

## Information taken from ECRE's Weekly Legal Update

(edition 10 October 2014)

### 1) European Court of Human Rights: *H.H v Greece* (no. 63493/11) [Articles 3, 5 and 13] 9 October 2014

(<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-147301>)

In a ruling which aligns itself to many of the Court's previous judgments concerning reception and detention conditions in Greece (notably *S.D. v. Greece*, no 53541/07, *M.S.S. v. Belgium and Greece* [GC], no 30696/09 and *B.M. v. Greece*, no 53608/11) the ECtHR in *H.H* has ruled that detention conditions at Soufli border post constitutes a breach of Article 3 ECHR. The Court, however, declined to accede to the applicant's submissions that the right to liberty and security (Article 5) and right to an effective remedy (Article 13) had been violated given that the applicant had not respected the admissibility criteria under Article 35 of the Convention.

In his submissions to the Court, the applicant, an Iranian national fleeing political persecution in Iran, had advanced that during a period of 6 months he had been placed at both Soufli and Feres border posts between 2010 and 2011. At both posts *H.H* submitted that he could not go outside, to walk or exercise. The conditions had a particularly adverse effect on his mental health, subsequently leading to suicide attempts. *H.H* further claimed that the centre was severely overcrowded, unhygienic and under-equipped. Noting that to reach the threshold of Article 3, the Court submitted that ill-treatment had to be of a certain gravity, depending principally upon the duration of treatment and the effects on the applicants mental and physical health (*Van der Ven c. Pays-Bas*, no 50901/99). The Court found that this was evident in the present case. Relying furthermore on UNHCR and the Committee for the Prevention of Torture reports, the Court concluded that nothing had improved in Soufli from its previous jurisprudence to counteract the present applicant's arguments. Thus, Greece had violated the applicant's Article 3 rights.

### 2) Upcoming hearing CJEU Case C-554/13 *Zh. and O.*

([http://curia.europa.eu/juris/document/document.jsf?text=&docid=145605&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=293372&utm\\_source=Weekly+Legal+Update&utm\\_campaign=521d6b6d31-WLU\\_10\\_10\\_2014&utm\\_medium=email&utm\\_term=0\\_7176f0fc3d-521d6b6d31-420368341](http://curia.europa.eu/juris/document/document.jsf?text=&docid=145605&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=293372&utm_source=Weekly+Legal+Update&utm_campaign=521d6b6d31-WLU_10_10_2014&utm_medium=email&utm_term=0_7176f0fc3d-521d6b6d31-420368341))

The CJEU will hold a hearing on the 15th October concerning the request for a preliminary ruling from the Dutch Raad van State in which the latter referred the following questions to the Court:

Does a third-country national who is staying illegally within the territory of a Member State pose a risk to public policy, within the meaning of Article 7(4) 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 (OJ 2008 L 348; 'the Return Directive'), merely because he is suspected of having committed a criminal offence under national law, or is it necessary that he should have been convicted in a criminal court for the

commission of that offence and, in the latter case, must that conviction have become final and absolute?

In the assessment as to whether a third-country national who is staying illegally within the territory of a Member State poses a risk to public policy within the meaning of Article 7(4) of the Return Directive, do other facts and circumstances of the case, in addition to a suspicion or a conviction, also play a role, such as the severity or type of criminal offence under national law, the time that has elapsed and the intention of the person concerned?

Do the facts and circumstances of the case which are relevant to the assessment referred to in Question 2 also have a role to play in the option provided for in Article 7(4) of the Return Directive, in a case where the person concerned poses a risk to public policy within the meaning of that provision, of being able to choose between, on the one hand, refraining from granting a period for voluntary departure and, on the other hand, granting a period for voluntary departure which is shorter than seven days?

3) **European Commission: Commission Staff Working Document on the Assessment of the implementation of the Greek Action Plan on Asylum and Migration management**

([http://data.consilium.europa.eu/doc/document/ST-14027-2014-INIT/en/pdf?utm\\_source=Weekly+Legal+Update&utm\\_campaign=521d6b6d31-WLU\\_10\\_10\\_2014&utm\\_medium=email&utm\\_term=0\\_7176f0fc3d-521d6b6d31-420368341](http://data.consilium.europa.eu/doc/document/ST-14027-2014-INIT/en/pdf?utm_source=Weekly+Legal+Update&utm_campaign=521d6b6d31-WLU_10_10_2014&utm_medium=email&utm_term=0_7176f0fc3d-521d6b6d31-420368341))

A factual assessment of the developments in Greece since 2010 in the areas of asylum, migration, border management and return have been outlined in this Staff Working Document from the Commission, which further focuses on the follow up to the agreed actions from the revised Greek Action Plan

([http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/p4\\_exec\\_summary/p4\\_exec\\_summary\\_en.pdf?utm\\_source=Weekly+Legal+Update&utm\\_campaign=521d6b6d31-WLU\\_10\\_10\\_2014&utm\\_medium=email&utm\\_term=0\\_7176f0fc3d-521d6b6d31-420368341](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/p4_exec_summary/p4_exec_summary_en.pdf?utm_source=Weekly+Legal+Update&utm_campaign=521d6b6d31-WLU_10_10_2014&utm_medium=email&utm_term=0_7176f0fc3d-521d6b6d31-420368341)).

Listing both the shortcomings, present situation and ongoing issues in Greece's asylum system, the report notes that in the area of reception conditions the sustainability of Greece's first reception services and centres needs to be ensured in order to identify persons in need of international protection and specific procedural needs at the main points of entry. Moreover, "First Reception Mobile Units" need to be established along with given assurances that unaccompanied minors are immediately referred to special accommodation centres.

As to the asylum procedure in Greece the document notes that the system has been characterised by its inaccessibility, the inadequate examination of applications at first instance and a lack of an effective remedy. Whilst rectification of these failings have led to the establishment and operation of the "Asylum Service, Regional Asylum Offices, Asylum Mobile Units" and an "Appeals Authority" the working document requires Greece to clear the backlog of pending applications, to guarantee the right

to effectively access free legal assistance and to assure an effective cooperation and coordination between all relevant national institutions in the asylum procedure.

The document continues with a discussion on the reception of vulnerable groups, return and detention of third country nationals and border control management, in which the working group requests increased places in open accommodation, the requirement that detention is a last resort, including alternatives to detention and the improvement of judicial review. Finally, the document advocates the full use of the Eurodac Regulation by Greece along with an enhanced cooperation between the Greek and Turkish authorities at sea and land borders.

#### **4) Council of the European Union: Justice and Home Affairs (JHA) Council conclusions on "Taking action to better manage migratory flows"**

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/145053.pdf?utm\\_source=Weekly+Legal+Update&utm\\_campaign=521d6b6d31-WLU\\_10\\_10\\_2014&utm\\_medium=email&utm\\_term=0\\_7176f0fc3d-521d6b6d31-420368341](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/145053.pdf?utm_source=Weekly+Legal+Update&utm_campaign=521d6b6d31-WLU_10_10_2014&utm_medium=email&utm_term=0_7176f0fc3d-521d6b6d31-420368341))

Following on from the JHA Council meeting on the 9 October the Council has published and adopted Conclusions which concern; action in cooperation with third countries; reinforced management of external borders and FRONTEX; and action at Member States' level, namely, reception and fingerprinting.

As to the first point the Council Conclusions focus particularly on Western African countries, in particular a heavy accent is placed on law enforcement procedures, including the launching of Joint Investigative Teams, the reinforced role of EUROPOL and their cooperation with FRONTEX with a view to dismantling smuggler networks along with cooperation with Egyptian, Tunisian and Libyan authorities to curtail the supply of vessels from Tunisia and Egypt. The question of returns is also put forward in the Conclusions with the Council surmising that "third Countries should be supported in building up their capacities to provide assistance to returnees and the implementation of information campaigns and the risks of irregular migrations." Regard is also paid to Regional Development and Protection Programmes in the North of Africa along with the proposal that "a credible number of resettlement places, on a voluntary basis, in order to offer an alternative legal avenue" are established.

With regards to FRONTEX the Council Conclusions submit that Mare Nostrum will be promptly phased out with joint Operation Triton taking its place. Emphasis is placed on FRONTEX's mandate of surveillance where Triton could incorporate operational tools such as "identification of migrants, the provision of information, and the screening of vulnerable cases or persons in need of medical attention in order to cater for their needs upon disembarkation." Lastly, attention is paid to the full implementation of the Common European Asylum System which is to partly realised through "systematic identification, registration and fingerprinting on land" along with "the possibility to use, in a more systematic manner, prioritized, accelerated, and border procedures in justified circumstances."

#### **5) UK case law: Court of Appeal Civil Division Decision: Detention Action, R (on the Application of) v Secretary of State for the Home**

## **Department [2014] EWCA Civ 1270**

(<http://www.bailii.org/ew/cases/EWCA/Civ/2014/1270.html>)

The Court of Appeal has dismissed an appeal requesting the prohibition of processing asylum and human rights claims in the Detained Fast Track System (DFT) until necessary steps have been taken to remove the unacceptable risk of unfairness for applicants.

The case appeals a previous decision by Mr Justice Ouseley from the High Court Administrative Division who despite ruling that the DFT does operate unfairly, due to a lawyer not given enough time to prepare a case, opted for a declaration of the “unacceptable risk of unfair determinations for those vulnerable or potentially vulnerable applicants” rather than an order, requested by the appellant. The order was to, firstly, have the effect of suspending asylum and human rights claims in the DFT. Secondly, the order sought by the appellant was that the DFT should not apply to those who served notice of an appeal from an adverse decision made by the Secretary of State [14] and, lastly, that the order would prohibit the removal of persons “from the jurisdiction whose claims have been processed in DFT until they have had the opportunity of seeking legal advice on the impact of this ruling on their asylum and human rights claims”[6].

In response to the applicant’s request for an order having the above stated effects the Court advanced “that the judge has a wide discretion when it comes to remedy”[8], this is even more so given that the claim is “essentially a prospective one, requiring changes to be made for the future”[9]. Moreover, the Court found, as to the first two requests that they were wide-ranging and “wholly excessive and an unnecessary blanket remedy,” a quotation taken from Mr Justice Ouseley’s decision in the Civil Division [17]. Furthermore the Court surmised that the determination of what “unfairness” constitutes, would likely to be highly problematic “giving rise to yet further dispute which might have to be resolved by the court” [13]. With regards to the last request the Court concluded that where an appeal has been dismissed and there has been a refusal to appeal to the Upper Tribunal “that will usually be the end of the matter,” if there is ground for a fresh claim “then this can be presented to the Secretary of State in the normal way” [21].

### **6) German case law: The German Constitutional Court takes critical position on expulsions to safe third countries and Dublin states**

In its recent case law, the German Constitutional Court has provided a general critique on the role of the authorities with regards to the expulsion of an asylum applicant to a safe third country or another Dublin-state. Whilst the court does, for formal reasons, not accede to the applicants submissions in both cases concerning return to Italy, (BVerfG Az 2 BvR 1795 14-1 – see

[http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/17-09-2014-%202BvR%20939-](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/17-09-2014-%202BvR%20939-14.pdf?utm_source=Weekly+Legal+Update&utm_campaign=521d6b6d31-WLU_10_10_2014&utm_medium=email&utm_term=0_7176f0fc3d-521d6b6d31-420368341)

[14.pdf?utm\\_source=Weekly+Legal+Update&utm\\_campaign=521d6b6d31-](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/17-09-2014-%202BvR%20939-14.pdf?utm_source=Weekly+Legal+Update&utm_campaign=521d6b6d31-WLU_10_10_2014&utm_medium=email&utm_term=0_7176f0fc3d-521d6b6d31-420368341)

[WLU\\_10\\_10\\_2014&utm\\_medium=email&utm\\_term=0\\_7176f0fc3d-521d6b6d31-](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/17-09-2014-%202BvR%20939-14.pdf?utm_source=Weekly+Legal+Update&utm_campaign=521d6b6d31-WLU_10_10_2014&utm_medium=email&utm_term=0_7176f0fc3d-521d6b6d31-420368341)

[420368341](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/17-09-2014-%202BvR%20939-14.pdf?utm_source=Weekly+Legal+Update&utm_campaign=521d6b6d31-WLU_10_10_2014&utm_medium=email&utm_term=0_7176f0fc3d-521d6b6d31-420368341) - and BVerfG Az 2 BvR 939 14-2 – see

<http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/bv>

[erfg-beschluss-17-09-2014-az-2-bvr-1795-14-ohne Anschreiben.pdf](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/bverfg-beschluss-17-09-2014-az-2-bvr-1795-14-ohne-Anschreiben.pdf)) it does submit,

on the basis of reports from both NGOs and the German Foreign Office, that Italy faces accommodation capacity problems for returned foreigners. Moreover, as a minimum, the Federal Office for Migration and Refugees should, in cases of family returns, cooperate with authorities in the receiving state to make sure that children under the age of 4 obtain safe accommodation upon return. This requirement remains in force independently of whether the persons in question have obtained a protection status in the receiving state or whether the persons fall under the Dublin Regulation.

In addition, the court submits that return to safe third countries or other Dublin-states and the related risks should be, when it comes to the relevant fundamental rights, assessed differently from returns to the country of origin. This is based on the fact that the persons in question do not have access to assistance from family members or a social network upon arrival. Lastly, the Court highlights that a tolerated status also exists when the persons in question are unable to travel in a wider sense. Thus the question of health risks not only during travel and expulsion, but also after the arrival at destination, must be taken into account. Where expulsion occurs the German authorities must make sure that the necessary aid is available in the receiving state for persons with health concerns. In this regard, these sections of the decisions are not only relevant for families with small children but for vulnerable persons in general.

**Two additional cases have been deliberated upon by the German Constitutional Court on the same date, 2 BvR 732/14 – see**

[http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/bv\\_erfg%2017.09.2014%20-%20vg%20ansbach-03102014172558.pdf](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/bv_erfg%2017.09.2014%20-%20vg%20ansbach-03102014172558.pdf) - and 2 BvR

991/14 – see

[http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/bv\\_erfg%2017.09.2014%20-%20vg%20ansbach-03102014172558.pdf](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/bv_erfg%2017.09.2014%20-%20vg%20ansbach-03102014172558.pdf), which reiterate the same arguments as those found above.

(Statewatch Summary)