

**CONFERENCE**  
**FORCED RETURNS. MIXED MIGRATION FLOWS AND HUMAN RIGHTS**

*"Mixed migration flows and forced returns: the Council of Europe view of a human rights challenge"*

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**OUTLINE**

1. The Council of Europe (CoE) looks at the return of irregular migrants not from a migration management perspective but as a human rights challenge. It considers forced return mainly from the European Convention of Human Rights (ECHR) perspective.

2. Article 3 of the ECHR, as interpreted by the European Court of Human Rights (the Court), prohibits the deportation of a person to a State or a place where he/she risks to be exposed to torture, inhuman or degrading treatment or punishment. A forced return will only be compatible with ECHR if the authorities of the State Party to the ECHR have considered thoroughly and effectively any allegation that the irregular migrant concerned will be exposed to torture or other ill treatment if sent back to his country of origin (or to a third country) and have concluded that there is no such a risk. Usually, the consideration of such claims is performed in the framework of the asylum procedure: a decision by the Asylum Service to reject an asylum application after fair, thorough and informed consideration, constitutes, as a rule, a sufficient basis for a forced return. However, it should be noted that the link between the decision of the Asylum Service and the administrative decision to deport an alien becomes less relevant as time elapses. As was shown during and after the so-called "Arab spring", the situation in countries of origin may change rapidly. Therefore, a negative asylum decision issued several years or several months before the deportation may no longer provide the safeguard that the domestic authorities have duly considered the risk of torture and/or other ill-treatment. When forced returns occur several months or years after the rejection of the asylum application a fresh consideration of possible claims may be necessary. It is not clear whether Greek law - in particular the remedies to challenge the administrative decision of deportation - allows such a fresh consideration of claims.

3. The ECHR allows the detention of aliens in order to ensure their removal from the territory (Art 5.1.f). However, the detention must be "legal", which means it must be decided in accordance with domestic law and shall take place for the purpose it is provided for in the ECHR. Four consequences derive from this principle:

- the detention must be necessary to secure the deportation; if other means to secure the removal exist, the detention is not necessary and is not compatible with the ECHR;
- the detention cannot exceed the maximum period of 18 months foreseen in the EU directive and transposed in the Greek legislation;
- the detention should take place in the detention places foreseen by the law (and not in police stations);
- the detention will remain compatible with the ECHR only as long as it is linked to the need to secure the deportation; if the authorities do no longer pursue the deportation, or if they do not pursue the deportation with due diligence, the legal basis for the detention collapses; the detention of an irregular migrant when there is no foreseeable prospect of return will be

no longer valid under 5.1.f and will look as a disguised and abusive punishment for the irregular entry in the country or as an attempt to discourage irregular entries through abusive detention.

4. Those who are detained have the right to know why (5.2 ECHR) and, most importantly, the right to challenge the legality of their detention before a judge and seek their release (5.4 ECHR) The procedure concerning the challenge of legality must be reasonably speedy, accessible to the alien (ie some linguistic and legal assistance for the applicant must be provided), and fair (including a hearing of the applicant). It is not clear that Greek law and practice secure these rights to the extent required by the Convention.

5. Minors, in particular unaccompanied children, should not be detained for more than some hours or days (see *Rahimi v. GR*, judgment of the Court) but rather be placed in care institutions where they shall receive shelter, food and clothing as well as education. The CoE has worked with several member States to define ECHR compatible medical / psychological procedures for age determination. It can put at the disposal of Greece the comparative experience of other CoE Member States.

6. The conditions of detention pending return must not infringe Art 3 ECHR. Unfortunately, there are numerous examples of cases (documented in reports of the European Committee for the Prevention of Torture - CPT -, including on Greece) that this is not the case. Several judgments of the Court also find Greece in breach of Art 3 because of the very poor material conditions of detention of aliens and because of the lack of appropriate medical care. Many of these cases relate to overpopulation in detention centers; others relate to detention of aliens in police stations for extremely long periods. The recent practical measures adopted by the Government are likely to contribute to the progressive elimination of this longstanding problem.

7. Article 3 combined with Art 13 ECHR (right to an effective remedy) requires that those foreigners who are detained must be able to claim before an authority that the conditions under which they are detained are in breach of Article 3 ECHR and obtain appropriate conditions (medical treatment, transfer to other detention place) or be released. It does not seem to me that the Greek law provides clearly for such a remedy. Whatever the legal situation, the National Preventive Mechanism (NPM) functions of the Greek Ombudsman are extremely important in this respect. It would be advisable that the Ombudsman and the Agent of the Greek Government cooperate closely to avoid cases being brought to the Court concerning conditions of detention of aliens, to settle those that are already introduced before the Court (friendly settlements or unilateral declarations) and, in cases where the Court found already a violation, provide the Committee of Ministers (supervising the execution of judgments) with action plans on the individual and general measures taken or to be taken.

8. The return as such must take place in accordance with Article 3 ECHR. Recent reports by the European Committee for the Prevention of Torture (CPT) show that this is not always the case, in particular in return flights (excessive use of force and constraint, abusive restrictions of movement in the airplane, inappropriate use of diapers). The use of tranquilising drugs also raises serious issues under Art 3. Psychological support before the return is essential.

9. The conclusions and proposals/ recommendations of the Greek Ombudsman in her report on Return Procedures are relevant for all the above issues and, if implemented properly, would address affectively many of - if not all - the challenges set out above.

10. The Council of Europe is presently considering the feasibility of a soft law instrument on minimal rules for the administrative detention of aliens. The NPMs of several Member States, as well as the EU-Commission and the CPT have supported this endeavour. The decision as to whether to engage or not in this operation belongs to the Committee of Ministers of the Council of Europe (ie to Member States).