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Protect the refugee.

# LOCKED UP WITHOUT RIGHTS

Nationality-based detention  
in the Moria refugee camp

A HIAS Policy Brief

December 2019

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## Introduction

HIAS is a global Jewish nonprofit organization that protects refugees—including women and children, and ethnic, religious, and sexual minorities—whose lives are in danger for being who they are. Guided by our values and history, HIAS helps refugees rebuild their lives in safety and advocates to ensure that all displaced people are treated with dignity.

HIAS Greece began its operations in 2016 on the Island of Lesbos to increase refugee protection, ensure equal access to rights, and lay the foundation for refugees' full social integration in Greece. HIAS Greece assists refugees through direct individual legal representation, legal information, and advocating for changes in policy and practice. In August 2017, HIAS opened an office in Athens to expand its advocacy, impact litigation and legal representation. Since its launch, HIAS Greece has provided services to about 2,000 asylum seekers, including representation during asylum procedures and in relation to access to rights and services.

This report provides an overview of the legal framework regulating the detention of asylum seekers in Greece and an analysis of the “low profile detention scheme” – under which single males from certain countries are automatically detained – implemented on the island of Lesbos. It then identifies concerning trends and potential legal violations in implementation of this policy. Finally, the report provides a summary of the new 2020 Law on International Protection.

The observations included in this report are based on the first-hand experiences of HIAS Greece lawyers who represent asylum seekers detained under the “low profile detention scheme” in the Pre-Removal Detention Center of Lesbos, situated inside the Moria hotspot.<sup>1</sup> These findings are further supplemented by the analysis of 40 cases of “low profile detention,” represented by HIAS Greece between October 2017 and October 2019.<sup>2</sup>

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<sup>1</sup> Gabe, Cahn. “HIAS Greece Wins Release of Three Detained Syrians on Lesbos.” HIAS, 1 Nov. 2017, <https://www.hias.org/blog/hias-greece-wins-release-three-detained-syrians-lesvos>.

<sup>2</sup> Detailed data on file with the author.

## Executive Summary

In October 2016, the Greek Police launched a pilot detention project on Lesbos, according to which, single male third-country nationals from “low profile” countries are detained upon arrival in the Pre-Removal Detention Center of Lesbos, located inside Moria camp. This policy aims at ensuring the swift readmission (ie, the swift return to Turkey under the EU-Turkey Statement)<sup>3</sup> of third-country nationals seen as coming from “safe” countries (deemed safe if they have less than 25% recognition rate).

Based on the analysis of client cases and observations of the system, HIAS has concluded that the detention of asylum seekers under the so-called “low profile detention scheme” **constitutes arbitrary detention** for the purposes of Article 9 of the International Covenant on Civil and Political Rights. Our main concerns pertaining to arbitrary detention include the following observations (among others):

- Greek law does not allow for nationality-based detention of migrants, nor does it provide for the detention of asylum seekers who apply while at liberty.
- The decision orders issued under the “low profile detention scheme” lack both legal basis and sufficient reasoning, while the “low profile” applicants often continue to be detained without their asylum seeker status or their vulnerability being taken into account.
- Detained asylum seekers are never informed of the reasons for their detention.
- Detained asylum seekers have no real access to legal representation.
- There is often no effective judicial review of the detention orders.

Finally, the rationale of the “low profile detention scheme” creates a self-fulfilling prophecy: Due to their detention, it is impossible for the “low profile” detainees to collect evidence and submit it to the Asylum Service in order to substantiate their asylum application, especially if they are not legally represented. This means that detained individuals are presumed to not have a valid asylum claim and simultaneously have no ability to prove their claim, seemingly proving the assumption (falsely) correct.

Greece’s new Law on International Protection, applicable as of 1 January 2020, **expands** the detention of asylum seekers and **extends** detention periods, while **removing** existing procedural safeguards. In particular, changes include the detention of asylum seekers even if they have requested asylum while at liberty, the abolition of the automatic judicial review of

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<sup>3</sup> EU-Turkey Statement. European Council Press Release, 18 March 2016, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

the initial asylum detention orders as well as the prolongation of the maximum detention period, which could reach up to 36 months.

**In view of the above, Greece should discontinue the “low profile detention scheme” immediately as it constitutes arbitrary detention.**

## Legal Framework for the Administrative Detention of Asylum Seekers

The administrative detention of asylum seekers<sup>4</sup> in Greece is currently governed by Art. 46 of Law 4375/2016, as amended by Law 4540/2018 (see Annex).<sup>5</sup> Article 46, entitled “Detention of applicants,” states that only persons who applied for international protection **while already in detention** may be detained, and only “exceptionally,” if necessary “after an individual assessment” and under the condition that no alternative measures can be applied. Applicants cannot be detained for the sole reason that they applied for international protection, and that they entered irregularly and/or stay in the country without a legal residence permit.

**Under this law, an asylum seeker may only be detained for one of the following reasons:**

- a. in order to determine his /her identity or nationality;
- 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;
- 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;
- d. when he/she constitutes a danger for national security or public order; or
- e. when there is a serious risk of absconding of the applicant in order to ensure the enforcement of a transfer decision according to the Dublin III Regulation.

A new detention order will be issued by the competent police authority and shall include a “complete and comprehensive reasoning,” which, with the exception of the “national security/public order” detention ground, is taken upon a recommendation by the Head of the competent Asylum Office.

The Law foresees that the detention shall be imposed for the minimum necessary period of time and that the detention on the grounds mentioned in points (a), (b) and (c) shall, initially, not exceed 45 days and can later be prolonged by a further 45 days, as long as the recommendation of the Asylum Service is not recalled. The detention on the grounds of points (d) and (e) shall not exceed three months. In any case, the total detention period may not

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<sup>4</sup> The terms “asylum seeker” and “applicant” will be used interchangeably throughout this report.

<sup>5</sup> *Greece: Law No. 4375 of 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 [Greece]*, 3 April 2016, available at: <https://www.refworld.org/docid/573ad4cb4.html>

exceed the maximum time limits for detention (18 months), while delays in the administrative procedure, which cannot be attributed to the applicants, shall not justify a continuation of detention.

Both the initial detention order and the order for the prolongation of the detention are subject to automatic judicial review by the territorially competent Administrative Court, which decides on the legality of the detention measure. If requested, the applicants or their legal representatives must mandatorily be heard in court. This can also be ordered by the judge.

Additionally, the applicants have the right to challenge the detention order using the legal remedy “objections against detention” and are entitled to free legal assistance and representation according to the provisions set in Law 3226/2004.

## Administrative Detention on Lesbos: “Low Profile Detention Scheme”

In October 2016, a few months after the EU-Turkey Statement of 18 March 2016, the Greek Police launched a pilot detention project on Lesbos, according to which, single male third-country nationals from “low profile” countries, who enter Lesbos irregularly, are detained upon arrival, in the Pre-Removal Detention Center (hereinafter “PRDC”) of Lesbos, located inside Moria camp. The maximum detention period under this project is, in principle, three months.<sup>6</sup> The program was temporarily suspended just before summer 2017,<sup>7</sup> re-launched in August 2017, and renamed the “low profile detention scheme.”

For the purposes of this project, a “low profile” country is any country whose nationals have an international protection recognition rate across the EU that is lower than 25%, as per the latest available EUROSTAT data. However, between October 2017 and May 2018, single men from Syria, Iraq and Eritrea - men from countries of origin with a recognition rate above 25% - were also detained in the Lesbos PRDC under the “low profile detention scheme.” This nationality-based segregation of new arrivals for the purposes of detention to ensure the swift readmission of third-country nationals seen as coming from “safe” countries, has no basis in Greek law.

### The procedure

Upon arrival to the island of Lesbos, and depending on the available space in the Lesbos PRDC, migrants who are eligible for detention under the “low profile detention scheme” are transferred by the Police authorities to the Reception and Identification Center of Moria (hereinafter “RIC”), in order to be registered, fingerprinted, and medically screened; to undergo a vulnerability assessment; as well as express, if they so desire, their will to apply for international protection, as provided for in Art. 9(1) of the L. 4375/2016.

Subsequently, their declaration of “will to apply for international protection” is assigned a unique reference number, so that they can be referred to the Regional Asylum Office of Lesbos (hereinafter “Lesvos RAO”), in order to register their application for international protection.

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<sup>6</sup> See also Art. 46(4)(c) of L. 4375/2016.

<sup>7</sup> *Transitioning to a Government-run refugee and migrant response in Greece*. Joint Agency Briefing Paper, December 2017, pp. 5-6, [https://reliefweb.int/sites/reliefweb.int/files/resources/greece\\_roadmap\\_oxfam\\_final.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/greece_roadmap_oxfam_final.pdf); *Asylum Information Database, National Country Report: Greece*. European Council on Refugees and Exiles, December 2017, p. 146, <https://www.asylumineurope.org/reports/country/greece>; *Fundamental Rights and the EU Hotspot approach*. DRC, October 2017, p. 21, [https://drc.ngo/media/4051855/fundamental-rights\\_web.pdf](https://drc.ngo/media/4051855/fundamental-rights_web.pdf); *Greece: Lives on Hold Update on Situation of Refugees and Migrants on the Greek islands*. Amnesty International, July 2017, p. 6, <https://www.amnesty.org/download/Documents/EUR2567452017ENGLISH.PDF>

Immediately after the reception and identification procedures, these persons are placed in detention in the Lesvos PRDC.

If, during the reception and identification procedures, these persons are found to belong to a vulnerable group - pursuant to their medical and vulnerability screening by the National Public Health Organisation (“NPHO”, formerly “KEELPNO”, and hereinafter referred to as “EODY”)<sup>8</sup> – they are exempted from the “low profile detention scheme.” This is because, as per Art. 60(4)(f) of L. 4375/2016, vulnerable applicants are exempted from the border procedure and, according to the prevailing interpretation of this article,<sup>9</sup> they are therefore also exempted from the EU-Turkey Statement.

Thus, because the “low profile detention” is ordered with a view to expulsion, and the only return proceedings taking place on Lesvos are the readmission proceedings under the EU-Turkey Statement, **the administrative detention of vulnerable applicants under this scheme does not serve any legitimate purpose.**

Nevertheless, as per the testimonies of many “low profile” detainees, the medical and vulnerability screening tends to be hasty and perfunctory, in response to pressure from the police authorities to speedily proceed to their detention. Additionally, many have complained that they could not communicate with the medical staff of EODY due to lack of interpretation.

The first detention order issued against “low profile” detainees, called a “temporary detention order,” is usually issued on the day of their arrival, but after they have already declared their “will to apply for international protection.” The unique reference number of their declaration can be found on the top left corner of the temporary detention order. This decision is issued by the Director of the Police Directorate of Lesvos and orders the detention of the third-country national *“until a deportation decision is issued within three days”* because *“he irregularly entered the country in violation of Art. 83 of Law 3386/05.”*<sup>10</sup> It either contains no reasoning as to why the detention is considered necessary, or includes the stereotypical phrase *“because, based on the general circumstances, he is considered to be a flight risk.”*

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<sup>8</sup> As per Art. 14(8) of L. 4375/2016, *“As vulnerable groups shall be considered for the purposes of this law: a) Unaccompanied minors, b) Persons who have a disability or suffering from an incurable or serious illness, c) The elderly, d) Women in pregnancy or having recently given birth, e) Single parents with minor children, f) Victims of torture, rape or other serious forms of psychological, physical or sexual violence or exploitation, persons with a post-traumatic disorder, in particularly survivors and relatives of victims of ship-wrecks, g) Victims of trafficking in human beings.”*

<sup>9</sup> However, as of March 2019, HIAS Greece has been informed of cases of vulnerable applicants who were returned to Turkey under the EU-Turkey Statement.

<sup>10</sup> Art. 83 of Law 3386/05 regulates the irregular entry and exit of third-country nationals from Greece.

Accordingly, the Director of the Police Directorate of Lesvos issues a new decision called “decision on deportation of an alien in view of a readmission procedure,” which orders *“the continuation of the detainee's detention until his deportation/readmission is carried out (...) because, based on the general circumstances, he is considered to be a flight risk.”*

The “low profile” detainee is then transferred to Lesvos RAO, where he registers his asylum application. This practically consists of providing his fingerprints and answering the questions of the “registration form,” one of which is to state “in a few words” the reasons why he does not wish to return to his country. Subsequently, Lesvos RAO schedules an asylum interview for the applicant. After the asylum registration and before the asylum interview, the Head of Lesvos RAO issues a recommendation suggesting the continuation of the detention of the asylum-seeker on the basis 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”*<sup>11</sup> and only *“if it is considered that alternative measures such as those referred to in Article 22 (3) of Law 3907/2011 cannot be applied”*<sup>12</sup> and *“provided that, possible lack of suitable space and the difficulties of securing decent living conditions are taken into consideration.”*<sup>13</sup> In principle, the Head of RAO recommends the continuation of detention of all asylum seekers falling within the parameters of the “low profile detention scheme.”

On the basis of this recommendation, the Director of the Police Directorate of Lesvos produces a new draft decision that suspends the earlier readmission decision. At the same time, this draft decision orders the continuation of the detention as per Art. 46 of L. 4375/2016, and specifically:

*“for a period not exceeding (45) days from the submission of the application [for international protection] (...) and which shall be extended for (45) days more unless the recommendation of the Head of the Receiving Authority [RAO] is revoked and provided that the total duration of the detention in no case exceeds the maximum detention limits foreseen in article 30 of Law 3907/2011.”*<sup>14</sup>

It is at this stage that the detention decisions are submitted to the Administrative Court of Lesvos for the purposes of the automatic judicial review foreseen in Art. 46(5) of L. 4375/2016.

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<sup>11</sup> Art. 46(2)(c) of L. 4375/2016.

<sup>12</sup> Art. 46(2) of L. 4375/2016. Also, as per Art. 22(3) of L. 3907/2011, such measures could be: regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place.

<sup>13</sup> Art. 46(8) of L. 4375/2016.

<sup>14</sup> As per Art. 30 of L. 3907/2011, which transposes the EU Return Directive, the maximum detention time is 18 months.

Once the legality of the detention is confirmed by the competent judge, the Police Directorate officially issues the above “asylum detention” decision.

Since vulnerability can be assessed at any time during the procedure, a “low profile” detainee could be found to be vulnerable at a later stage, either after a reassessment of his vulnerability by EODY (pursuant to a referral by the Lesvos PRDC), or after a decision by Lesvos RAO based on his asylum interview. In these cases, the Head of RAO will usually either abstain from issuing a recommendation of detention, or will revoke such recommendation, if they have already provided one.

### **Lack of legal basis and insufficient reasoning of the detention orders**

The decision orders issued in the framework of the “low profile detention scheme” lack both legal basis and sufficient reasoning.

As explained, at the moment of the issuance of the first, temporary detention order, third-country nationals are already considered asylum seekers, as they have declared their “will to apply for international protection” during the reception and identification procedures. This is expressly provided for in Art. 34(d) of L. 4375/2016, which reads:

*“[a]pplicant for international protection’ or ‘applicant for asylum’ or ‘applicant’ is the alien or stateless person, who declares orally or in writing before any Greek authority, at entry points of the Greek State or inland, that s/he is asking for asylum or subsidiary protection, or asks, in any form, not to be expelled to a country for fear of prosecution due to race, religion, nationality, political opinion or membership to a particular social group, in accordance with the Geneva Convention, or because he is at risk of suffering serious harm in accordance with Article 15 of Presidential Decree 141/2013 (A’ 226) and on whose application no final decision has yet been reached.”*

**Hence, their administrative detention is illegal, as Art. 46(2) provides for the administrative detention only of “aliens” or “stateless persons” who submit an application for international protection while in detention.** Additionally, as asylum seekers, they are not deportable.

Interestingly, their status as asylum seekers is not mentioned in any of the detention orders issued prior to the recommendation of detention by the Head of Lesvos RAO, and the procedure of Art. 46 (“detention of applicants”) is only followed after they register their asylum application with Lesvos RAO.

None of the decisions made under the “low profile detention scheme” include an individualized assessment and sufficient reasoning. In particular, as mentioned above, the first, temporary detention order contains, at best, vague and stereotypical wording stating that the detention is ordered because the alien is *“based on the general circumstances, considered a flight risk.”*

Similarly, the deportation decision “in view of a readmission procedure” repeats the same generic phrase, despite explicit reference to L. 3907/2011 (the Law that transposes the EU Return Directive), which provides that the *“detention decision must contain factual and legal reasoning”* and that for a third-country national to be considered a flight risk, *“there must exist reasons based on objective criteria”* (Art. 30(2) and Art. 18(g) of L. 3907/2011 respectively).

Further, the “asylum detention” decision refers to the recommendation of the Head of Lesvos RAO for the continuation of the detention of the asylum seeker. However, in 34 of the 40 cases we have represented, this recommendation was not included in the applicant's detention file. Consequently, the migrant's legal representatives cannot obtain knowledge of the content of this recommendation when they request copies of the detention file from the Police, but they must also apply for access to the administrative file held by Lesvos RAO.

Although the recommendation of the Head of Lesvos RAO for the continuation of the asylum seeker's detention states 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,”* these grounds are not specified in the recommendation. What is more, in many of the cases represented by our organization, the applicants, as can be seen in their asylum registration forms, had articulated, during their registration with Lesvos RAO, clear grounds for international protection (such as persecution on the basis of their sexual orientation or political activities).

In addition, the recommendation of the Head of Lesvos RAO, expressly states that the continuation of detention is recommended only *“if it is considered that alternative measures such as those referred to in Article 22 (3) of Law 3907/2011 cannot be applied”* and *“provided that possible lack of suitable space and the difficulties of securing decent living conditions are taken into consideration.”* However, the detention decision issued on the basis of this recommendation lacks reasoning, as it does not consider any alternatives to detention nor does it assess the appropriateness of the detention facilities in light of the obligation to ensure decent living conditions.

## Continuation of detention without a legal basis

“Low profile” detainees often remain in detention even when the legal basis invoked for the deprivation of their liberty has ceased to exist and without their status as asylum seekers and their vulnerability being taken into consideration.

A significant number of asylum seekers detained under the “low profile detention scheme” (usually more than 50% of all “low profile” detainees), speak languages and dialects for which the Asylum Service cannot provide interpretation.

Twenty-five of the 40 cases that have been represented by HIAS Greece fall under this category. Due to lack of interpretation, in about half of these cases, Lesvos RAO was unable to register their application for international protection. Hence, the applicants, despite their declared “will” to apply for asylum, continued being detained on the basis of the original readmission decision, without their status as asylum seekers having been taken into consideration and without the procedural safeguards foreseen in Art. 46 of Law 4375/2016 (continuation of detention of asylum seekers only after a recommendation by the Head of Lesvos RAO to this effect, automatic judicial review of the legality of the detention, etc.). In the remaining cases, Lesvos RAO was able to register the applications for international protection, either by conducting the registration in French, for those applicants who had a basic understanding of French, or by using other asylum seekers as interpreters.

However, due to the lack of professional interpretation, no asylum interview could be scheduled for the above 25 applicants during their detention. Therefore, their readmission to Turkey was halted indefinitely and until the Asylum Service could provide interpretation in their language. The Asylum Service has been unsuccessful in securing interpretation for the majority of these languages over the course of the last three years. Hence, the return proceedings could not be considered as ongoing or pursued with due diligence and, accordingly, their detention in view of readmission lacked legal basis.

Similarly, as per Art. 46(4)(a) of L. 4375/2016, “4. a. *The detention of applicants for international protection shall be imposed for the minimum necessary period of time. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.*” Eventually, these detainees were released either due to the expiration of the maximum detention time (90 days, in principle), either because they were later found to belong to one of the categories of vulnerable persons, or because their detention was successfully challenged before the Administrative Court.

In 17 out of the 40 “low profile detention” cases represented by our organization, the asylum seekers were detained for more than one month under the original readmission/detention decision, without their status as asylum seekers having been taken into consideration.

In 10 out of the 40 cases, asylum seekers remained in detention for several days after being assessed as vulnerable and, therefore, as seen above, exempted from the readmission to Turkey under the EU-Turkey Statement. Specifically, one applicant continued to be detained for approximately two months after the recognition of his vulnerability, four applicants were detained for 11 to 16 extra days, and three applicants were detained for three to six extra days. In addition, one applicant remained in detention for 20 more days and another for more than one month after they were flagged to Lesvos RAO as vulnerable by their asylum interviewers.

In addition to these ten cases, two “low profile” detainees were detained without any prior medical screening and vulnerability assessment, as they arrived on Lesvos during the period when EODY had suspended their medical screening services due to understaffing (between mid-August to mid-October 2019). Accordingly, Lesvos RAO refused to schedule an asylum interview for them until their medical screening and vulnerability assessment was completed. They both remained in detention under the original readmission/detention decision, without their status as asylum seekers having been taken into consideration and without the guarantees envisaged in Art. 46 of L. 4375/2016.

Furthermore, one of the two detainees was an alleged unaccompanied minor, who, against the principle of presumption of minority, remained in detention for three more weeks after his official referral by Lesvos RAO for an age assessment. The Police authorities alleged that they could not release him pending the outcome of the age assessment and that the age assessment procedure could not be initiated because the competent authority, EODY, had suspended its services. After the resumption of the age assessment services by EODY, the applicant was indeed found to be a minor.

The second applicant was an alleged victim of torture. Although we requested in writing that he be referred to certification services for victims of torture, as foreseen in Art. 23 of L. 4540/2018,<sup>15</sup> the Police authorities informed us orally that EODY had suspended its services and that there was no other public institution on the island competent to certify victims of torture. He was eventually released, after we successfully challenged his detention order before the Administrative Court, on the basis that the procedure foreseen in Art. 46 of L. 4375/2016 had not been respected as there had been no recommendation for detention by the Lesvos RAO.

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<sup>15</sup> Art. 23(1) of L. 4540/2018 reads: “1. Victims of torture, rape or other serious acts of violence shall be attested by means of a medical certificate issued by a public hospital, military hospital or qualified doctors employed in public bodies providing health services, including forensic specialists, and shall receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care.”

Finally, it is worth mentioning that 23 out of the 40 “low profile” detainees represented by HIAS Greece were eventually found to belong to one of the vulnerable categories. Sixteen of them were reassessed as vulnerable while they were still in detention, most of them on the basis of their asylum interview.

### **Inhuman and degrading detention conditions**

The detention conditions in the Lesvos PRDC amount to inhuman and degrading treatment.

The number of detainees in each container varies from nine to twelve persons and the size of each cell/container is 47 m<sup>2</sup>.<sup>16</sup> Upon arrival, each detainee receives a clean blanket, but no bedsheets. Depending on stock and available donations by humanitarian organizations, they either receive an insufficient quantity of hygiene items (e.g. toothpaste, shampoo, washing powder) or no hygiene products at all. Additionally, there is no access to clean water. Although the detainees are required to clean the containers themselves, they are not provided with the necessary cleaning products. Furthermore, blankets are never changed and they are not provided with a clean change of clothes or any shoes during the period of their detention. The food is of poor quality and quantity. Yard time usually fluctuates between two to three hours per day. The detainees have access to their cellphones only during the weekend, which makes communication with lawyers and outside organizations particularly difficult. While they are allowed to use the payphones of the detention center, they cannot afford the calling cards, and there is no commissary in the Lesvos PRDC where they could purchase such cards. Additionally, there are no interpretation services in the PRDC, which makes the communication between guards and detainees impossible.

**Medical services in the detention center are alarmingly inadequate.** As of approximately March 2018, the provision of medical services in the Lesvos PRDC has been entrusted to “AEMY SA” (in English: “Health Units SA”), a “legal entity of private law in the form of a ‘Societe Anonyme’, the Greek State being its sole shareholder.”<sup>17</sup> From the beginning of its operation, AEMY’s medical team had consisted of only one psychologist and one social worker, while the latter resigned in April 2019 and has not been replaced as of December 2019. AEMY has been operating without interpretation services, with the exception of an interpreter in Arabic between September 2018 and January 2019. Occasionally, the staff resorts to the already strained teleinterpretation services of the Greek NGO “METAdrasi” (in English: “METAction”).

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<sup>16</sup> *Report to the Government of Greece 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 10 to 19 April 2018 [CPT/Inf (2019) 4].* CPT, February 2019, para. 103, <https://rm.coe.int/1680930c9a>

<sup>17</sup> <http://www.aemy.gr/en/>

The referral and transfer of the detainees by the Police to the medical services provider of RIC, EODY, is almost impossible, due to the understaffing of both the detention authorities and EODY itself. Therefore, serious medical conditions often go unnoticed, while, at the same time, there are numerous reports of suicide attempts. Finally, in September 2019, many detainees reported an outbreak of scabies in the Lesvos PRDC.

The inadequacy of the medical services provided in the PRDC has been tragically illustrated in the case of a 38-year-old national from DRC, suffering from kidney failure (end-stage renal disease). On 24 May 2019, he was detained upon arrival under the “low profile detention scheme.” His condition was not diagnosed at the level of his initial medical screening and vulnerability assessment at RIC. Despite the asylum seeker’s daily and repetitive attempts to explain his medical condition to AEMY and the police authorities, he was never referred by AEMY to either EODY, for a reassessment of his vulnerability and further actions, or directly to the public Hospital of Mytilene. On 29 May 2019, the Head of Lesvos RAO informed the Police authorities that he did not intend to recommend the detention of the applicant, allegedly because the asylum recognition rate for nationals of DRC was, as per the latest EUROSTAT data, higher than 25%. Accordingly, on 31 May 2019, the Police Directorate issued a release order. However, on 1 June 2019 and, while still in the PRDC, the asylum seeker lost consciousness and was urgently transferred to the Hospital, where he was hospitalized in a critical condition for six days. He was eventually diagnosed with kidney failure and was prescribed hemodialysis every three days.

### **No access to a legal remedy**

The “low profile” detainees cannot effectively access a legal remedy against their detention order, because they are never informed promptly, and in a language they understand, of the reasons for their detention and they have no real access to legal representation.

In almost all of the cases represented by HIAS Greece, only the first, temporary detention order had been served on the detainees. However, the content of the decision was never translated to them in a language they understand. Despite the reference, in the temporary detention order, of an information brochure regarding the rights of the detainees and the grounds for their detention, none of the 40 detainees represented by our organization had been informed of the existence of such a brochure. Furthermore, none of the decisions make any reference to the right of the detainees to be heard in the context of the automatic judicial review (Art. 46(5), of L. 4375/2016). As a result, “low profile” detainees are never *“informed, in writing and in a language which they understand, of the nature of and grounds for the decision to detain, the*

*duration of detention, as well as of the possibility to challenge the legality and arbitrariness of such decision.*<sup>18</sup>

Additionally, the “low profile” detainees’ access to legal representation, in order to exercise their right to be heard in the context of the automatic judicial review or to pursue the “objections against detention” (Art.46(5), Art.46(6) and Art. 46(7) of L. 4375/2016), in order to challenge their detention order, is extremely limited. The detainees do not have the financial means to cover the costs of legal representation themselves. Similarly, they do not have access to the free legal assistance provided by Law 3226/2004, as provided for in Art. 46, par. 7 of Law 4375/2016, due to the inability to produce the necessary supporting documents (e.g. copies of tax declarations, tax clearance notes, statement of assets, Tax ID, social welfare certificates, or affidavits). Additionally, the application for free legal aid under Law 3226/2004 would already necessitate the intervention of a lawyer, as the detainees are unable, due to their detention, to approach the competent authorities. In any event, the inmates do not receive any information regarding avenues to access legal assistance in order to challenge their detention order.

### **Ineffective judicial review of the detention orders**

The judicial practice in relation to the “low profile detention scheme” raises serious concerns as regards the effectiveness of the judicial review of the detention orders.

The observations included in this section are based on the analysis of 17 cases of “low profile” asylum seekers, whose detention was challenged by HIAS Greece lawyers before the Administrative Court of Mytilene, Lesbos. The legal remedy lodged in these cases is called “objections against detention” and the ensuing decision cannot be challenged before a Court of a higher instance.

HIAS Greece’s argument that the detention was arbitrary because the detainees had already applied for asylum while at liberty (Art. 46(2) of L. 4375/2016) has never been addressed by the Court. Furthermore, the Court has never addressed whether the conditions of detention in the Lesbos PRDC amount to ill-treatment.

Our contention that the detainees were not informed about the grounds of their detention in a language they understand has been addressed in only one decision. The Court’s decision proceeded to reject our argument, holding that the Greek authorities are not obliged to inform

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<sup>18</sup> *Revised Deliberation No. 5 on deprivation of liberty of migrants*. UN Working Group on Arbitrary Detention, February 2018, para. 33, [https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation\\_AdvanceEditedVersion.pdf](https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf)

the immigrants in their own language about the grounds of their detention, citing jurisprudence of the Greek Council of State.<sup>19</sup> However, the cited jurisprudence expressly mentions the detention orders in the list of decisions for which translation is mandatory. Additionally, our argument that the authorities failed to consider less onerous measures has been repeatedly rejected. In particular, the Court reasoned that no alternative measures could have been ordered because the detainees, not possessing travel and identification documents, are a flight risk.

With respect to the lack of reasoning of the detention orders, the Court found that, in the case of four Syrian applicants,<sup>20</sup> the Head of RAO had not provided reasoning as to why it had been considered that they “*only applied for international protection in order to delay or frustrate the enforcement of the return decision,*” and ordered their release. In two of these cases, the Court also based the decision on the fact that the applicants were in possession of original identification documents. However, in the case of another Syrian asylum seeker, also detained on the basis of the same reasoning, the Court rejected the legal remedy, on the basis that the expiry date on his passport was not clear and, hence, he could still be considered a flight risk.

In cases of continuation of detention without a recommendation by the Head of RAO, the Court’s approach depended on whether the detainees had already registered their asylum application with Lesvos RAO. If they had already registered their application, but were still being detained on the basis of the initial readmission order and without the procedure of Art. 46 having been followed, the Court would, in most cases, order the release of the detainees. However, in the case of two Eritrean applicants, the Court found that, despite the absence of a recommendation by the Asylum Service, their detention was necessary because they were not in possession of identification documents and they could be considered a flight risk.

On the other hand, in cases where Lesvos RAO had not been able to register the detainees’ application for asylum due to lack of interpretation or other operational difficulties, the Court pronounced that the declaration of “will to apply for international protection” would not be enough to bring the detainees within the protective purview of Art. 46 of L. 4375/2016. However, the decisions in these cases would partly accept the legal remedy, ordering the continuation of detention for maximum 60 additional days, within which the applicant was expected to complete his registration with the Asylum Service.

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<sup>19</sup> Greek Council of State, Decision No 1592/2012

<sup>20</sup> As mentioned above, between October 2017 and May 2018, also single men from Syria, Iraq and Eritrea, namely men from countries of origin with a recognition rate of above 25%, had been detained in the Lesvos PRDC under the “low profile detention scheme.”

Likewise, a persistent matter of concern is that, even in the cases where the Court has ordered the release of the detainees (for example, due to the insufficient reasoning of the decision, or because the Art. 46 procedure had not been followed, because they were in possession of original documents, or even because they were eventually found to be minors), it has always ordered measures alternative to detention. In the vast majority of the cases, these measures include the applicants' obligation not to leave the island of Lesbos and to report to the police authorities of Mytilene town either on a daily basis or twice per week. No legal remedy is foreseen in the decision whereby the asylum seekers could challenge this order. This is even more challenging for applicants who are later assessed as vulnerable and are, as such, mandatorily transferred to camps/accommodation in the mainland, as part of the "decongestion of the islands" strategy.

Additionally, the automatic judicial review procedure seems to be limited to the detention decisions that are issued pursuant to a recommendation for detention by the Asylum Service. Accordingly, the review is restricted to examining whether the detention has indeed been recommended by the Asylum Service, without assessing its reasoning or the necessity and proportionality of the detention measure. Cases where the detainees have not been able to register their asylum application with Lesbos RAO or where the Head of Lesbos RAO has not proceeded to recommend the detention are not submitted to the Administrative Court for automatic judicial review purposes. As seen above, these asylum seekers continue to be detained under the original readmission/detention decision and not as asylum seekers under the procedure foreseen in Art. 46 of L. 4375/2016.

Finally, there is no practical possibility for the participation of detainees or their legal representatives in the automatic judicial review proceedings, as they are never informed about the date of the transmission of the decision to the Court or about the date of the hearing.

### **Restricted access to international protection**

The administrative detention of asylum seekers decisively restricts their effective access to the asylum procedure.

Due to their detention, it becomes impossible for the "low profile" detainees to collect evidence in support of their statements and to submit such material to the Asylum Service. This is especially true if they are not legally represented. However, the available free legal aid on Lesbos, especially for detained asylum seekers, is scarce. Between May 2018 and December 2019, Lesbos RAO has been unable to provide adequate free legal aid at second instance for asylum seekers whose applications are rejected. This is due to the fact that there has either only been one State lawyer appointed for the appeals of Lesbos RAO or no lawyer at all,

depending on the time period. As a result, and since they cannot access private lawyers due to their detention and lack of financial means, “low profile” detainees often do not have access to an effective legal remedy.

### Concerning new legislation on international protection

On 15 October 2019, the Ministry of Citizen Protection published a new draft legislative proposal on International Protection, which was submitted for public consultation until 21 October 2019, and adopted by the Greek Parliament on 1 November 2019. The new Law 4636/2019,<sup>21</sup> which will enter into force on 1 January 2020, introduces a series of worrying changes that are of particular relevance to the “low profile detention scheme.” **In particular, it allows for the expansion of the detention of asylum seekers and the extension of the detention periods, while, at the same time, removing existing procedural safeguards.**

The new Law foresees the detention of applicants for international protection, even if they have applied for asylum while still at liberty. At the same time, it abolishes the automatic judicial review of the detention decision, which continues to be issued by the Police authorities, and foresees that only the decisions of prolongation of the detention will be subject to automatic judicial review. However, the asylum seekers and their legal representatives will not have the right to be heard in court in the framework of the automatic judicial review proceedings. The need for a prior recommendation for the detention by the Asylum Service is also abolished.

The Law extends the maximum period of both the initial detention and the prolongation of detention to 50 days respectively. Although the maximum detention limit of 18 months is maintained in the new law, pre-removal detention periods will not be taken into account when calculating the maximum asylum detention time. Considering that the maximum limit of the pre-removal detention is also 18 months,<sup>22</sup> this risks extending the maximum detention period to 36 months.

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<sup>21</sup> Greece: Law 4636/2019 on International Protection and other provisions, 1 November 2019, <https://www.asylumineurope.org/sites/default/files/resources/internationalprotectionact.pdf>

<sup>22</sup> L. 3907/2011, Art. 30(6), transposing Art. 15(6) of 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.

## Conclusion

### Arbitrary detention in inhuman and degrading conditions

The administrative detention of asylum seekers on the island of Lesbos under the so-called “low profile detention scheme” constitutes arbitrary detention for the purposes of Art. 9 of the International Covenant on Civil and Political Rights.

The discriminatory, nationality-based segregation of asylum seekers for the purposes of detention has no basis in Greek law. Additionally, the detention of third-country nationals who have applied for international protection while at liberty is not permissible under the applicable legal framework for the administrative detention of asylum seekers.

The blanket continuation of the detention of “low profile” asylum seekers, pursuant to a stereotyped reasoning, and without an individualized assessment or consideration of alternatives to detention, further attests to the automatic character of the detention under the “low profile scheme.”

Likewise, “low profile” applicants continue to be detained, in view of readmission, without their “asylum seeker” status being taken into account and, therefore, without benefiting from the procedural safeguards that the law envisages for the detention of asylum seekers. Additionally, vulnerable applicants often remain in detention, although they are, in principle, not deportable under the EU-Turkey Statement and, as such, not included in the “low profile detention scheme.” This is exacerbated by the fact that the conditions of detention in the Lesbos PRDC amount to ill-treatment, especially in view of the inadequate medical services provided.

### Lack of access to a legal remedy and of effective judicial review

“Low profile” detainees are never informed about the grounds of their detention and avenues to obtain legal aid in a language they understand so that they can challenge their detention. The “free legal assistance” scheme mentioned in the law is not accessible in practice.

This is exacerbated by the judicial practice in relation to the “low profile detention scheme.” The Court decisions do not address arguments related to the conditions of detention, the lack of reasoning of the detention orders and the inadequate notification of the detention decisions. Additionally, the Court seems to interpret the procedural guarantees for the detention of asylum seekers as applicable only after the detainees register their application with the Asylum Service. The reasoning of the decisions focuses on whether the detainee lacks identification documents and is, hence, a flight risk. The automatic judicial review envisaged in the law,

although an important procedural guarantee, is, in practice, limited to ensuring that the formal aspects of the procedure for “asylum detention” have been complied with, and it does not include a full review of the legality of the detention measure.

### **Restricted access to international protection**

The adverse impact of the “low profile detention scheme” on the effective access to international protection cannot be underestimated. Due to their detention, it is impossible for the “low profile” detainees to collect evidence in support of their statements and to submit it to the Asylum Service, especially if they are not legally represented. However, the available free legal aid on Lesbos is scarce, especially at the appeals stage. At the same time, the “low profile” applicants are unable, in view of their detention and lack of financial means, to have access to private lawyers. Therefore, the rationale of the “low profile detention scheme” creates a self-fulfilling prophecy.

### **Expansion of detention under the new Law on International Protection**

Finally, it is important to note that the above observations should be read in light of the changes in the legal framework for the administrative detention of asylum seekers, introduced in the new Law on International Protection [Law 4636/2019]. These include the detention of asylum seekers even if they have requested asylum while at liberty, the abolition of the automatic judicial review of the initial asylum detention orders as well as the prolongation of the maximum detention period, which could reach up to 36 months. Thus, the new Law, expected to enter into force on 1 January 2020, risks further undermining the protection of asylum seekers from arbitrary detention.

**In view of the above, Greece should discontinue the “low profile detention scheme” immediately as it constitutes arbitrary detention.**

## Annex

### Article 46

(Article 26 of Directive 2013/32 (EU) and 8-11 of Directive 2013/33 (EU))

#### Detention of applicants

1. An alien or stateless person who applies for international protection shall not be held in detention for the sole reason that he/she has submitted an application for international protection, and that he/she entered irregularly and/or stays in the country without a legal residence permit.

2. An alien or a stateless person who submits an application for international protection while in detention according to the relevant provisions of Laws 3386/2005 (O.G. A' 212) and 3907/2011 (O.G. A' 7) as in force shall remain in detention, exceptionally and if this is considered necessary after an individual assessment under the condition that no alternative measures, such as those referred to in article 22 paragraph 3 of Law 3907/2011 can be applied, for one of the following reasons:

- 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, as defined in article 18 point (f) of Law 3907/2011, 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;
- d. when he/she constitutes a danger for national security or public order, according to the reasoned judgment of the competent authority of point 3 of this Article, 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 according to the criteria of Article 18 point (f) of law 3907/2011 which apply respectively and in order to ensure the enforcement of a transfer decision according to the above Regulation.

3. The detention order shall be taken by the respective Police Director and, in the cases of the General Police Directorates of Attica and Thessaloniki, by the competent Police Director for Aliens matters and shall include a complete and comprehensive reasoning. In cases (a), (b) (c) and (e) of paragraph 2 of this Article the detention order is taken upon a recommendation of the Head of the competent Receiving Authority.

4.
  - a. The detention of applicants for international protection shall be imposed for the minimum necessary period of time. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.
  - b. The detention of applicants on the grounds mentioned in points (a), (b) and (c) shall, initially, not exceed 45 days and can later be prolonged by a further 45 days, as long as the recommendation of paragraph 3 is not recalled.
  - c. The detention of applicants for international protection on the grounds of points (d) and (e) shall not exceed three (3) months.
  - d. In any case, and independently of whether the time limits for points (d) and (e) above have been completed or not, the total detention period may not exceed in any case the maximum time limits for detention, as they are foreseen in Article 30 of Law 3907/2011.

5. The initial detention order and the order for the prolongation of detention shall be transmitted to the President of the Administrative Court of First Instance, or the judge appointed by this former, who is territorially competent for the applicant's place of detention and who decides on the legality of the detention measure and issues immediately his decision, in a brief record, a copy of which he/she immediately delivers to the competent police authority. In case this is requested, the applicant or his/her legal representative must mandatorily be heard in court by the judge. This can also be ordered, in all cases, by the judge. In this case, the provisions of paragraph 3 and subsequent paragraphs of Article 76 of Law 3386/2005 shall apply respectively. The aforementioned procedure shall not restrict the possibility of the applicant to raise objections against the detention order or the order to prolong the detention period, pursuant to the provisions of the following Article.

6. Applicants in detention, according to the above paragraphs, have the rights to appeal and submit objections as foreseen in paragraphs 3 and subsequent of Article 76 of Law 3386/2005, as in force.

7. Detainees who are applicants for international protection shall be entitled to free legal assistance and representation to challenge the detention order according to the provisions valid for third country nationals in detention, according to the provisions set in law 3226/2004 (O.G. A' 24) which apply accordingly.

8. The detention of an applicant constitutes a reason for the acceleration of the asylum procedure, taking into account possible shortages in adequate premises and the difficulties in ensuring decent living conditions for detainees. These difficulties, as well as the vulnerability of applicants, as per Article 14 paragraph 8 above shall be taken into account when deciding to detain or to prolong detention. When an alien or stateless person applies for international protection while in detention, the Head of the competent Receiving Authority and/or the Administrative Director of the Appeals Authority shall be immediately informed and shall ensure the prioritized examination of the application or the appeal.

9. Applicants are detained in detention areas as provided in Article 31 of Law 3907/2011.

10. Whenever applicants are detained, the competent authorities shall ensure that:

- a. applicants are detained in specialised detention facilities, separately from ordinary criminal-law detainees and, where possible, separately from other third-country nationals or stateless persons who have not lodged an application for international protection. Where this is not possible, the competent authorities shall ensure that the detention conditions meet the requirements of Article 15(1);
- b. detained applicants have access to open-air spaces;
- c. persons representing the United Nations High Commissioner for Refugees (UNHCR) as well as any organisations acting on behalf of the UNCHR in Greece by virtue of a special agreement, have the possibility to communicate with and visit detained applicants in conditions that respect the privacy of the detained, pursuant to the provisions of Article 48(2) indent (c) of Law 4375/2016;
- d. family members, representatives, legal advisers or counsellors have the possibility to communicate with and visit applicants, and that any public bodies or accredited social welfare organisations have access to them for the purpose of offering to detained applicants, especially vulnerable persons and persons with special reception needs, pursuant to Article 18(1), legal services, psychosocial support or medical services, in conditions that respect their privacy. Limits to such access may be imposed only where they are objectively necessary for the security, public order or smooth administrative management of the detention facilities, provided that such limits do not render the access extremely difficult or impossible.
- e. applicants in detention are systematically informed of the rules applied in the facility in which they are detained, as well as of their rights and obligations in a language they are reasonably supposed to understand, in accordance with the provisions of Articles 41, 44 and 60 of Law 4375/2016.

- f. applicants are provided with adequate medical care;
- g. the right of applicants to legal representation is respected.'

10A. The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to the competent authorities. In case of detention, the competent authorities shall ensure regular monitoring and adequate support taking into account their particular situation, including their health, and shall ensure that:

- a. minors are not detained, unless as a measure of last resort, with due consideration to their best interest, and after it has been established that other less coercive alternative measures cannot be applied. Such detention shall be for the shortest period of time and all efforts shall be made to withdraw detention and to refer the minors to accommodation centres suitable for them, and never to prison accommodation. In any case, the procedure for the referral of minors to accommodation centres should be completed within twenty five (25) days at the latest. If, due to extraordinary circumstances, such as a substantial increase in the number of minors entering the Greek territory, the competent authorities are unable, despite reasonable efforts, to ensure safe referral of minors within the period of twenty five (25) days set out above, the detention period may be extended for twenty (20) days;
- b. unaccompanied minors are detained separately from adults;
- c. minors have the possibility to engage in leisure activities, including play and educational/recreational activities appropriate to their age;
- d. detained families are provided with separate accommodation, with the consent of all adult family members, under conditions that guarantee adequate protection of their privacy and family life;
- e. detained women are accommodated separately from men, unless the latter are family members and on the condition that all individuals concerned consent thereto; detention of women should be avoided throughout pregnancy and for three (3) months after childbirth and their transfer and placement to suitable accommodation facilities should be sought.'

11. When the reasons set out in paragraph 2 justifying detention of the applicant cease to exist, the authorities which ordered the detention, with a reasoned decision, shall release the applicant and inform without delay the Receiving Authorities or the Appeals Authority, if the application is pending before the second instance.