof are rejected while the third-country national remains in the FRC, s/he shall be referred to the authority competent for deportation, return or readmission procedures.

⁵² Joint Ministerial Decision 6634/1-147524 (O.G. B’ 10/8.1.2016)

⁵³ Law 3907/2011 on the Establishment of an Asylum Service and a First Reception Service, transposing into Greek legislation of 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.

⁵⁴ The First Reception procedures shall include: a. their identity and nationality verification; b. their registration; c. their medical examination and any necessary care and psycho-social support; d. providing proper information about their obligations and rights, in particular about the conditions under which they can be placed under international protection and e. identifying between them those who belong to vulnerable groups so that they be given the proper procedure provided for.

⁵⁵ Art. 11 par. 5 L.3907/2011.

⁵⁶ These include: a. live under decent living conditions; b. are allowed to keep, to the extent possible, their family unity; c. have access to emergency medical care and all necessary medical treatment and psychosocial support; d. enjoy, if they belong to vulnerable groups, appropriate treatment; e. they are adequately informed of their rights and obligations; f. they have access to guidance and legal advice regarding their situation; g. they are able to maintain contact with social agencies and organizations.

⁵⁷ Law 3386/2005 on entry, residence and social integration of third-country nationals on the Greek territory (O.G. A’212/23.8.2005).

⁵⁸ Art. 11 par 1, L.3907/2011 in combination with Art. 12.

3.1.5 According to Art. 12 of P.D. 113/2013⁵⁹, an asylum-seeker can only be detained on an exceptional basis, if it is demonstrated that it is necessary for a number of grounds⁶⁰ and that alternatives are not available.⁶¹ The detention of asylum-seekers should be limited to the minimum necessary period of time and in principle may not exceed 3 months. Detained asylum-seekers have the right to appeal, during which they may submit “objections” to the decision to detain.⁶² Continuation of restriction of liberty in a FRC of an asylum seeker, after having completed the first reception procedures, is allowed only if the grounds above are substantiated. Competent authorities should ensure, inter alia, the right to legal representation and that detainees are informed in a language they understand, of the reasons and the duration of their detention.

*Law 4375/2016*⁶³

3.1.6. Pursuant to L.4375/2016 which was adopted on 3 April 2016, the First Reception Service was replaced by the Reception and Identification Service (Art. 8). However, the latter was only formally established on 19 May 2016.⁶⁴ As a result, during this period, there was a lack of clarity in a number of administrative procedures normally under the responsibility of the Reception and Identification Service. According to Art. 9 of L. 4375/2016, reception and identification procedures shall include a number of critical steps.⁶⁵

3.1.7. In accordance with Art. 14 of L. 4375/2016, third-country nationals or stateless persons attempting to enter the country irregularly shall be directly led to a RIC. They shall be placed under a status of restriction of liberty by decision of the Manager of the Centre, to be issued within 3 days of their arrival.⁶⁶ If, upon expiry of these three days, the reception and identification procedures have not been completed, the Manager of the Centre may decide to extend the restriction of liberty until the completion of these procedures and for a period not exceeding 25 days as of the date of entry into the Centre. That decision shall be reasoned, in fact and in law. The review of the decision on the restriction of liberty is provided for under L.3907/2011 (see above para. 2.1.4), with an additional provision allowing the administrative court to order alternative measures to the restriction of liberty, if the judge finds the restriction of liberty as unlawful. Again, no free legal aid is provided to challenge the decision on the restriction of liberty, unless the applicant has also applied for international protection (see below).

3.1.8. The Manager and the staff of the Centre shall ensure that third-country nationals subject to reception and identification procedures enjoy similar rights as those stipulated under Art. 13 L. 3907/2011 (see para. 2.1.3. above). The information unit or the RIC shall inform third country nationals of their rights and obligations as well as of the procedures to receive international protection status and the procedures for voluntary repatriation.

3.1.9. Asylum-seekers shall be referred to the competent Regional Asylum Office, a unit of which may operate inside the Centre, and to the extent possible separated from the other foreigners within the Centre. Asylum-seekers may remain in the premises during the examination of their claims, up to a period of 25 days from their arrival at the centre, but only if the

⁵⁹ P.D. 113/2013 “Establishment of a single procedure for granting the status of refugee or of subsidiary protection beneficiary to aliens or to stateless individuals in conformity with Council Directive 2005/85/EC “on minimum standards on procedures in Member States for granting and withdrawing refugee status” (L 326/13.12.2005) and other provisions.” (O.G. A’)

⁶⁰ The grounds for detention are: a. for the determination of the actual data of his/her identity or origin, b. if he/she constitutes a danger for national security or public order, according to the reasoned judgement of the police authority or c. if detention is deemed necessary for the prompt and effective completion of the examination of his/her application, including for applications submitted in the FRC.

⁶¹ As described in Art. 22 par. 3 of L.3907/2011, the competent authorities to issue the return decision have also the possibility to impose, over the period of voluntary departure, obligations on a third-country national such as regular reporting to the authorities, deposit of an adequate financial guarantee, the submission of documents or the obligation to stay at a certain place, in order to avoid the risk of absconding.

⁶² As foreseen in Art. 76 of L.3386/2005.

⁶³ Law 4375/2016, on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC “on common procedures for granting and withdrawing the status of international protection (recast) (L 180/29.6.2013), provisions on the employment of beneficiaries of international protection and other provisions (O.G. A’). L.4375/2016 was amended by L. 4399/2016 (O.G. A’ 117/2016). Wherever necessary both regimes will be mentioned (from 3/4/2016 until 22/6/2016 and after 22/6/2016).

⁶⁴ Ministerial Decision No 16931 (O.G. B’ 1410/19.05.2016).

⁶⁵ These steps include the following: a. registration of personal data and the taking and registering of fingerprints for those who have reached the age of 14; b. verification of identity and nationality; c. medical screening and provision of any necessary care and psycho-social support; d. information about rights and obligations; e. attention for those belonging to vulnerable groups, in order to put them under the appropriate, in each case, procedure and to provide them with specialized care and protection; f. referring those who wish to submit an application for international protection to start the procedure for such an application; g. referring those who do not submit an application for international protection or whose application is rejected while they remain in the Reception and Identification Centre (RIC) to the competent authorities for readmission, removal or return procedures.

⁶⁶ Temporary permission to leave these facilities may be granted on an exceptional basis, notably for medical reasons.

exceptional grounds of art. 46 of L.4375/2016 are met (see par. 2.1.14). If, after the expiry of that period, the examination of the application is not completed, the competent Regional Asylum Office shall either grant to the person concerned an asylum-seeker card and refer him/her to appropriate reception facilities, or, prolong the detention if it is justified on other grounds. If the asylum claim and the subsequent appeal are rejected while the applicant remains in the RIC, s/he shall be referred to the competent authority in view of his/her return, readmission or removal.

3.1.10. Article 36 of L. 4375/2016 foresees that if a foreigner expresses his/her intent to seek asylum while under the regime of restricted liberty in the context of the reception and identification procedures, the competent authorities (RIS/Police) shall ensure the immediate recording of the person's intention to seek international protection and allow for the submission of a relevant written statement. Following this, the application for international protection shall be registered by the detention authority or the Reception and Identification Service through an electronic network connected with the Receiving Authority (Asylum Service/Regional Asylum Office) no later than 6 working days after the recording. The detention authorities or the Regional Reception and Identification Services shall ensure the transfer of the detainee before the Receiving Authority so as to complete the full registration of the application for international protection. Although the asylum application is considered submitted as of the date of the full registration, the person is to be considered as an asylum-seeker at the time he/she who expresses his/her intention to submit an application for international protection.⁶⁷

3.1.11. The detention of asylum seekers under the new framework of L.4375/2016 is regulated by Art. 46.⁶⁸ Pursuant to this provision, an asylum-seeker who is in the identification and reception procedure may remain in detention beyond the maximum period of 25 days on a number of grounds (referred to below).⁶⁹ However such detention shall remain exceptional and is only allowed if it is considered necessary after an individual assessment including a determination that no alternative measures can be applied. The detention order shall be issued by the competent Police Director and shall include a complete and comprehensive reasoning.

3.1.12. The detention of applicants on the first three grounds⁷⁰ shall, initially, not exceed 45 days and can be prolonged for a period not exceeding 45 days. The detention of asylum-seekers on national security ground or on account of the risk of absconding shall not exceed 3 months. The initial detention order and the order for the prolongation of these two types of detention shall be transmitted to the President of the Administrative Court of First Instance which is territorially competent. The Administrative Court is required to decide on the legality of the detention measure and issue immediately its decision which should be communicated to the Head of the Police. Asylum seekers in detention are entitled to free legal assistance. When a decision is taken to detain or prolong detention, the vulnerability of the applicant shall be given due consideration.

3.1.13. Article 60 par. 4 of L. 4375/2016 referring to border procedures introduces accelerated border procedures, with shorter deadlines, in case of mass influx at the borders and for those remaining in the RICs. These procedures are to be implemented "on an exceptional basis". The related Joint Ministerial Decision for its implementation was issued in October 2016.

3.2. Practice regarding the treatment of foreigners and asylum-seekers in the RICs⁷¹

⁶⁷ Article 34 point (d) of the law L.4375/2016.

⁶⁸ Art. 12 of P.D. 113/2013 until 3 of June 2016 and, as of 3 June 2016, Art. 46 of L.4375/2016.

⁶⁹ The grounds are: a. in order to determine his /her identity or nationality, or b. in order to determine those elements on which the application for international protection is based which could not be obtained otherwise, in particular when there is a risk of absconding of the applicant, or c. when it is ascertained on the basis of objective criteria, including that he/she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of a return decision, if it is probable that the enforcement of such a measure can be effected; or d. when he/she constitutes a danger for national security or public order, according to the reasoned judgment of the competent authority, or, e. when there is a serious risk of absconding of the applicant, pursuant to Article 2 point (n) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013.

⁷⁰ a. in order to determine his /her identity or nationality, or b. in order to determine those elements on which the application for international protection is based which could not be obtained otherwise, in particular when there is a risk of absconding of the applicant, or c. when it is ascertained on the basis of objective criteria, including that he/she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of a return decision, if it is probable that the enforcement of such a measure can be effected.

⁷¹ UNHCR describes in this Chapter findings that were collected on the concerned locations through its permanent presence at all the "hotspot" islands for the whole period that is being examined. In April 2016, UNHCR had approximately 14 staff on Chios and was implementing activities either directly or through partners (Samaritan Purse, WAHA, Save the Children, PRAKSIS, Municipality of Chios).

3.2.1 After the EU-Turkey Statement was published on 18 March 2016⁷², the RICs (Hotspots or First Reception Centers - FRCs at that time) were turned into closed facilities in accordance with the Greek legal framework.

3.2.2. Following the initial implementation of the EU-TUR Statement, all First Reception Centres and Hotspots experienced a rapid deterioration of conditions due to the overcrowding and inadequate conditions, low infrastructure capacity and limited services. The lack of a stable managing authority in the centres as well as an inadequate number of administration staff exacerbated the situation mainly in the centres of Chios, Leros and Samos.

3.2.3. During this period, UNHCR and most humanitarian actors suspended some of their activities in the closed facilities, although UNHCR maintained its presence to provide information on the right and procedure to seek asylum, to identify and refer those with specific needs and to carry out protection monitoring.

3.2.4. During the period between 20 March and 02 April, the vast majority of third-country nationals who arrived on the islands remained detained for weeks in the closed facilities without being served with any type of detention decision, nor were they informed, through the assistance of an interpreter or otherwise, of the reasons or the duration of their detention by the competent authorities. Information on the legal remedies available to them to challenge their detention was not provided either.

3.2.5. With respect to the identification of persons with specific needs/vulnerable groups, their exemption from detention and their referral to appropriate services, no effective processes were put in place after 20 March, mainly due to the understaffing of the RICs. On Chios, the FRS only began to systematically screen new arrivals for vulnerability after 19 April. This led to vulnerable individuals already found in the centre not being identified as such. The lack of a systematic medical and psychosocial screening by the FRS had consequences in the further administrative and medical/psychosocial treatment of persons with specific needs; it led to prolonged detention, non-exemption from the asylum admissibility procedure as well as to delayed referrals of serious medical and psychological cases to relevant institutions.

3.2.6. During the period from 20 March to 19 April, free legal aid had not been established at the entry points for asylum-seekers. A limited capacity for legal aid and free representation were instituted by a few NGOs however, it did not suffice to cover all the needs.⁷³

3.2.7. With respect to the asylum procedure, the Regional Asylum Offices and Asylum Units on the islands were not fully functional as of 20 March 2016. Contrary to Lesbos, the Regional Asylum Offices on Chios and Samos remained semi-functional⁷⁴ for a significant period of time after 20 March due to insufficient staffing capacity. As a result, as of 20 March, asylum-seekers had to wait for their claims to be registered and examined leaving the persons concerned in a state of acute uncertainty and limbo. Access to the asylum procedure has been particularly problematic for non-Syrian asylum seekers, including Afghans and Iraqis. In practice, only a small proportion of Afghans and Iraqis, whose intention to apply for asylum was registered by the authorities, have had their asylum applications fully lodged with the authorities.

3.2.8. Substantial improvements have taken place as of June 2016, by which time most centres operated as open facilities, the Asylum Service and European Asylum Support Office (EASO) had increased their staff, certain procedures with respect to administrative treatment began to be harmonized, and a large number of persons, in particular vulnerable individuals, found shelter in sites and shelters operated by UNHCR, its partners and other actors. As a result, UNHCR resumed further activities in the RICs (infrastructure and maintenance as well as distribution of non-food items) in support of the Greek authorities and in close coordination and cooperation with other humanitarian partners.

4. Conclusion

4.1. UNHCR considers that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position. Furthermore, where it is applied, detention of asylum-seekers should be justified according to the principles of necessity, reasonableness and proportionality, and subject to a series of important legal standards and procedural safeguards.

**UNHCR,
12 December 2016**

⁷² EU-Turkey Statement, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

⁷³ On Chios, legal NGOs operating in the said period were METAdrasi and the 'Refugee Support Project Aegean – RSPA', supported each one by one lawyer.

⁷⁴ In March-April 2016, RAOs in Samos and Chios had 2-3 staff each.