

RETURN OF THIRD-COUNTRY NATIONALS

SPECIAL REPORT 2016



THE GREEK
OMBUDSMAN
INDEPENDENT AUTHORITY



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THE GREEK OMBUDSMAN

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Special report 2016

The following Special Report is drafted on the basis of work material– complaint investigation, interventions, on-site inspections, monitoring of return procedures – contributed by the independent authority’s Monitoring Returns team. The team worked under the supervision of the Greek Ombudsman, Andreas Pottakis and the Deputy Ombudsman, George Nikolopoulos.

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Introduction	04
Summary	06
1. The competence of the Ombudsman in the external monitoring of forced returns	09
• Legal framework	
• What changed in 2016	
• Organisation, evaluation and contacts	
• External monitoring of returns in 2016 at a glance	
2. Data on the field of operation	10
• Problems of financing of returns and of their external monitoring	
• The general framework for managing migrants	
• Numerical data on returns	
• Qualitative parameters of returns data	
• Numerical data on administrative detainees to be returned	
3. Visits to Pre-removal Centres –Problems in the return process	12
• Sampling inspections, findings and recommendations	
4. External monitoring of removal operations of third-country nationals	13
• Joint European removal operations by air	
• Readmission to Turkey operations	
5. Regulation (EU) 2016/1624 as a point of reference for the development of the external monitoring of returns on national and European levels	15

Introduction

2016 was a critical turning point with regard to the competence for the external monitoring of the return of third-country nationals to their country of origin, in accordance with the Return Directive (2008/115/EC, Article 8(6), Law 3907/11, Article 23(6)), at both national and European Union level.

Following the surge in refugee-migrant flows during the previous year, in 2016 the management of irregular migrants faced two major challenges: on the one hand, the closing of the borders of what is commonly known as the Western Balkan Route and, on the other, the EU-Turkey Statement of March 18, following which 5 islands in the Eastern Aegean (Lesbos, Chios, Samos, Kos, Leros) shouldered the burden of detaining all new irregular arrivals through the sea borders for rapid readmission to Turkey following their identification. The numbers, however, including those who have been readmitted, reveal that forced removal operations decreased in 2016 in relation to the previous year, whereas the numbers of detainees in Pre-removal Centers have increased, causing justified questions regarding the cohesion and effectiveness of the forced return system.

With its presence at all stages of the procedure, the Greek Ombudsman, identifies its problem points in relation to the imperatives of European or domestic law, based on sampling inspections both at pre-removal detention centres and on Hellenic Police operations for the realisation of forced return by land, sea or air. With the annual report it publishes specifically on Returns, the Greek Ombudsman recommends organisational and other measures to ensure the rights of the people who are involved in the forced removal procedure and the overall improvement of the forced return system.

In this context, during 2016 the Ombudsman had the opportunity to recommend improvements to the detention procedure prior to return, such as the need for new substantive grounds for re-detention, as well as specific justification for invoking reasons of public order, to ensure that the non-punitive character of administrative detention is maintained. However, while awaiting the implementation of its recommendations, the Greek Ombudsman observes that the problem of managing mixed flows, consisting of both migrants and asylum seekers, along the south-eastern borders of the

EU, is what underlies and defines the issue of detention as well, which tends to become the general rule rather than an exclusive and individualised measure for ensuring return, as both the relevant Directive and the principle of proportionality stipulate with regard to the worst restriction to personal freedom. At the end of 2016, the construction of new Pre-removal Centres on the islands is a European pronouncement, which begins to be realised in early 2017. Moreover, the Greek Ombudsman's inspections reveal consistent administrative use of police station holding cells for third-country nationals awaiting return, in conditions, including lack of access to open air, that constitute a significant breach not only of the requirements of the Return Directive but also of the detention guarantees of the EU Charter of Fundamental Rights.

Regarding the removal operations, in which the Ombudsman as the national external monitoring mechanism participated on a random basis, to begin with in 55% of joint European flights in which the Hellenic Police participated, two problems appear to be constant in all the operations:

- the lack of adequate and timely information being provided to the third-country nationals (at least 24 hours in advance) regarding the removal operation and its particulars, and
- the use of handcuffs as a standard procedure without individual assessment of the necessity of constraint.

The Ombudsman considers that the fact that the returnees are not given timely information is a characteristic example of a violation of rights that creates a series of problems for the overall effectiveness of the return operation, when taken together with the provision of inadequate information regarding the potential exercising of the right to international protection, family cohesion, etc., creating disputes and/or last-minute cancellation of the operation.

The same problems are apparent in the operations of readmission to Turkey in 2016. It should be noted that readmission constitutes an exceptional procedure of forced removal, based on Article 2 of the Directive, where however the basic guarantees of fundamental rights are applied. The Ombudsman was also present at readmission operations, carrying out sampling inspections in 45% of the operations by sea and air from the Greek islands to Turkey. This institutional safeguard of external monitoring by the national mechanism in readmission procedures is rendered even more critical by the

fact that the EU-Turkey Statement of 18 March is not under the judicial control of the EU bodies, according to the decision of the EU General Court of 28 February 2017, which ruled that regardless of whether the Statement is a political document with binding legal consequences its content cannot be attributed to the European Council or any other EU body, but to the leaders of the Member States.

External monitoring by an independent authority and transparency of police operations thus constitute a necessary safeguard of the rule of law against the risks to fundamental rights involved in any similar procedures of forced removal which also entail restrictions to personal freedom.

For this reason, external monitoring is also an irrevocable part of the new Regulation (EU) 2016/1624 on the conversion of FRONTEX into a European Border and Coast Guard Agency, which was adopted in September 2016 and provides for a European pool of monitors drawn from the Member States (Article 29), so that no return operation is carried out without external monitoring (Article 28).

This EU Regulation, however, creates a new landscape for the monitoring of returns, since the European pool of monitors no longer reports to the national external monitoring mechanisms, in most cases Ombudsmen, but to FRONTEX itself. The result is that in the now extensive operations of the European border organization the monitoring is no longer external but is being internalized.

The provision in the new Regulation for a FRONTEX complaints mechanism (Article 72) for Member States' operations that are organised by its officers or in which its officers participate, for incidents after 6 October 2016, leads to the same conclusion. In these cases, the submission of a complaint initiates the procedure with FRONTEX requesting an investigation by the competent Member-State authority (usually the police) and the parallel notification of the national mechanism, i.e. the Ombudsman. The utilisation of this mechanism, which has already been activated in three cases since the beginning of 2017, will be evaluated by the Ombudsman with regard to the response of the Hellenic services during the coming year. It should, however, be noted that the provision for a complaints mechanism in the recent Regulation is a further manifestation of own-accountability, given that the evaluation of the results of the investigation of the complaint is carried out by the FRONTEX fundamental rights officer.

At the close of 2016, the external monitoring of return operations as an institutional guarantee appears to be regressing at the level of the European institutions, given that with regard to the European operations it tends not to rely on independent institutions, external and separate from the executive branch of the European Union for the safeguarding of the borders.

This development further increases the burden of responsibility borne by the Ombudsman, as the independent national monitoring mechanism for forced returns, for meaningful collaboration with every competent national, international or EU agency to achieve the greatest possible transparency in all administrative actions and the entrenchment of respect of fundamental rights in the corresponding national operations.

Andreas I. Pottakis
The Greek Ombudsman

Summary

This publication constitutes the special report for 2016 as prepared by the Greek Ombudsman in the framework of its competence with regard to the external monitoring of forced returns (Article 23(6) Law 3907/2011). The main points of this report are included in the annual report the Ombudsman submitted to the Hellenic Parliament in March 2017. The ensuing Report makes reference to the following:

1. The special competence for the external monitoring of returns, and specifically:

- the [legal framework](#) of the Ombudsman's competence (with emphasis on the EU basis of the external monitoring, the monitoring of all stages from the issuing to the implementation of a return decision, the access to all third-country nationals' detention/transit sites, the continual flow of information from the Hellenic Police and its obligation to give reasoned answers, as well as the submission of a special report by the Ombudsman to Parliament).
- the [new data for 2016](#): The EU-Turkey Joint Statement of 18 March 2016, a challenge to which the Ombudsman responded by extending its sampling inspections of readmissions, by air and sea (*with monitors participating in 45% of the readmission to Turkey operations carried out in 2016*). The legal basis of the Ombudsman's competence in the external monitoring of this exceptional removal procedure is defined in the Return Directive and in Law 3907/11.
- the Ombudsman's [organisation, evaluation and contacts](#) in the context of external monitoring (education, networking with its counterpart institutions of EU Member States in the FReM programme, cooperation with competent authorities and international and European organisations, [positive evaluation](#) of the mechanism for the external monitoring of returns by the European Commission in the context of Greece's regular assessment with regard to the Schengen acquis. The European Commission delegation identified our need of increased funding from the European Asylum, Migration and Integration Fund).
- the [external monitoring in 2016 at a glance](#) (visits to detention sites, Ombudsman monitors' participation in removal operations).

2. Data on the field of operation in 2016:

- the [problem of funding both of returns](#) (e.g. only joint European flights took place with the participation of the Hellenic Police) [and of external monitoring](#) (which due to the Managing Authority's delay in issuing the call, was carried out in 2016 through own resources, drawn from the existing State budget, as well as with partial funding by FRONTEX).
- the [general framework of migrant management](#). In 2016 the number of persons to be returned/readmitted was influenced to a significant degree by the reception procedures at the hotspots and the rate of examination of applications for asylum. [Provision of numerical data on forced returns](#), which decreased in 2016 (13,000 compared to 17,000 in 2015), [and qualitative data](#) (over 50% of returnees were Albanian citizens), as well as [numbers of detainees in pre-removal centres](#) (over 1500 detainees in November 2016, three times more than in 2015), noting that while the Hellenic Police does not provide data on detentions in other sites than pre-removal centres, the Ombudsman's on-site inspections show that the practice of detaining third-country nationals for return in police holding cells continues.

3. Problems that were identified in relation to the Return Directive from 14 visits to detention sites:

- [inadequate provision of information](#) to detainees regarding the procedure
- [differentiation of detention according to nationality](#), which creates problems in relation to the provision on the need for individualised assessment of international protection applications (Corinth is a positive example, with regard to persons belonging to a Pakistani religious minority (Ahmadiya).
- detention even when [there is no reasonable prospect of removal](#), is not in accordance with the Return Directive.

- frequent [detention for reasons of public order](#). The Ombudsman stresses that it is necessary to specify the risk to public order, otherwise it weakens the justification of the decision for administrative detention, which has a non-punitive nature according to European Court of Human Rights case law.

- [Re-detention](#), even though the 18-month time limit has previously been exhausted. For the maximum time limit of detention of persons waiting to be returned not to be violated the Ombudsman specifies the necessity for new substantive justification, constituting a significant change in the circumstances, in accordance with European Court of Human Rights case law and the EU Return Handbook.

4. Problems that were identified during the participation of Ombudsman monitors in forced removal operations (11 joint European flights to Pakistan and Georgia and 12 readmissions by sea and air to Turkey):

Two general problems:

- Lack of [timely notification](#) (at least 24 hours previously) of the return/readmission
- uniform constraint by means of [handcuffs](#), without individual assessment of the necessity.

Moreover, during the joint European operations no telephone access was provided in some cases.

Regarding readmissions, the Ombudsman also underlined the need for a prior fit-to-travel certificate. Also, in certain cases obstacles were raised regarding the Ombudsman's participation in the briefing and debriefing meetings of readmission operations. A more general problem was the lack of a complete case file accompanying third-country nationals for readmission.

Also noted are:

- 2 incidents of readmission for which the Ombudsman has [begun an official investigation](#) based on a report that the expressions of intent to lodge applications for asylum were disregarded, on the one hand of a 5-member family of Syrian citizens, who from the hotspot on Leros boarded a plane

in Kos which was to fly a readmission operation from Lesvos to Turkey, and, on the other, of 6 Iraqi women being held in Kalamata, who were exempted from the scheduled readmission by the intervention of the Ombudsman until issues pertaining to access to the asylum procedure and reunification with their families were resolved.

- The Ombudsman's appeal to the heads of the co-competent ministries for their services to cooperate and provide [complete information on the pre-removal monitoring](#) of returns.

5. The new European Regulation concerning FRONTEX which presents increased challenges for the Ombudsman as the national external monitoring mechanism (European Pool of Monitors, FRONTEX Complaints Mechanism).

In conclusion, we note the Ombudsman's aim to monitor the dynamic development of these procedures, contributing to the actual safeguarding of fundamental rights and the transparency of administrative action.

1. The competence

1. The competence of the Ombudsman in the external monitoring of forced returns

The Greek Ombudsman has special competence to monitor all stages of the forced return process of third-country nationals, from the issuing of the return decision until the implementation of removal by land, sea or air transport to their country of origin.

Legal framework

The external monitoring is provided for in EU Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive, Article 8(6)) and it has been assigned to the Greek Ombudsman according to Law 3097/2011 (Article 23(6)), which provides for the cooperation of the Independent Authority with international organisations and NGOs in pursuit of this purpose. The Ombudsman's competence was fully activated with the organisation of the system of external monitoring in the necessary Joint Ministerial Decision (JMD, Government Gazette 2870B'/24/10/2014) which was issued following the Authority's recommendation. The JMD requires all relevant authorities to systematically provide the Ombudsman with information regarding the forced returns. The Greek Ombudsman reviews the legality of actions, omissions and material acts of the competent services, using all the institutional tools provided for in the Ombudsman's statutory provisions, while it has unimpeded access to all places of detention, waiting or transit across the Greek territory. Moreover, the Ombudsman carries out sampling inspections by participating with its experts as monitors in return decision enforcement operations. The Ombudsman sends reports and recommendations for the improvement of return procedures to the administration, which is required to give a reasoned response. It publishes its findings in a special report, which it submits annually to the Greek Parliament.

What changed in 2016

The EU-Turkey Statement of 18 March activated the procedure for the readmission to Turkey of third-country nationals who irregularly entered Greece from the sea borders. This is an exceptional procedure, based on Article 2 of the

Directive, where the basic guarantees of fundamental rights are however applied. The Ombudsman was also present at readmission operations, carrying out sampling inspections of 45% of the operations by sea or air from the Aegean islands that it was informed of.

Organisation, evaluation and contacts

In 2016, in the context of carrying out the external monitoring of returns, the Greek Ombudsman:

- Had working meetings with the Hellenic Police, the General Secretariat for Migration Policy, the Office in Greece of the United Nations High Commissioner for Refugees (UNHCR), the EU Agency for Fundamental Rights (FRA), the UN Special Rapporteur on the Human Rights of Migrants, the Commissioner for Human Rights as well as a delegation from the Committee for the Prevention of Torture (CPT) of the Council of Europe, and various NGOs. It also met with the various local First Reception Services and Asylum Services, which are involved in the return system at the initial stage of identifying vulnerable persons and asylum seekers so they may be exempted from the return procedures.
- Was positively evaluated for its system of external monitoring of returns by a delegation of the European Commission which found that its operation is in line with the Schengen acquis and the provisions of Article 8(6) of the Return Directive, in the regular evaluation of Greece with regard to its application of the Schengen acquis (April 2016). At the same time, the delegation highlighted the necessity that the State make available the funds for the scheduled financing of the external monitoring provided by the European Asylum, Migration and Integration Fund (AMIF).
- Members of the Ombudsman's return team participated in the training seminar for return monitors in Warsaw (28-29 June 2016), in view of adopting the EU Regulation concerning the European Border and Coast Guard¹ which provides for a European pool of monitors. It also participated in the working meeting of national external monitoring mechanisms with the European Ombudsman and FRONTEX in Brussels (6 December 2016) concerning the establish-

1 <https://publications.europa.eu/en/publication-detail/-/publication/65db3442-7bcf-11e6-b076-01aa75ed71a1/language-en>

2. Data on the field of operation

ment of an operational complaints mechanism on a European Level in the relevant FRONTEX operations. It also participated with a trainer at the Hellenic Police's seminar for return escort leaders on 14 November 2016.

- It took part in a training seminar organised for the Ombudsman's return team in Athens by the European Union's Fundamental Rights Association (FRA) (12-14 July 2016). Moreover, two members of the Ombudsman's return team participated in a FRA training seminar in Vienna (February 2014).
- It participated as a founding member of the European Forced Return Monitoring (FRoM)-II programme in the framework of the European Commission's European Return Fund - Community Actions. The programme was led by the International Centre for Migration Policy Development (ICMPD) with the participation of national agencies responsible for the external monitoring of forced return operations in various Member States and aimed at developing common standards and institutional monitoring tools to strengthen the reliability of the European return system.

The external monitoring of returns in 2016 at a glance:

The Ombudsman visited:

- 3 Pre-removal Centres (7 visits)
 - 4 police station holding cells
- as well as certain police stations

The Ombudsman participated as monitor in:

- 11 EU Joint Return Operations (JROs – flights) (55% of those realised)
- 12 readmissions (45% of the sea and air readmissions to Turkey, about which it was previously informed), and
- 1 land removal operation.

2. Data on the field of operation

Problems of financing of returns and of their external monitoring

The Annual Report 2015 (p.126) refers to the lack of steady funding for Pre-Removal Centres and of forced return opera-

tions by the now unified European Asylum, Migration and Integration Fund (AMIF) for the main body of Returns, based on the national programme that was approved in 2015. Regulatory changes in the management of the programme followed, with Article 9(6) et seq. of Law 4332/2015 (Government Gazette 76A/9.7.2015) and the subsequent normative acts issued pursuant to that law. In practice, due to its inability to contract charter flights for returns by air, the Hellenic Police participates in joint European operations which are carried out by air and coordinated by FRONTEX.

Another related problem mentioned in the report pertains to the funding for the external monitoring of returns by the Greek Ombudsman, which, while provided for by the JMD governing the organisation of the monitoring (Government Gazette 2870B/24.10.2014), is hindered for the aforementioned reasons by the State's delay in financing this Ombudsman action since 1 July 2015 and for almost the whole of 2016. In November 2016 a call was made for the external monitoring of returns for the next 2 years by the managing authority (European and Development Programmes Division/ Ministry of Interior-Citizen Protection Sector) and the Ombudsman submitted the relevant project proposal together with the Hellenic Parliament's European Programmes Implementation Service.

Throughout 2016, the Ombudsman continued to operate on its own resources, to the extent that it could draw a certain amount from its budget for sampling inspections at both Pre-removal Centres or other detainment sites and return or readmission operations of third-country nationals. In the second semester of 2016, the external monitoring actions regarding readmissions to Turkey as well as the joint European air return operations to Asian countries, were realised with the substantive contribution of FRONTEX.

The general framework for managing migrants

The escalation of mixed flows in 2015 and the difficulties in implementing the European Commission action plan for, initially, the reception and relocation of asylum seekers and, additionally, an effective system of forced return for the remaining populations, also mark developments in the management of returns in 2016. The adoption of the EU-Turkey Statement of 18 March activated the procedure for the readmission to Turkey of third-country nationals who irregularly entered Greece from the sea borders. This is an exceptional procedure, based on Article 2 of the Directive, where the

basic guarantees of fundamental rights (Article 4(4) of the Directive) are however applied. To ensure these guarantees, the Ombudsman also carries out sampling inspections of readmissions, based on the broad scope of its competence in relation to forced removal operations and the provisions of the law on returns (Article 23(6) and Articles 17-19 of Law 3907/2011), and the authorising JMD, which also refers to readmissions data and regulates the details of exercising external monitoring.

As discussed in the Ombudsman's report on *Migration Flows and Refugee Protection*², the number of candidates for readmission or return depends on the reception procedures for identifying vulnerable persons at the Reception and Identification Centres (RICs-hotspots) on the 5 Aegean islands and by the speed with which potential asylum applications are examined at first and second instance.

Numerical data on returns

Chart 1 Returns 2016-2015

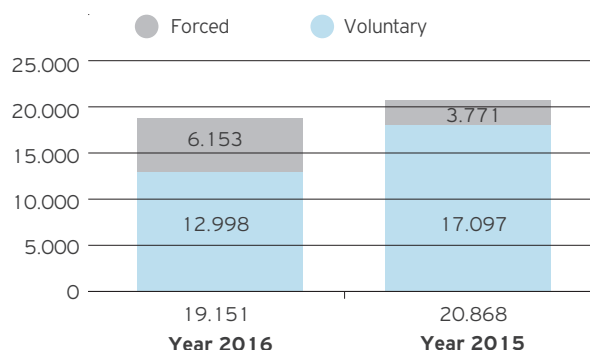
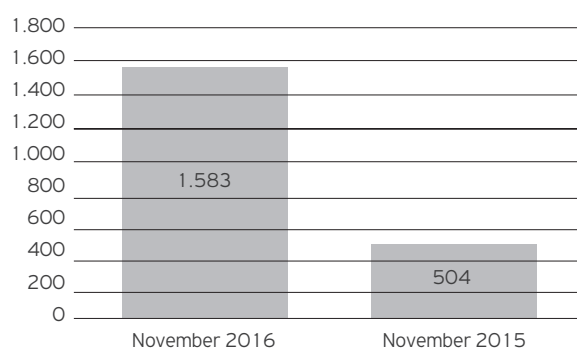


Chart 2 Detainees in Pre-removal Centres



² April 2017, p.30 and seq. <https://www.synigoros.gr/?i=human-rights.en.recentinterventions.434107>

In the general political context of the development of the refugee/migration crisis, the number of forced returns realised in 2016 shows a certain decrease compared to the previous year. The data forwarded by the Hellenic Police for 2016 show a total of 19,151 returns, compared to 20,868 in 2015. Of the total of 19,151 removal operations, 12,998 were forced returns, including deportations and readmissions based on bilateral agreements with neighbouring countries (see Chart 1). Of these, 6,153 are voluntary returns carried out by the International Organisation for Migration (IOM). This decrease compared to 2015 pertains to forced returns, whereas voluntary returns have increased, from a total of 3,771 in 2015 (3,718 by the IOM and 53 by the Hellenic Police) to 6,153 in 2016.

The Ombudsman considers the publication of statistical data by the Hellenic Police, with regard also to readmission operations and irregular migrant issues, to be a significant step for transparency. On 27 October 2016 the following announcement was posted on the website www.astynomia.gr: “It is noted that since the beginning of the year, 1,158 third-country nationals have been returned to Turkey in accordance with the bilateral Greece-Turkey Readmission Protocol, 51 third-country nationals of Turkish citizenship have been returned in accordance with the EE-Turkey Readmission Protocol, and 716 third-country nationals of various nationalities have been returned in accordance with the EU-Turkey Statement. Additionally, since the EU-Turkey Statement came into effect, 255 third-country nationals who irregularly entered Greece from the sea border with Turkey have been returned to their countries of origin voluntarily by IOM”.

Qualitative parameters of returns data

For the time being, for technical or organisational reasons the aggregate data on the entire Greek territory available to the Ombudsman do not include qualitative parameters for persons who may belong to vulnerable groups (pregnant women, persons suffering from chronic or incurable illnesses, the elderly, families, unaccompanied minors, etc.). The Ombudsman requested collective data from the Ministry but each police division so far sends separate data, an issue which has not yet been resolved. Aggregate data are, however, provided by the Hellenic police on the citizenship of the third-country national returnees or deportees, and these show that 8,771 (54.9 %) of the total of 15,954 forced removal operations which were effected during the first 10 months of 2016 concern Albanian citizens.

3. Visits to pre-removal centers

Numerical data on administrative detainees to be returned

With regard to detention sites, the Hellenic Police informed the Ombudsman that on 3 November 2016 a total of 1,583 third-country nationals were being detained at Pre-removal Centres, a number that is vastly greater than the corresponding 504 in 2015 (see Chart 2). The largest concentration of detainees was in the Pre-removal Centre of Corinth (697 detainees).

The corresponding number of third-country nationals for return in police holding cells is not known. The Hellenic Police continues its efforts to detain third-country nationals for only a few days at police stations until space is found at Pre-removal Centres, without this always being possible (due to the overcrowding in the Aliens Division of Attica at the Pre-removal Centre of Tavros characteristically, on 7 June 2016 there were 114 men detained in Attica police stations). It is also noted that the police holding cells at the Aliens Division of Thessaloniki appear to be used as a standard site for the detention of third-country nationals for return (case 216963/2016), see also previous relevant observations by the Ombudsman (*Annual Report 2015*, p. 128-129).

3. Visits to Pre-removal centers – Problems in the return process

Sampling inspections, findings and recommendations

Exercising the external monitoring of the return procedures, pursuant to Art. 23(6) of Law 3907/2011, the Ombudsman proceeded with on-site sampling inspections at the Pre-removal Centres of Tavros/Petrou Ralli Str. (7 June 2016), Corinth (13 April 2016, 7 December 2016) and Moria, Lesbos (27 January 2016, 9 May 2016, 12 October 2016, etc.), the holding cells of the Police Stations of Chios (26 January 2016), Lesbos (12, 19, 25 October 2016), Kos (12 July 2016), Samos (27 July 2016), as well as individual holding cells in the Police Stations of Ellinikon (9 March 2016), Patissia (18 August 2016), and others.

The Ombudsman's findings and recommendations regarding the detention conditions of third-country nationals are

presented in its annual report (*p.140 et seq., section "Prevention of Torture and Ill-Treatment"*), based on its competence as the National Mechanism for the Prevention of Torture and Inhuman or Degrading Treatment (Optional Protocol to the UN Convention Against Torture). However, the on-site inspections in 2016 confirm the observation the Ombudsman made in the previous year's annual report (*Annual Report 2015*, p. 130) on the unsuitability of the detention areas at the Aliens Division of Athens on Petrou Ralli Street in Tavros, with regards to the specifications of the Pre-removal Centres (Article 30 et seq. Law 3907/2011). It also notes that the increase of new arrivals at the hotspots (RICs, Reception and Identification Centres) has led to the replacement of detention with a restrictive condition to remain on the 5 islands where hotspots are located (see annual report³, "Refugee and Migrant Question").

As regards the correct implementation of the procedures of the Return Directive 2008/115/EC, from the on-site inspections, the reports to the Ombudsman, the discussions with detainees and the police officers regarding the difficulties they deal with in practice, the Ombudsman's main observations for 2016 are the following:

- Communication with the detainees during the on-site inspections revealed a significant problem, namely the provision of inadequate information regarding the duration of their detention and the general progress of the procedure.
- The differentiation in treatment as regards detention sites or the implementation of detention as an administrative measure according to the nationality of the third-country nationals to be returned also appears to be a cause for resentment and legitimate questions (e.g. in January 2016, in Chios, only Algerian, Moroccan and Tunisian nationals were detained). The Ombudsman pointed out that, in cases of expression of intent to lodge an asylum application, collective consideration of detainees for return as irregular migrants according to their nationality is not consistent with the obligation to assess each request for international protection individually. In this direction the Ombudsman had good cooperation with the Pre-removal Centre in Corinth, in the case of the statement of intent to lodge asylum applications by Pakistan citizens claiming to belong to the

³ https://www.synigoros.gr/?i=kdet.el.ehtisies_ektheseis_documents.416089, p 28 et seq. in Greek. English summary in <https://www.synigoros.gr/?i=stp.en.annualreporten.436032>

Ahmadiya religious minority (case 214862/2016).

- Moreover, as was also found in 2015, it appears that detention continued to be used in 2016 in cases where the return of the third-country national is not possible (case 213273/2016). Such continued detention is contrary to Article 30(5) of Law 3907/2011 and the corresponding Article 15 of the Return Directive, which stipulate that the detention ceases “*when it appears that a reasonable prospect of removal no longer exists for legal or other considerations*”.
- 2016 saw the frequent detention of irregularly arriving or staying third-country nationals for reasons of public order. The Ombudsman notes that it is necessary to give specific justification of the risk to public order, according to the *Conseil d'Etat* case law, in order to prevent phenomena relating to the survival of residual provisions of the law regarding administrative detention before the Return Directive. The latter introduced the objective goal of return as a legal basis for detention, when this is necessary because no alternative measures can be implemented, the third-country national is a flight risk, etc. (see Article 30 Law 3907/2011) (case 216583/2016). The Ombudsman also stressed that that the administrative detention of third-country nationals awaiting return must not be confused with the imposition of restrictive measures in the framework of penal procedures, for which the judicial authorities have sole competence (case 212773/2016). Extensive administrative detention of third-country nationals released from penitentiary institutions at Pre-removal Centres “for reasons of public order” is not consistent with the non-punitive nature of administrative detention according to European Court of Human Rights case law (case *Saadi v. UK*, 2008, App. No 13229/2003 para. 78).
- Given that under the Return Directive detention may not exceed 18 months (Art. 15(5-6), CJEU *Katzoev C-457/2009*, *Bashir Mohammed Ali Mahdi C-146/2014*), the Ombudsman expressed concern about the re-detention, after only a few months, of third-country nationals who had been released due to expiry of the 18-month period. The Ombudsman pointed out that, for the re-detention not to be considered a violation of the maximum duration of administrative detention, new substantive grounds must exist [ECtHR, case *John vs. Greece* (10.5.2007), appeal No. 199/2005], which constitute a significant change in the circumstances, according to the EU Return Handbook (para-

graph 14.5). According to the handbook, the new detention decision is also contingent on the condition that all other requirements for the imposition of detention of article 15 of the Return Directive are met (which include the inability to impose alternative measures, etc., pursuant to Article 30 of Law 3907/2011) (cases 209362, 212773/2016).

4. External monitoring of removal operations of third-country nationals

In 2015, after being informed of the schedule of removal operations according to the relevant order issued on 4 June 2015 by the Hellenic Police Chief to all Greek police divisions, the Ombudsman proceeded with inspections of - mainly - removal operations by land to Albania (see *Annual Report*, p. 129-130). By contrast, in 2016 the external monitoring focused mainly on air removals, and specifically on Joint European Operations coordinated by FRONTEX, as well as on re-admissions to Turkey from the islands of the eastern Aegean, by air or sea, following the EU-Turkey Statement of 18 March.

Joint European removal operations by air

The Ombudsman participated with its experts as monitors in 11 joint removal operations by air, to Pakistan and Georgia, coordinated by FRONTEX (55% of those in which the Hellenic Police participated). The relevant reports document the professionalism and courtesy of the police escorts and the improvement of certain conditions and procedures, such as the use of the amphitheatre of the Aliens Division of Attica instead of the underground parking garage as the assembly point for the third-country nationals awaiting return prior to departure from the airport and the use of individual plastic labels with their full names for marking their luggage. In many cases it was observed that sandwiches and water were distributed in a timely fashion to the third-country nationals awaiting return and a special area inside the airport that is not in regular use was selected as the point of departure (Satellite Terminal), which ensured: easy access to bathroom facilities, access to payphones, protection of the privacy of the third-country nationals to be returned and direct boarding of the aircraft via a jet bridge without requiring the use of a bus. Also, for the most part, the Ombudsman met with the necessary cooperation by the police authorities with regard to allowing access to

4. External monitoring of removals

its representatives to the detention sites of the third-country nationals to be returned. However, the above were not the case in all operations, and the Ombudsman stresses that the provision of food and water, payphone access and the protection of the privacy of the detainees must be standard procedure for every forced removal operation.

Among the negative points which are tending to become standard in the relevant procedures the following should be mentioned:

- the failure to provide third-country nationals with timely information (at least 24 hours in advance) about the removal operation and its particulars
- the lack of timely access to telephones in order to notify their families and
- the use of restraints, in most cases with metal handcuffs, as a standard procedure without individualised assessment of its necessity.

Readmission operations to Turkey

Members of the Greek Ombudsman's team also participated as monitors in 12 readmissions to Turkey (45% of the operations by sea or air from the Aegean islands that the Ombudsman was informed of), after the EU-Turkey Statement of 18 March 2016 and, specifically, from 18 May 2016 onwards.

In the framework not only of its specific mission of external monitoring of forced removal operations from Greece but also of its broader constitutional mission to protect human rights, the Ombudsman was able, through systematic participation in these operations, which were organised by the Hellenic Police and coordinated by FRONTEX, to identify certain failures and request their immediate resolution by the competent Authorities. The Ombudsman's recommendations focused mainly on issues such as:

- the provision of timely information to citizens of Syria and other third countries that they are about to be included in a readmission operation to Turkey
- the individualised assessment of the need to use restraints (handcuffs) and the review of the means of restraint used during the operation
- the provision of a medical examination card to persons who have recently arrived at a hotspot according to Law

3907/2011 or any other medical examination document certifying that they are fit to travel

- the completeness of the case file accompanying the detainees, regarding all necessary information in a language they understand, including the processing of applications for international protection (rejection of appeals, service of documents, etc.).
- the necessary participation of an Ombudsman representative in all removal operation briefing and debriefing meetings.

A less than complete file is a very disturbing symptom because it might conceal a disregard for the fundamental right for examination of a request for international protection during a period when the Asylum Service and the Appeals Authority are called upon to accelerate their procedures because the number of candidates for readmission or return depends on the examination of any asylum applications at first and second instance.

It must be noted that the Ombudsman examined a report of a five-member family of Syrian citizens who found themselves being detained in Adana on 21 October 2016 following their readmission from Kos by air, whereas the operation initially had as sole starting point the island of Lesbos. The Ombudsman launched an investigation seeking evidence on the written or other information provided to the Syrian citizens about their right to international protection, in a language they understood, as well as the fact that apparently their intention to lodge an asylum application had not been recorded in the relevant database at the Leros hotspot and in the list submitted to the Ombudsman as national monitoring mechanism of the readmission operation (case 220930/2016).

The UNHCR also investigated this matter, and it informed the Ombudsman also of a case where a large group of third-country citizens who were found at sea off the coast of Messinia and were detained for readmission did not have access to information about international protection from refoulement. Following a complaint submitted by an authorised attorney, the Ombudsman requested the suspension of the imminent readmission of Iraqi women, who, despite having apparently expressed their intention to lodge an application for asylum, were being held for readmission in Messinia, until the issues of their access to the asylum procedure and reunification with the male members of their family were resolved. The

Ombudsman received a positive response from the Hellenic Police (case 220665/2016).

However, the Administration's internal investigation on both the above cases does not appear to have been completed to date, and the Ombudsman has requested a specific time frame and to be informed of the results. Specifically, with a letter to the General Inspector of Public Administration the Ombudsman noted the failure – despite repeated reminders – to be kept informed about the progress of the Inspectorate's investigation and requested the findings to date and the expected time of completion, while underlining the obligation of all public services to cooperate with the Independent Authority.

In general, regarding the full exercise of the external monitoring, the Ombudsman addressed a letter to the heads of the competent ministries in October, requesting the cooperation of their services, in order for the Independent Authority to have full and timely information about all stages of the return/readmission procedure, so that it may form a comprehensive picture of the practices relating to the rights of information, family unity, protection regarding non-refoulement, etc., particularly during the pre-removal stage. The invitation met with the positive response of the Hellenic Police.

5. Regulation (EU) 2016/1624 as a point of reference regarding the development of the external monitoring of returns at national and European levels

The new European Regulation, approved in September, on the conversion of FRONTEX into a European Border and Coast Guard⁴ presents new challenges to the external monitoring of returns/readmissions, on both national and European levels.

⁴ <https://publications.europa.eu/en/publication-detail/-/publication/65db3442-7bcf-11e6-b076-01aa75ed71a1/language-en>

Specifically:

Regulation (EU) 2016/1624 aims at increasing the competence of FRONTEX in managing the external borders of the European Union, including the organisation, coordination and implementation of return operations. The broadening of the competence of this European agency is accompanied by guarantees that respect for fundamental rights, with emphasis on the right to international protection (non-refoulement) and the protection of vulnerable persons, children and unaccompanied minors, are ensured (Art. 34,35). Particular mention is also made of the use of means of restraint during return operations according to the proportionality principle (Art.28(3)).

However, the basic institutional guarantee of the Regulation is dual: it introduces the rule that every return operation must be carried out with the presence of a monitor at every phase of the operation, who shall submit a report to the executive director and the FRONTEX fundamental rights officer and to the competent national authorities of the Member-States involved (Art.28(6)), and requires FRONTEX to create a European pool of monitors of recognized experience, including expertise in issues of child protection. Member States will contribute to the pool by nominating monitors who will be required by FRONTEX to participate in European return operations (Art.29).

The Greek Ombudsman, as a national mechanism for the external monitoring of returns responded to the institutional challenge posed by the EU Regulation and already participates in the European pool of monitors with 8 members.

However, in a letter to the executive director of FRONTEX, the Ombudsman also pointed out that this action lacks common financing rules at a uniform level, with the result that the national mechanism of a Member State such as Greece is called upon to pay fees to its members of staff for participating even in national return operations by other countries where there is no national external monitoring mechanism in place, such as Germany.

Moreover this lack of rules is not confined to the funding aspect of the activity of the European pool of monitors, but primarily concerns the nature of the monitoring. The participation of monitors is mandatory for the national mechanism, and the Ombudsman notes the oddness of the fact that the action of its experts during an EU monitoring operation is subject to its own internal control but the relevant guidelines are not (Art. 29(4,5)). Nor is the Ombudsman informed of the

5. Regulation (EU)

content of the monitoring report of its participating member, which according to the Regulation is submitted to FRONTEX.

A basic concern of the workings of the European pool of monitors, therefore, appears to be the handing-over of the monitoring of forced returns by national, independent and external, monitoring mechanisms, to FRONTEX, as a single, both executive and monitoring, body for European returns.

The conclusion that external monitoring is being internalised, despite its explicit invocation by the Regulation (Art.28(6)) as the implementor of the guarantee of Article 8(6) of the Return Directive, is further reinforced by the Complaints Mechanism established by Article 72 of the Regulation. The Complaints Mechanism provides for the direct appeal of aggrieved parties both with regard to actions of its own officials during operations and for those of involved bodies of the Member States. In the latter case, the Member State's competent authority is charged by the FRONTEX fundamental rights officer with investigating internally and forwarding the results within a certain deadline to the European agency and in parallel the complaint is communicated by FRONTEX to the national monitoring human rights mechanism, in this case the Ombudsman (Art.72(4)). FRONTEX has already addressed the Ombudsman, as the national mechanism competent for the protection of fundamental rights, activating this provision of the Regulation (Article 72(4)) for a Complaints mechanism about incidents during returns/readmissions since 6 October 2016. Again, however, once the investigation of the Greek administrative authorities has been completed, and the relevant observations of the Ombudsman as an independent authority have been submitted, the evaluation of the results of the complaint are carried out by the competent officers belonging to FRONTEX and not by a third party, an independent EU authority⁵, something that appears to have escaped the attention and the relevant discussions on the draft Regulation in the European Parliament. The only relevant amendment⁶ pertained to the addition of a recommendation by the Committee that the Complaints Mechanism must be effective, must be subject to sanctions if fundamental rights have been

violated, and that FRONTEX must include an appraisal of the mechanism in its annual report.

The conclusion is that at the level of checks and balances of the European construct, the institutional guarantee for both the external investigation of complaints and the external monitoring of returns appears at the end of 2016 to be weakening in relation to European operations, where the deciding voice and role is not that of an independent authority but the one of the executive branch of the EU for border control. In a word, the exclusive and deciding voice on the monitoring has been given to the EU body being monitored. This places an even greater responsibility on the national external monitoring mechanisms for return operations, in the field of reference.

Conclusion

The Greek Ombudsman shall continue to monitor the return/readmission procedures in their ever-changing dynamics and shall contribute, with effective recommendations and in co-operation with all competent international and EU agencies, to safeguard in practice the fundamental rights of the third-country nationals involved. Also to ensure the necessary transparency in forced removal operations, which constitute a challenging by definition field of administrative action.

⁵ It has to be noted that the existence of a complaints form for returnees was recommended by the European Ombudsman, in order to increase the transparency of FRONTEX actions, without however providing for the investigation to be carried out by an independent authority/agency.

⁶ Amendment no. 37 of the LIBE Committee, 30.6.2016