ADiM BLOG
ANALISI & OPINIONI

The "Hotspots" Approach and the Rule of Law: The "Greek" Experience in Relation to Mass, Administrative Detention

Themis Tzimas

Member of the International Laboratory for International Studies in the Black Sea and Eastern Mediterranean
Aristotle University

Key Words

Administrative detention - Greece - EU-Turkey Statement

Introduction

Almost 3 years have passed since the adoption of the EU- Turkey statement, which constitutes the cornerstone of the EU refugee policy in the face of the mass- influxes of asylum-seekers and migrants, especially since 2015. A critical aspect of the agreement is the "hotspots" approach. Although the latter preceded the agreement, the generalization and their imposition is consistent with the agreement.

The scope of the scheme has been allegedly to register and process individually asylum-seekers' applications, through fast-track procedures aiming at the determination of the status of asylum-seekers. Hotspots are part of the administrative detention facilities in Greece for asylum- seekers. Prolonged administrative detention, both in the hotspots and in other sites in the mainland, such as Registration and Identification Centers (RICs), Pre-Departure Centers or even police stations, has been common practice, leading also to poor-living conditions and to serious violations of human rights.

In this post, the analysis focuses first on the normative framework for hotspots and administrative detention of asylum-seekers and then on how the hotspots approach is implemented in practice.

The Greek legal framework

The legal framework for hotspots and administrative detention of asylum-seekers in Greece includes the Hellenic Constitution, the legislation on asylum-seekers and courts' decisions. Article 6 of the constitution provides that "No person shall be arrested or imprisoned without a reasoned judicial warrant which must be served at the moment of arrest or detention pending trial, except when caught in the act of committing a crime." Article 7 establishes the "nulla poena, nullum crimen sine lege" principle and the prohibition of torture.

Although these articles refer to judicial detention as a penalty rather than to administrative detention, it can be reasonably argued that situations which de facto are equivalent in terms of deprivation of personal freedom requires equivalent guarantees. In this sense, when administrative detention of asylum-seekers is imposed without such guarantees it should be considered as an unconstitutional practice.

The issue of administrative detention has emerged in the Greek legal order with regard to individuals who are indebted towards public institutions. Both the Greek Council of State and the 2nd Instance administrative court of Larissa in their 2775/1989 and 72/1989 decisions respectively held that administrative detention violates articles 5 and 6 of the Greek constitution, which guarantee the protection of personal freedom and the rule of law.

In addition, the majority of legal scholars in Greece consider administrative detention as unconstitutional and as contradictory to the "in dubio pro libertate" principle. The core of the argument is that the guarantees of personal freedom and of the rule of law cannot be downgraded by administrative procedures, which transfer authorities of the judiciary to organs of the administration, an approach which applies to asylum-seekers as well.

The Greek legal system transposed the EU Return Directive 2008/115/EK by Laws 3907/2011 (Article 30) and 3386/2005 (Article 76) which were adopted by the Greek Parliament and the EU framework for asylum seekers- namely the EU Directive 2005/85/EK -by Presidential Decrees 114/2010 (Article 13) and 113/2013 (Article 12 para. 4), which are adopted by the executive following legislative authorization by the Parliament.

Article 30, of Law 3907/2011 established the imposition of administrative detention for third country citizens who are to be returned and on whom no other, less restrictive measures may be implemented, only for the absolutely necessary period of time, provided that adequate living standards are guaranteed and after individualized justification.

In addition, when objectively the return of the third country citizen cannot take place for legal or other reasons, the detention must cease.

While, the Presidential Decree 113/2013, in article 12 established only as exceptional the imposition of detention, the level of discretion that rests upon the police authorities is significant in terms both of duration and of the groups of people who may be imposed.

Presidential Decree 114/2010, in article 13 establishes that an asylum- seeker is not detained for the sole reason of entering and residing illegally in the state, but only exceptionally if and when the identity of the asylum- seeker must be identified, when national security or public health are endangered, when the detention contributes into a faster assessment of the application and only when all other measures have failed.

The Presidential Decree in practice leaves several loopholes which are at large used to justify mass, prolonged detention, both in the hotspots and in the mainland.

An effort for more effective regulation of the reception and identification of asylum- seekers, as well as of the overall asylum policy was forwarded by Law 4375/2016. It was adopted

following the EU- Turkey agreement at large – but not solely – as an effort to regulate the framework of "hotspots" or of RICs as they have been officially labeled.

The main concept is that all third- country citizens who illegally enter Greece are led to a RIC where the procedures of identification take place, the will for asylum is registered, vulnerabilities are identified, and several psycho-social and legal services are provided. Detention is supposed to be short-*maximum of 25 days* and only if a longer than 3 days detention, is necessary.

However, in article 46 of the same Law, the pre- existing provisions about longer administrative detention, under the discretion of the police authorities is retained.

While it is provided that asylum- seekers should not be detained for the sole reason of delays in the administrative procedure and a number of guarantees for vulnerable groups are foreseen, the loopholes still exist for manipulation and violation of such guarantees.

In article 41, para. 1c, a general provision for restriction of free movement regarding certain parts of the state is established, by decision of the director of the asylum service, without any reference to the precondition for individualized assessment of each case.

In general, the Greek legal framework regarding administrative detention of asylum- seekers is a palimpsest of different laws which have been adopted during various phases. While the goal of legislation is to achieve compliance with EU regulations and standards of international law, the existing loopholes have paved the way for conditions leading to mass and prolonged administrative detention.

This explains why and how administrative detention in general has been used extensively and at a mass scale, through a nexus of laws, presidential decrees, ministerial decisions and unofficial practice.

In this framework the director of the asylum service in Greece, following the EU- Turkey statement issued a decision with collective implementation, applying administrative detention on all asylum- seekers who entered Greece after March 20, 2016, through the islands of the Aegean.

Against this decision of the Greek Asylum Service director, the decision 805/2018 of the Greek Council of State – G CS – has been issued about mass detention. The case was built on the judicial remedy which was submitted by the Greek Council for Refugees- GCR-claiming that mass administrative detention in the hotspots and more specifically article 41 of L. 4375/2016 are unconstitutional.

The Court decision rejected the argument about unconstitutionality of the asylum service director decision but accepted that the latter was unjustified and that it was not proven as necessary for public security.

The GCS decision stood on "middle grounds"; it did not go as far as overturning holistically the hotspot approach, but it demanded specific justification for the imposition of administrative detention. In addition, the GCS decision does not apply to other places in Greece where administrative detention is imposed as well as cases of administrative detention where the justification does not orientate the EU-Turkey agreement.

In this sense, the GCS decision can be criticized for declining to take advantage of the case in order to challenge the hotspots scheme and the wider issue of administrative detention. Still it imposed some restriction and clearly defined as contrary to the rule of law the mass and unjustified imposition of geographical restriction and of administrative detention. In this sense, it contradicted the essence of the hotspots approach as it is imposed.

The overturned decision of the Asylum Service was however replaced by a new, identical one, in a clear indication of defiance of the administration against the judiciary. GCR challenged the new decision too but before the date of the trial, the director of the Asylum Service issued a third one, in October 2018 excluding from mass administrative detention cases of family reunification and some vulnerable groups. GCR announced that it will challenge this new decision as well.

It must be stressed - concluding- that while hotspots and administrative detention have not been found as illegal by the Greek judiciary in general, their specific implementation have suffered a blow buy the GCS decision.

The implementation of the hotspots scheme and of administrative detention in Greece

On the basis of the above- mentioned criticism to the hotspots approach in principle, further concerns emerge due to its specific implementation.

The level of compliance with the international and European standards for administrative detention has deteriorated on the double ground of the latest financial crisis and mass refugee influxes.

The conditions are bleak not only for the general population but for vulnerable groups too, such as children. Human Rights Watch characteristically observed: "… unsanitary conditions, often with unrelated adults… subject to abuse and ill-treatment by police.

Several other reports found severe and mass violations of human rights, including a very detailed one by the Greek Ombudsman and other interventions that the latter has conducted in the field.

Things are equally bad for detainees –adults and children alike- in pre- deportation centers, as, the UNHCR found in 2017.

The conditions on the ground become obvious in relation to the overcrowded populations of Registration and Identification Centers- RICs- in Lesvos and Kos: between May 2017 and October 2018 Lesvos' RIC functions at 150% to 300% of its capacity, whereas Kos at about 100% of its capacity.

Due to the mass influxes and the incapacity of the Greek authorities to cope with the situation, pre- RIC detention – that is detention before the entrance to RICs- is widespread especially in Evros, for a period of even up to 3 months or even larger, with no guarantees for children, in local police stations.

Such conditions crate a framework of extreme psychological pressure, which profoundly deteriorates A2J imperatives. The attempted suicides by children are a shocking, albeit verified reality.

The Fourth Report on the implementation of the EU-Turkey Statement, acknowledged the "increasingly overcrowded reception capacity' of the hotspots located on Greek islands" and in the EU Commission recommendation of December 8th of 2016, the dangerous overcrowding on Greek islands, the insufficient staff, the risks for unaccompanied children and the dangers for vulnerable groups were mentioned. Amnesty International also stressed the inhumane conditions for asylum seekers in the islands.

As mentioned above, while hotspots are more often at the epicenter of mass media attention, the situation is not significantly better in other places of administrative detention of asylum-seekers. Characteristically bad is the situation in the Reception and Identification Center-RIC- at the borderline with Turkey, in Fylakio, Evros, as the UNHCR stressed in one of its appeals to the Hellenic government. The conditions were described as "abhorrent" in one of the many reports of ECRE.

Conclusions

The goal of containment of the asylum- seekers leads to mass administrative detention and eventually to violations of human rights, as well as to the erosion of the rule of law. Greek laws and especially their implementation is problematic regarding the constitutionality.

The Greek Council of State took a hesitant step towards challenging the hotspots approach and the administrative detention subsequently, falling short of a complete denunciation of mass and prolonged administrative detention as unconstitutional. Even though, the Asylum Service refuses to comply.

Administrative detention remains a thorny problem for the rule of law in Greece. While in principle it can be lawful, it must be applied under the substantial control of the judiciary, imposed only when necessary and for a limited period of time, profoundly lower than that of penalties and only if the living conditions uphold the relevant international and European standards.