

CoS 805/2018

For the following reasons, the Court rejected the administrative decision of regulatory character of the Director of Greek Asylum Service :

[...]

12. Art. 41 par 1 d iii of L. 4375/2016, which shall be interpreted in the light of following articles :

- **Art. 31 par 2 of the Geneva Convention,**
- **Art. 6, 18 in conjunction with Art. 52 par. 1 of the Charter** which provide that any restrictions of movement should be imposed only if they are necessary and genuinely meet objectives of general interest
- **Art. 7 par.1 of the Directive 2013/33/EU,**

delegates the Director of the Asylum Service to define the parts within the Greek territory, to which are imposed restrictions (and not a deprivation) of the freedom of movement of the international protection applicants which fall under the meaning of the “necessary restrictive measures” that could be applied to international protection applicants their status in the country is regularized .

Moreover, by means of Art. 41 par 1 d iii, the Decision of the Director of the Greek Asylum Service has a regulatory character and it is based upon the **Article 43 par of 2 the Greek Constitution** according to which decisions of regulatory character by means of law provisions are permitted to be issued by other administrative organs (such as the Director of the Greek Asylum Service) if they regulate specific issues or issues of regional/local interest of technical and detailed nature. Therefore, the in question delegation provided in Article 41 par 1 d iii which namely defines in a concrete way the area of the exercise of the regulatory competence of the Director of Asylum Service is in line with the aforementioned provision of the Greek Constitution (Article 43 par of 2) about delegated acts because the delegation in this case seeks to regulate a specific issue and this issue is defined therein.

Moreover, in order for the delegation which is enshrined in Art. 41 par 1 d iii to comply with the Constitution, it is not required that specific criteria that have to be fulfilled for the purposes of the regulation of this issue should be enlisted in it or by means of reference to another provision, under the condition that the issued decision of regulatory character is subject to the objectives of public interest and the principle of proportionality.

The CoS accepts that the absence of such specific criteria in the delegation of Art. 41 of Law 4375/2016 is explained by the nature of the issue at stake, whose regulation pre-conditions the assessment of factors related to the public interest which are uncertain and unforeseeable. Moreover, in **Art. 7 par.1 2013/13/EU** are not set any criteria, which should be taken into account for the introduction of restrictions of freedom movement of asylum seekers in the area assigned to them by the Member State. However, in **par. 2 of Art. 7 2013/13/EU** is explicitly provided that the host Member State may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection. To this, the provision of **Art. 5 of the Greek Constitution** does not prohibit the establishment of restrictions of freedom of movement of foreigners who seek international protection.

Additionally, the issue for the regulation of which the delegation to the Director of the Asylum Service is provided in Art. 41 par 1 d iii, namely the determination of the special areas within the country in which is imposed the restriction of movement of the international protection applicants, is a more specific one than the main provision in Art. 41 par 1 d iii.

13. For this reason, the regulation of this specific issue is correctly delegated to the Director of the Asylum Service in line with Art. 43 par. 2 of the Greek Constitution. Thus, the respective plea that Art. 41 par. 1 d iii is against Art. 43 par. 2 of the Greek Constitution should be rejected as unfounded.

14. It is not required that the acts of regulatory character such as the one under question must be justified by the administration but they should be nonetheless assessed in terms of whether they lay within the limits of the law on the ground of which they have been issued.

For this assessment by the CoS are examined the legal grounds which justified the issuance of the Decision by the Director of the Asylum Service.

For the purposes of this assessment are taken into account, among others, the documents of the file, those elements of the file, which according to the administration, deem the issuance of the decision of regulatory character necessary. These elements should either be provided explicitly in the legal provision that refers to the delegation for the issuance of the Decision, or should be in line with the spirit and the objective of this legal provision.

15. Thus, by means of the contested Decision, restriction of movement of asylum seekers was imposed. This restriction may **not be prohibited by the Constitution or by any other provision with overriding legislative power** (meaning EU law), but it is necessary that the reasons, for which this measure was imposed, can be deduced from the preparatory work for the issuance of this administrative Decision. Otherwise, it cannot be ascertained whether this measure was indeed necessary (Art. 31 par. 2 of the Geneva Convention).

Moreover, the challenged restriction of freedom movement has as a consequence that these persons were not distributed across the entire Greek territory but on the contrary they are unequally gathered on only some of its regions, which leads to a significant burden for these regions as well as their degradation in comparison with other parts of the territory. During a significant financial crisis that the country confronts, these regions must manage in their existing capacity the entry and stay of an essential number of international protection applicants. This results in a serious risk of generating social unrest with further consequences on the public order and the economy of those regions, which are also touristic destinations.

However, in this case, the reasons, which permitted the imposition of the restriction, cannot be deduced neither from the text of the contested Decision nor from the elements included in the preamble of this decision and thus it is not possible to examine whether this decision lays within the limits of Art. 41 par. 1 d iii of the L. 4375/2016, which should be interpreted in the light of Art 31 par 2 of the Geneva

Convention that allows the establishment of the necessary only restrictive measures with regards to international protection applicants.

Moreover, the fact that the contested decision mentions that the restriction must apply to the international protection applicants who enter the Greek territory from 20th March 2016 does not lead in a safe and indisputable way, as it is required so that the judicial review is made possible, to the conclusion that the legal ground of the contested decision is the EU-Turkey Statement which is neither recalled in the preamble of the decision nor in other elements of the file precedent to the issuance of the decision.

Even under the assumption that the challenged restriction had indeed been taken for the needs of the implementation of the EU-Turkey Statement, it cannot be concluded whether the Director of the Asylum Service was given the discretion by means of any clause of the Statement to choose which should be the necessary restrictive measures or, conversely, if she (the Director) had the obligation by means of any clause of the Statement to impose the specific challenged restrictive measure.

The aforementioned insufficiencies of the contested decision are not outweighed by the claims of the administration as these were submitted by the Ministry of Migration Policy through the Deputy Head of the Asylum Service's Legal Service in the document with No 4340/26-2-2018.

In view of the above facts, serious and imperative reasons of public interest and migration policy cannot be deduced from the Decision, which could justify as necessary the imposition of the restriction of the freedom of movement of international protection applicants who enter the Greek territory after the 20th March 2016 through these specific islands (Lesvos, Rhodos, Samos, Kos, Leros, Chios). Therefore, the Court is not able to assess whether the Decision lays within the limits of Art. 41 par 1 d iii of L. 4375/2016, since the Decision does not set out legal grounds for the imposition of the restriction of asylum seekers' freedom movement. For this reason, the challenged decision must be annulled.

According to the three diverging opinions (namely of the President, of the councilor/advisor and of a member of judicial board) the challenged decision is lawful because on the one hand, the restriction of freedom of movement in the aforementioned islands is imposed for a specified period of time which is necessary for the examination of the asylum claim of international protection applicants, namely in line with Art. 60 L. 4375/2016), and on the other hand, this restriction applies to the persons arriving in the Greek territory after the 20th March 2016, the date at which began the implementation of the EU-Turkey Statement. Thus, it is concluded that the contested measure was taken for the needs of the implementation of the content of the EU-Turkey Statement.

To this, according to the above three minority opinions, the issuance of the Decision is justified also by the document with No 4340/26-2-2016 of the Ministry of Migration Policy submitted to the CoS. On the basis of this document, the restriction imposed by means of that Decision is introduced for the purposes of public interest, and aims at the effective and appropriate examination of the international protection claims, at the management and the reasonable allocation of the number of

international protection applicants across the Greek territory and, lastly, at the implementation of the EU-Turkey Statement. With regards to the implementation of the Statement, the practice applied until today has shown that the applicants who are transferred to the mainland and do not remain on the Aegean islands are not eligible for return by the Turkish authorities.

18. The Court has taken into consideration: a) the reason for annulment of the contested decision, b) the increased number of asylum applicants, who remain on the islands of Lesbos, Rhodos, Samos, Kos, Leros and Chios and c) the difficulties which the administration will have to confront in case the annulment of the decision had retroactive effects. Thus, it orders that in this particular case are fulfilled the reasons of general interest which according to Art. 50 par 3 (b) of presidential decree 18/1989 provided that the effects of the ruling will not be retroactive, meaning it does not apply to people who arrived on the islands prior to the ruling but to people arriving on the islands after its publication.

Translated by Evita Armbouti