



Border Violence Monitoring Network

14 April 2023

Application nos.

16089/20 B.T. v Greece

16186/20 B.C. v Greece

**Third Party Intervention to the
European Court of Human Rights**





**Border Violence
Monitoring Network**

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EUROPEAN COURT OF HUMAN RIGHTS
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Third party intervention on behalf of Border Violence Monitoring Network

Pursuant to the Registrar's notification dated 24 March 2023 that the President of the Section has granted leave, under Rule 44(3) of the Rules of the European Court of Human Rights

1. Suspension of asylum procedures in the reported period of time implicating potential violations of the right to an effective remedy in combination with violations of Article 3 ECHR, prohibition of torture

In February 2020, President Recep Tayyip Erdoğan announced Turkish authorities would no longer prevent migrants on their territory from entering Greece and declared the EU Agreement officially suspended.¹ This resulted in thousands of people seeking protection attempting to cross the border to Greece both by land and by boat across the Aegean Sea. According to UNHCR estimates over 2,100 persons entered Greece in March 2020 mostly travelling at sea.²

In response to an alleged crisis at the border, the Greek government suspended its asylum procedures for a month and instructed its law enforcement authorities to unlawfully return those entering Greek territory back to Turkey or their countries of origin.³ In order to enforce unlawful return orders, all those who were apprehended in this period of time were detained systematically, without identification or registration procedures, and with limited access to procedural safeguards and guarantees. The suspension of asylum procedures and subsequent mass detention amount to violations of both EU refugee law and the 1951 Refugee Convention Relating to the Status of Refugees, as confirmed by the United Nations High Commissioner for Refugees.⁴

Indeed, all those who entered irregularly faced criminal charges pursuant to Law 3386/2005 on the “Entry, residence and social inclusion of third-country nationals in the Greek Territory”⁵ and, due to the suspension of asylum procedures, were unable to “show good cause” for their irregular entry, as prescribed by Article 31 of the Convention Relating to the Status of Refugees. Moreover, in the case of asylum seekers, the right to an effective remedy under Article 13 concretises in having their claim heard, individually assessed and in their ability to effectively appeal a negative decision, both of which were not achievable during the reported period of time due to the suspension.

Several reports document the material conditions preventing asylum seekers from seeking a remedy. Upon their visit to Greek detention centres in 2020, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment found there to be a lack of access to legal aid, poor interpretation services, and an inability for migrants to present their cases, also due to intimidation by the authorities and bias by the court.⁶ The Greek Council for Refugees⁷ and Refugee Support Aegean⁸

¹ President Erdoğan of Turkey: “18 thousand irregular immigrants crossed the border, we will not close the doors.” Available at: <https://www.trthaber.com/haber/gundem/cumhurbaskani-erdogan-18-bin-duzensiz-gocmen-siniri-gecti-kapilari-kapatmayaca-giz-463917.html>

² UNHCR, “UNHCR Greece Factsheet March 2020.” Available at: <https://data.unhcr.org/en/documents/details/76284>

³ Government Decree on “suspension of the submission of asylum applications,” Gov. Gazette A’ 45/2.3.2020. Available in Greek at: <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/document.pdf>

⁴ UNHCR, “UNHCR statement on the situation at the Turkey-EU border,” 2 March 2020. Available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>

⁵ Available at: <https://www.refworld.org/docid/4c5270962.html>

⁶ Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020. Para 18. Available at: <https://rm.coe.int/1680a06a86>

⁷ Greek Council for Refugees & Oxfam, “Diminished, Derogated, Denied.” 2020. Available at: <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621011/bp-diminished-derogated-denied-greece-refugees-020720-en.pdf>

⁸ Refugee Support Aegean, “Rights denied during Greek asylum procedure suspension.” 2020. Available at: https://rsaegean.org/wp-content/uploads/2020/05/RSA_LN_AsylumSuspension.pdf

have documented how the administrative procedures to appeal detention and deportation are ineffective and demonstrate the underlying intention to deny effective remedies and criminalise undocumented migrants.⁹ The decisions issued by the courts were often identical and showed no consideration of individual circumstances.

The practice of illegal pushbacks carried out by Greek authorities in this period of time is well-documented,¹⁰ and attempting to summarily or collectively return asylum seekers already on Greek territory is another example of this tactic. Ordering unlawful summary returns of persons without access to lodge asylum claims and perform an individual assessment is in violation of the principle of non-refoulement,¹¹ which was found to be implicit to Article 3 ECHR by the jurisprudence of this Court. Returning persons to Türkiye without prior assessment can lead to violations of Article 3 as it could expose them to persecution and ill-treatment by Turkish authorities in Türkiye.¹² Indeed, there are many reports documenting the mass deportation of Afghan and Syrian refugees to their countries of origin,¹³ and the discrimination towards minorities, such as Kurdish, Yazidi and Armenians, and political opponents by Turkish authorities is well known.¹⁴

2. Relevant European Union Law and ECtHR Jurisprudence

Irrespective of the way of entry in a country, people who express the wish to claim asylum must have access to asylum procedures, including remedies capable of suspending a removal decision.

Several international and national bodies and organisations declared the unlawfulness of the decision made by the Greek authorities to suspend asylum applications in March 2020. Following the enactment of Act of Legislative Content (Πράξη Νομοθετικού Περιεχομένου), Gov. Gazette A' 45, UNHCR publicly stated that “*Neither the 1951 Convention Relating to the Status of Refugees nor EU*

⁹ BVMN, Rule of Law Report: Greece. 2023.

<https://borderviolence.eu/reports/rule-of-law-report-greece/>; Greek Council for Refugees & Oxfam, “Diminished, Derogated, Denied.” 2020.

¹⁰BVMN, “Balkan Region Report – March 2020.” 2020. Available at:

<https://borderviolence.eu/reports/balkan-region-report-march-2020/>; BVMN. “New report on violations at Greek border.” March 2020. Available at: <https://borderviolence.eu/reports/new-report-on-violations-at-greek-borders/>; BVMN, “Special Report: COVID-19 and Border Violence along the Balkan Route.” May 2020. Available at:

<https://borderviolence.eu/reports/special-report-covid-19-and-border-violence-along-the-balkan-route/>; Refugees Support Aegean, Multiple Reports Available at: <https://rsaagean.org/en/violations-at-the-borders/>; Forensic Architecture, Multiple Reports. Available at: <https://forensic-architecture.org/location/greece/>; European Centre for Constitutional and Human Rights, “Analyzing Greek Pushbacks: Over 20 Years of Concealed State Policy Without Accountability.” Available at:

https://www.ecchr.eu/fileadmin/Publikationen/ecchr_analysis_greek_pushback_practice.pdf; Amnesty International, “Greece: Violence, lies, and pushbacks.” 2021. Available at: <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>;

UNHRC Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, “Report on means to address the human rights impact of pushbacks of migrants on land and at sea” (2021) UN Doc A/HRC/47/30

¹¹ This Court has found a similar link in the following cases: *R.U. v. Greece*, no. [2237/08](#), §§ 94-95; see also *Longa Yonkeu v. Latvia*, no. [57229/09](#), § 143; *Čonka v. Belgium*, no. [51564/99](#), § 42

¹² EASO, “Turkey - Content of Protection. Country Information Pack.” 2019. Available at:

https://rsaagean.org/wp-content/uploads/2021/06/2019-08_EASO_TurkeyReport.pdf; Refugees Support Aegean, “Greece deems Turkey “safe”, but refugees are not: *The Substantive Examination of Asylum Applications is the only safe solution for refugees.*” 2021. Available at: <https://rsaagean.org/en/greece-deems-turkey-safe-but-refugees-are-not/>

¹³ European Council of Refugees and Exiles, “Greece: Increase of Pushbacks with Impunity Amid Ongoing Crackdown on Solidarity.” 2023. Available at:

<https://ecre.org/greece-increase-of-pushbacks-with-impunity-amid-ongoing-crackdown-on-solidarity-turkiye-considered-safe-by-greek-authorities-sets-new-record-of-deportations-thousands-of-vulnerable/>

¹⁴ See: Finland: Kurdish appellant would face real risk of suffering serious harm if returned to Turkey, Available at:

<https://www.asylumlawdatabase.eu/en/content/finland-kurdish-appellant-would-face-real-risk-suffering-serious-harm-if-retur-nd-turkey>; European Union Asylum Agency, Kurds. Available at:

<https://euaa.europa.eu/country-guidance-syria/2112-kurds>; Human Rights Watch, “Turkey Events of 2019.” Available at: <https://www.hrw.org/world-report/2020/country-chapters/turkey>

*refugee law provides any legal basis for the suspension of the reception of asylum applications*¹⁵. On 23 March 2020, the UN Special Rapporteur on the Human Rights of Migrants called upon Greece to “immediately reverse its decision on the suspension of asylum application which has no legal basis in international human rights law. The right to individual assessment is the cornerstone of human rights and refugee protection. It cannot be put on hold [...] Returning people without due process will inevitably result in cases of refoulement to situations where they may face the risk of death, torture, ill-treatment, persecution or other irreparable harm”¹⁶. Furthermore, according to the Greek National Commission for Human Rights (GNCHR), “there are no clauses allowing for derogation from the application of the aforementioned provisions [the right to seek asylum and the prohibition of refoulement] in the event of an emergency situation, on grounds of national security, public health etc”¹⁷.

Under EU Law, Article 18 of the EU Charter establishes the right to asylum and provides that “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union”¹⁸. Furthermore, according to Recital 8 of the Return Directive (2008/115/EU)¹⁹, “It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement”. The Asylum Procedures Directive (2013/32/EU)²⁰ sets out common procedures for granting and withdrawing international protection, which are applicable to asylum claims lodged in the territory of EU Member States. Specifically, according to recital 25, “[i].., “every applicant should have effective access to procedures”. In addition, under Art. 6 of the Directive Member States are required to register an asylum application within established deadlines, and under Article 8, they must provide asylum applicants with information on the possibility to lodge their claims.

Even if the European Convention of Human Rights does not explicitly set out the right to asylum as such, denying access to asylum procedures may lead to an arbitrary removal and to a possible violation of the principle of non-refoulement. Removing an individual without a proper assessment, and thus, putting them at risk of torture or other forms of inhuman or degrading treatment or punishment, is prohibited under Article 3 ECHR. Furthermore, where the individual has an “arguable complaint” that his removal would expose him to treatment contrary to Article 2 or 3 of the Convention, he must have an effective remedy, in practice as well as in law, at the domestic level in accordance with Article 13 of the Convention.²¹

¹⁵ UNHCR, “UNHCR statement on the situation at the Turkey-EU border.” 2020. Available at:

<https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>

¹⁶ UN OHCHR, “Greece: Rights violations against asylum seekers at Turkey-Greece border must stop - UN Special Rapporteur.” 2020. Available at:

<https://www.ohchr.org/en/press-releases/2020/03/greece-rights-violations-against-asylum-seekers-turkey-greece-border-must>

¹⁷ GNCHR, “GNCHR Statement: Reviewing asylum and immigration policies and safeguarding human rights at the EU borders.” 2020. Available at:

https://www.nchr.gr/images/English_Site/PROSYGES/GNCHR_STATEMENT_Borders.pdf

¹⁸ Council of the European Union, “Charter of Fundamental Rights of the European Union” (2007/C 303/01). 14 December 2007.

¹⁹ Council of the European Union, “Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals,” (2008/115/EC). 16 December 2008,

²⁰ Council of the European Union, “Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection,” (2013/32/EU). 29 June 2013.

²¹ ECtHR, “Guide on the case-law of the European Convention on Human Rights: Immigration.” 2022. Available at: https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf

These aspects have been assessed by the European Court of Human Rights (ECtHR) in the case *M.A. v. Lithuania*, which concerned the failure to allow a Russian family with five children to submit asylum applications on the Lithuanian border and their removal to Belarus. On this occasion, the Court reiterated that “[...], the expulsion of an alien by a Contracting State may give rise to an issue under Article 3 of the Convention where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country”²². Furthermore, it was the Court’s view that the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448), independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari v. Turkey*, no. 40035/98, § 50), as well as a particularly prompt response (see *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136.); it also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Čonka v. Belgium*, no. 51564/99, §§ 81-83, and *Gebremedhin [Gaberamadhién] v. France*, no. 25389/05, § 66). The Court also noted that the national authorities are thus required to examine the applicants’ fears and to assess the risks they would face if removed to the receiving country, and that their obligations under Article 3 are fulfilled primarily through appropriate procedures allowing such examination to be carried out. Therefore, the Court found that the failure to initiate asylum proceedings and the consequent removal of the applicants without prior assessment, amounted to a violation of Articles 3 and 13 of the ECHR.

Similarly, in *A.E.A. v. Greece*, the Court recognised the existence of the right “to seek asylum” under international and domestic law, and recalled that the Asylum Procedures Directive transposed into the Greek law requires the authorities to “ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf”²³. According to the Court, the effective protection of those in need of international protection is conditional upon the possibility to lodge an asylum application in practice. It follows that “if national authorities do not guarantee the unhindered access to the asylum procedure, asylum seekers cannot benefited by the procedural guarantees connected to this procedure”²⁴, leaving them subject to detention at any time. In this case, since the applicant was not able to lodge an asylum application for a considerably long time due to the deficiencies in the asylum procedure, the Court found Greece in violation of Article 13 ECHR read in conjunction with Article 3 ECHR.

In light of the above and in line with ECtHR jurisprudence, not guaranteeing an effective access to the asylum procedure for individuals that might be at risk of treatment contrary to Article 3 ECHR and legal remedies against possible removal to the country of origin, may amount to breaches of Article 3 in conjunction with Article 13 of the ECHR.

3. Practices of arbitrary detention in the reported period of time implicating potential violations of the right to liberty

Due to the unwillingness of the Turkish government to allow returns, people were deprived of their liberty indefinitely, arbitrarily and indiscriminately. The suspension decree established that people could be detained without prior registration and identification procedures, notwithstanding their explicitly requesting asylum. However, under EU and domestic law, persons must be afforded asylum

²² *M.A. and Others v. Lithuania*, no. 59793/17, § 102, ECHR 2018

²³ *A.E.A. v. Greece*, no. 39034/12, § 83, ECHR 208

²⁴ *Ibid.*, § 85.

seeker status and derived rights as soon as they express the intention to seek international protection, even if they are not registered as such. As asylum seekers, they should benefit from material reception conditions of a certain standard²⁵ and they should enjoy freedom from detention.²⁶

According to EU directives and the jurisprudence of this Court,²⁷ deprivation of liberty is permissible only in exceptional cases where other less coercive means are not viable.²⁸ Where detention is used to effect deportations, it can only be ordered if a risk of the individual's absconding has been established or the person poses a threat to national security and there is a reasonable prospect of removal.²⁹ In the reported period of time, there was no reasonable prospect of removal, as Türkiye was not accepting returns. Far from being adopted as a means of last resort, arbitrary detention was used systematically to enforce unlawful returns. None of the procedural guarantees afforded by the ECHR and EU directives has been implemented by the Greek state in practice. None of the persons underwent the reception and identification procedures prescribed by domestic law for all undocumented arrivals, including an assessment of vulnerability.³⁰ Thus, the legality of detention of migrants in these circumstances is called into question.

Several reports from the Greek Refugee Council, Refugees Support Aegean, BVMN and others show that detention conditions were and are appalling in most detention centres³¹ and the possibility to appeal detention decisions was virtually inexistent and woefully ineffective.³² The uncertainty caused by the indefinite nature of administrative detention coupled with severely inadequate conditions and the lack of appeal prospects, have caused many detainees to take their own lives³³ and others to hunger strike over the years.³⁴

According to EU law and Article 5 ECHR, any person detained is entitled to a trial within a reasonable time or to release pending trial. The legislation on administrative detention entered into force in January 2020 does not comply with these requirements, as it allows detention for up to 36 months simply for entering Greece irregularly. Indeed, the initial detention period is set at 50 days for asylum seekers pending a decision on their case, but there may be consecutive decisions that extend the detention for another 50 days at a time. Through a series of extensions asylum seekers can be detained for a maximum of 18 months. In the event that after 18 months, a return decision is issued, a person can be held for another 18-month period pending deportation. This means that, theoretically, it is possible that people can be detained for up to 36 months. In practice, detention usually lasts more

²⁵ Article 55 Law 4636/2019 ("International Protection Act"), Gov. Gazette A' 169/1.11.2019, available in Greek at: <https://www.kodiko.gr/nomothesia/document/572171/nomos-4636-2019>; Article 17 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

²⁶ Article 46 International Protection Act; Article 8 Reception Conditions Directive.

²⁷ *Mikolenko v. Estonia*, no. [10664/05](#), ECHR 2010

²⁸ Article 15, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

²⁹ *S.Z. v. Greece*, no. [66702/13](#), ECHR 2018

³⁰ RSA, "Rights denied during Greek asylum procedure suspension".

³¹ RSA, "Administrative detention: A human rights 'black hole'." 2021. Available at: <https://rsaagean.org/en/administrative-detention-a-human-rights-black-hole/>

³² GCR & Oxfam, "Diminished, Derogated, Denied".

³³ *Ibid.* at 31

³⁴ BVMN, "Dark Rooms, Degrading Treatment and Denial: The Use of Violence in Greece's Pre-Removal Detention Centres." 2023. Available at: <https://borderviolence.eu/reports/detention-violence-greece/>; see also https://www.efsyn.gr/ellada/dikaionomata/279379_se-apergia-peinas-metanastes-sto-paranesti-katagelloyn-basanismoys-apo

than 6 months, during which asylum seekers' right to liberty is violated, in absence of safeguards and guarantees.³⁵ This is a disproportionate amount of time, if compared with the "offence" committed.³⁶

To this day, these conditions persist and the uncertainty is exacerbated by the fact that detainees are not being informed about the reason for their detention, access to the outside is limited, including access to legal support due to lack of information and limiting visits in detention centres to certain and specific legal counsel providers. Limited access to legal aid is complemented by interpretation services that are mostly of poor quality if available. These are common features of most pre-removal detention centres, including Paranesti, Xanthi, Corinth, Amygdaleza, Tavros (Petrou Ralli), Fylakio,³⁷ Malakasa³⁸, Lesvos and Kos³⁹.

The lack of legal aid and adequate interpretation services is particularly concerning as it results in a decreased chance of lodging a successful asylum claim if any at all. According to the Asylum Service's statistics, in 2019, out of 15,378 appeals lodged, only 33% involved the state-funded legal aid scheme.⁴⁰ In several cases, interpretation was carried out by other detainees.⁴¹

Finally, as was the case for appeals to deportation orders, at the reported period of time no effective appeal procedure for administrative detention existed.⁴²

4. Violation of Article 5 § 1

The Greek government's practice of detaining asylum seekers during the period in which it had suspended asylum applications constitutes unlawful and arbitrary action. As, furthermore, detainees had no effective means by which to appeal their administrative detention, Greece's actions may amount to violations of the safeguards against the arbitrary deprivation of liberty provided by Article 5 §§ 1 and 4.

As the Greek statute suspending asylum procedure is inconsistent with the ECHR, deprivation of liberty is not a lawful exception under Article 5 § 1(f). Though it is true that, to be lawful, detention must comply with domestic law, the Court has recognized that this condition alone is insufficient: domestic law itself must comport with the express and implied principles of the ECHR.⁴³ Thus, the fact that asylum seekers may have been detained under Greek laws related to administrative detention or suspension of asylum does not satisfy the Article 5 lawfulness requirement. As previously discussed, the law enacted in March 2020 contravenes the Court's recognition of a right to access asylum procedure, which itself reflects the fundamental principles of non-refoulement and protection against arbitrariness. The latter principle is the central purpose of Article 5, which protects individuals from arbitrary detention.

³⁵ Greek Council for Refugees & Oxfam, "Detention as the default." 2021. Available at:

<https://oxfamlibrary.openrepository.com/bitstream/10546/621307/1/bp-detention-as-default-greece-asylum-161121-en.pdf>

³⁶ HIAS et al, "Observations on the Implementation of Law 4636/2019 "On International Protection and Other Provisions" at the 'Hotspot' of Lesvos." 2020. Available at:

https://hias.org/wp-content/uploads/joint_briefing_paper-law_4636_2019_hotspot_of_lesvos-english.pdf

³⁷ BVMN, "Dark Rooms, Degrading Treatment and Denial."

³⁸ RSA, "Rights denied during Greek asylum procedure suspension."

³⁹ GCR & Oxfam, "Diminished, Derogated, Denied."

⁴⁰ AIDA, Country Report on Greece, Update 2019. Available at:

<http://asylumineurope.org/news/23-06-2020/aida-2019-update-greece>

⁴¹ Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020.

⁴² RSA, "Rights denied during Greek asylum procedure suspension;" GCR & Oxfam, "Diminished, Derogated, Denied".

⁴³ *Plesó v. Hungary*, no. 41242/08, § 59, ECHR 2012

Applicants for international protection detained while the asylum procedure was suspended demonstrably experienced both objective and subjective elements of arbitrary detention. With respect to the objective component, an individual must have been confined to a particular restricted space for a non-negligible amount of time.⁴⁴ As was previously discussed, civil society organisations have reported that applicants lodged in detention centres are confined in terrible conditions. Particularly given the Greek government's unlawful use of detention to effect deportations and the uncertainty experienced by migrants as to whether they would be permitted to apply for asylum, a period of two and a half months ought to be considered "non-negligible" confinement in a "particular restricted space." Notably, the Court has observed that, if the threshold for arbitrary detention under Article 5 § 1 is met, a relatively short duration of detention would be insufficient to reverse this conclusion.⁴⁵ The subjective element requires that an individual did not validly consent to the confinement in question. To conclude that an individual who has been prevented from applying for asylum, a right of access supported by ECtHR jurisprudence, could have provided valid consent to their detention, which pending deportation proves to be inextricably linked to their immigration status, seems inconsistent with Article 5's fundamental purpose.

In *Saadi v. the United Kingdom*, the Court describes when State action would not constitute an arbitrary deprivation of liberty, observing that the same standard applied to both limbs of Article 5 § 1(f): it 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 the detention should be appropriate, recognizing that this measure regulates those who have fled from their countries of origin often under extraordinary duress; and the length of the detention should not exceed that reasonably required for the purpose pursued.⁴⁶ As a consequence of Greece's unlawful suspension of asylum procedure, detention of potential applicants for international protection does not represent a good-faith exercise of the country's obligations under the ECHR and ECtHR jurisprudence. With respect to a close connection between detention and the State's purpose, indefinite detention and inability to access asylum procedure does not suggest that deprivation of liberty was, in practice, closely related to unauthorised entry. Considering the third criterion, conditions in administrative detention centres have credibly been reported to be deplorable, and these, in conjunction with lack of information and access to legal support, has driven detainees to measures as extreme as hunger strikes and self-harm. Finally, Greece has not demonstrated a clear purpose in detaining asylum applicants, nor was the length of their confinement demonstrated to be rationally related to asylum applicants' immigration status. An evaluation of these factors strongly indicates that detention of asylum seekers in Greece was arbitrary as well as unlawful.

Of additional relevance, the Court has stated that detention with a view to expulsion would only be compatible with Article 5 § 1 if the proceedings relating to expulsion were in process and pursued with due diligence, and if the detention was lawful and was not arbitrary.⁴⁷ At minimum, based on the *Saadi* standard, asylum seekers' detention in this context, predicated upon a law which contravenes Article 5, appears arbitrary; there is also no indication that lawful returns of people having entered irregularly was being pursued "with due diligence", considering especially that the Turkish government had officially and publicly announced the suspension of receiving returnees. Furthermore, the Court has observed that international law, as applied to Greece, requires an asylum application to be dealt with prior to deportation and that detention with the intent to deport requires that such a

⁴⁴ *Storek v. Germany*, no. 61603/00, § 74, ECHR 2005; *Stanev v. Bulgaria* [GC], no. 36760/06, § 117, ECHR 2012

⁴⁵ *Rantsev v. Cyprus and Russia*, no. 25965/04, § 317, ECHR 2010; *Iskandarov v. Russia*, no. 17185/05, § 140, ECHR 2010; *Zelčs v. Latvia*, no. 65367/16, § 40, ECHR 2020

⁴⁶ *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 64-66, 73-74, ECHR 2008

⁴⁷ *S.K. v. Russia*, no. 52722/15, ECHR 2015

deportation be executable.⁴⁸ Under circumstances in which the ability to request asylum was suspended, as was true in Greece in March 2020, expulsions would also be illegitimate.

Additionally, detention of asylum applicants violated the principle of legal certainty. With respect to the “quality of the law,” a statute authorising the deprivation of liberty must be sufficiently accessible, precise, and foreseeable in its application, providing safeguards against arbitrary administration.⁴⁹ These might include clear legal regulations concerning initial detention, its extension and duration, and an effective remedy for challenging its lawfulness and length.⁵⁰ In *Khlaifia and Others v. Italy*, the Court found that imprecise provisions depriving migrants of liberty were based on “legislative ambiguity” and thus failed to demonstrate legal clarity, consequently proving inconsistent with Article 5 § 1.⁵¹ Similarly, the administrative detention procedures enacted in January 2020 did not guarantee that deprivation of liberty would be proportionate or that an effective judicial remedy would be available, and the law halting asylum procedure did not provide such safeguards against arbitrariness for would-be asylum seekers. Furthermore, Greece’s precipitous suspension of asylum lacked foreseeability. Asylum seekers who entered immediately following the law’s enactment should not be expected to have known that they would no longer be able to avail themselves of the right to access asylum procedure.

Based on this section’s principle of protection against arbitrariness, the Court has expressed reservations about detaining asylum seekers without making individualized assessments of their needs.⁵² Given the suspension of asylum and accompanying lack of an effective judicial remedy, asylum seekers detained in Greece were effectively deprived of their liberty without such an evaluation. The Court might also consider whether, as in *R.R. and Others v. Hungary*, no strictly defined basis exists in domestic law for applicants’ detention and the relevant authorities issued no formal decision including reasons for detention, prohibiting the determination that their deprivation of liberty was lawful under Article 5 § 1.⁵³

5. Violation of Article 5 § 4

Article 5 § 4’s right to have the lawfulness of detention speedily examined by a court is meant to be consistent with the purpose of Article 5 § 1, though it requires an independent evaluation of the lawfulness of an applicant’s detention. Nonetheless, this review must be broad enough to consider the circumstances determining lawfulness under Article 5 § 1.⁵⁴

In *Khlaifia and Others v. Italy*, the Court affirmed the right to “speedy review” and to subsequent release if detention is proved unlawful, with deprivation of liberty requiring “particular expedition.”⁵⁵ It further observed that such a remedy must be “sufficiently certain” in practice and recognized that the State has an affirmative obligation to ensure that the necessary proceedings are conducted as rapidly as possible.⁵⁶ Ultimately, it held that there had been an Article 5 § 4 violation because an Article 5 § 2 had deprived applicants’ right to appeal their detention of all effective substance; on this

⁴⁸ *R.U. v. Greece*, no. 2237/08, ECHR 2011

⁴⁹ *J.N. v. the United Kingdom*, no. 37289/12, § 77, ECHR 2016

⁵⁰ *Ibid.*

⁵¹ *Khlaifia and Others v. Italy*, no. 16483/12, § 106, ECHR 2016

⁵² *Thimothawes v. Belgium*, no. 39061/11, § 73, ECHR 2017; *Mahamed Jama v. Malta*, no. 10290/13, § 146, ECHR 2015

⁵³ *R.R. and Others v. Hungary*, no. 36037/17, ECHR 2021

⁵⁴ *Ibid.* at 51, § 129

⁵⁵ *Ibid.* at 51, § 131

⁵⁶ *Ibid.*

basis, it did not need to consider whether remedies under domestic law would be sufficient.⁵⁷ In the context of suspended Greek asylum procedure, though Article 5 § 2 violation has not been alleged, the recognition of an Article 5 § 1 violation would similarly demonstrate that asylum seekers in detention were effectively unable to avail themselves of a judicial remedy, as an inability to appeal their detention is one component of the determination that such a deprivation of liberty was unlawful.

If, however, an Article 5 § 1 violation were not recognized and the Court proceeded to the question of domestic remedies, there is clear evidence of insufficiency. While asylum applicants may be able to submit their cases to administrative courts, these have a demonstrated practice of rejecting appeals with extreme speed and without consideration of the individual merits. Furthermore, limited access to legal aid and interpretative services within detention centres is a substantial impediment to even accessing this process. Though decisions may be quickly rendered, this should not satisfy the “speedy review” requirement, which must be thorough enough to consider the circumstances surrounding lawlessness under Article 5 § 1. As well, only a fraction of detained migrants are able to access the necessary resources to avail themselves of this ineffective remedy, and the practice of indefinite detention contravenes the principle of “particular expedition.”

As the Court discussed at length in *Khlaifia*, the right to be heard during an administrative hearing that might have an adverse outcome is a fundamental protection that the CJEU has recognized EU law affording to migrants.⁵⁸ Similarly, the Court’s own jurisprudence involving migrant applicants emphasises the importance of an accessible and expedient remedy: cases in which it observed that the applicable legislation omitted review of detention and failed to provide for regular review,⁵⁹ that judges had not reviewed the question of lawfulness of detention with a view to expulsion,⁶⁰ and that there was no avenue for prompt judicial resolution⁶¹ have been found to violate Article 5 § 4. It would be consistent with these holdings to find that asylum applicants detained under Greece’s suspended asylum procedure lacked an effective mechanism through which to challenge the lawfulness of their arbitrary deprivation of liberty.

⁵⁷ *Ibid.*, § 132-35

⁵⁸ *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, C-249/13, §§ 28-36, CJEU 2014

⁵⁹ *Ibid.* at 47

⁶⁰ *Ibid.* at 48

⁶¹ *Ibid.* at 53