

## CASE REPORT \_\_\_\_\_

### **EASO's involvement in Greek Hotspots exceeds the agency's competence and disregards fundamental rights**

Since the introduction of the EU-Turkey statement, fast-track joint asylum procedures were introduced in the Hotspots on the Eastern Aegean Islands. Asylum-seekers must first establish that Turkey would not constitute a safe country for them. Only then is their asylum claim examined. For this first stage – the admissibility procedure – the European Asylum Support Office (EASO) has been conducting interviews. During these interviews, EASO agents can also assess whether applicants should be exempted from the admissibility procedure and transferred out of the Hotspots due to vulnerability. EASO is an EU agency initially established to support EU Member States at their request in assessing and providing international protection. However, the new operating plans broadened EASO's role, conferring it illegitimate influence and de facto decision-making powers, although these are expressly excluded from its mandate under EU law. EASO's significant influence within the joint procedures in the Hotspots is all the more concerning given the persistence of systematic failures in the conduct of interviews by EASO's officials. In many cases, these have proven to disregard the agency's very own guidelines and safeguards.

In light of the lacks of both transparency and accountability within which EASO operates, ECCHR submitted a complaint to the European Ombudsperson. This led to the opening of an inquiry in April 2017. In parallel, ECCHR requested access to several EASO documents and thereby obtained the disclosure of key information on the internal functioning of the agency. The Ombudsperson issued a decision in July 2018, acknowledging serious concerns as to the fairness of admissibility interviews and the extent of EASO's involvement in assessing asylum applications. Nevertheless, the Ombudsperson decided to close the inquiry. ECCHR submitted a request for review against this decision in September 2018. In her response in April 2019, the Ombudsperson upheld her previous decision and refused to use her mandate to address the blatant failures she acknowledged herself. This final decision perpetuates the lack of accountability on EASO's actions specifically and EU agencies in general.

## **Context: The EU-Turkey statement and inadmissibility procedures in Greek Hotspots**

According to the [EU-Turkey statement](#), “[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey.” As a consequence, the administrative procedures in the Hotspots were adjusted, significantly increasing the hardship faced by those who are subjected to them. New arrivals are not allowed to leave the islands before a decision on the admissibility of their cases is taken. The admissibility procedure prevents access to international protection by introducing an additional administrative step preceding the substantive examination of asylum applications. If Turkey is considered a safe third country or first country of asylum, claims are rejected as inadmissible and the person concerned can be returned to Turkey. For the authorities, the (in)admissibility procedures form a cornerstone of the EU-Turkey statement. However, their enforcement endangers the fundamental rights of those who survive the maritime crossing from Turkey to the Greek Islands, because it bars access to protection and the possibility to enter the asylum system.

## **Implementation: The involvement of the European Asylum Support Office (EASO)**

The interviews as to the admissibility of international protection applications in the Greek Hotspots are conducted by the European Asylum Support Office. EASO is an EU agency established in 2010 with a mandate of support to Member States in providing international protection. EASO may be involved when Member States are considered as facing exceptional difficulties to maintain their asylum systems. Thus, in order to assist with the “extraordinary measures” stipulated under the EU-Turkey statement, the agency deployed numerous experts to the Greek Hotspots. As outlined in [EASO’s Special Operating Plan to Greece](#) in the section concerning support with the implementation of the EU-Turkey statement (EASO Activity HEL 4), EASO’s deliverables in the Hotspots include “admissibility interviews conducted, opinions drafted and decisions recommended.”

In effect, EASO officers conduct interviews and recommend a decision to the Greek Asylum Service. EASO’s concluding remarks specify whether the safe third country concept may be applied in the particular case, and thereby provide the ground on which the application can be rejected as inadmissible. It is regular practice for the Greek Asylum Service to rely on EASO’s record without posing any direct questions to the applicant. Under those circumstances, the Greek Asylum Service’s decision is bound to heavily rely not only on EASO’s decision-making as to the conduct of the interview itself, but also on EASO’s final recommendation on admissibility. Therefore, EASO officers exercise de facto power on decisions in relation to applications for international protection by conducting admissibility interviews and making recommendations.

Further, the conduct of interviews by EASO officials fails to respect core standards of fairness. This is the conclusion of ECCHR’s analysis of a series of admissibility interviews conducted on the Greek Islands by EASO officers after 20 March 2016. These interviews did not permit a fair assessment of individual cases and lacked a critical approach as to whether Turkey qualified as a safe third country for the person concerned. In particular, EASO’s influence and failures manifested in the lack of a thorough investigation of vulnerability. Concretely, EASO officers often stuck to a rigid questionnaire without giving the applicant room to elaborate on their personal history of harm or persecution. Interviews consisted of an overwhelming number of closed questions, the inappropriate use of suggestive questions, and were marked by a failure to ask follow-up questions concerning vulnerability. Moreover, EASO officers failed to give applicants the opportunity to clarify inconsistencies between their statements and information from other sources. Yet, these inconsistencies were systematically highlighted in EASO’s concluding remarks to refute the applicant’s account. In the most severe cases, the concluding remarks did not include crucial information on vulnerability expressly raised by the applicant. In sum, the interviews consistently failed to consider the individual experiences and vulnerabilities of the applicants. This is particularly critical, given that these vulnerabilities could significantly impact the assessment of Turkey as a safe third country and corresponding exemptions from inadmissibility. Persons recognized as vulnerable are not forced to stay in the Hotspots and instead allowed to transfer to mainland Greece.

## **Legal framework: Limited Competences and Applicable Safeguards**

Article 41 of the Charter of Fundamental Rights (CFR) stipulates the Right to Good Administration, which includes the right of every person to have a fair procedure and to be heard before any measure with potentially adverse effects is taken against them. EASO’s influence on inadmissibility decisions constitutes a double violation of Article 41 CFR.

- a) EASO’s limited mandate under EU law: EASO’s involvement in the joint processing of asylum claims stands outside the scope of the EASO Regulation

Firstly, EASO exceeds its legal competences and acts without a basis in law, in violation of Article 4 of the European Code of Good Administrative Behaviour. Article 4 requires EU officials to act according to EU legislation, with particular emphasis on decisions which affect the rights and interests of individuals. However, EASO’s involvement in the decision-making process of applications for international protection has no legal basis in the applicable [EU Regulation No 439/2010](#) establishing the agency (thereafter “the EASO Regulation”).

Indeed, the EASO Regulation expressly limits the agency’s competences in this area: “The Support Office shall have no direct or indirect powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection” (Preamble §14 and Article 2(6)). Through the conduct of admissibility interviews and vulnerability assessments, EASO exercises at the very least indirect powers on the decision-

making process at the admissibility stage, in violation of its own founding regulation and mandate.

Further, the EASO Regulation expressly requires a request by the Member State concerned as a precondition for the deployment of EASO's Asylum Support Teams. However, the deployment on the Eastern Aegean Islands appears to be based on operating plans drafted for the implementation of European Council decisions around the EU-Turkey statement, rather than on a request by Greece. This implies that the agency's involvement is not grounded on the EASO Regulation.

b) **The Right to a Fair Hearing: EASO's systematic failures in the conduct of interviews violate the agency's very own guidelines and safeguards**

Secondly, EASO's conduct of interviews is in violation of the right to a fair hearing as guaranteed under Article 41(2a) CFR. Although fair hearing safeguards are part of EASO's own guidelines, those are disregarded by the agency in its conduct of admissibility interviews. The [EASO Practical Guide for Personal Interviews](#) emphasizes the obligation to maintain an atmosphere of trust (§2.1), to provide information on the aim and frame of the interview (§2.4), to use appropriate interview techniques and types of questions (§3.5), to provide an opportunity to clarify inconsistencies (§3.6) and to gather information about past persecution or serious harm (§3.6). However, EASO's conduct of interviews systematically disregards these obligations, despite the fact that the denial of a fair hearing during those interviews may expose applicants to dangerous returns to Turkey and hence to *refoulement*.

**Demanding accountability: ECCHR's complaint to the European Ombudsperson**

Legal avenues to hold EU agencies to account for their actions are limited. However, as an EU agency, EASO can be investigated for maladministration under the mandate of the European Ombudsperson. This institution was established as an independent and impartial authority to hold the EU administration accountable for failures to respect fundamental rights and legal principles. ECCHR used this instrument in order to raise strong concerns as to the legality and legitimacy of EASO's actions in implementing the EU-Turkey statement.

In March 2017, ECCHR contacted EASO to complain about the agency's maladministration in violation of EU law. In its reply, EASO conceded that its competence is limited to a supportive role and does not include decision-making powers. Notably, EASO highlighted that "in practice decisions [by the Greek Asylum Service] tend to be in line with the opinion of Member States' experts deployed by EASO." Nevertheless, EASO claimed to have no influence on the decision-making concerning individual applications for international protection and did not admit any shortcomings in its conduct of interviews.

In April 2017, ECCHR asked the European Ombudsman to open an inquiry as to EASO's involvement in inadmissibility decisions. ECCHR requested the suspension of EASO's conduct of admissibility interviews and the limitation of its activities to those compatible with EU law. The complaint raises that EASO's role in the decision-making process amounts to maladministration: Not only does EASO's involvement in the procedure lie outside of its legal competence under EU law; EASO also violates its own guidelines in the way it conducts the interviews, thus depriving applicants for international protection of a fair hearing.

The European Ombudsman decided to open an inquiry into [EASO's involvement in applications for international protection in the Hotspots in Greece](#) in July 2017. The Ombudsman asked EASO to provide a written response to the issues raised. ECCHR received this response in January 2018. EASO failed to address the legal concerns raised as to the agency's limited mandate under EU law. Although EASO acknowledged that its conduct of interviews required improvement over time, the agency avoided expressly admitting to any misconduct. Strikingly, EASO informed the Ombudsman that it kept no record of its conduct of interviews and ensuing concluding remarks. This concession confirms that there is ground for serious concerns as to the lack of accountability and transparency in the agency's past, present and future operations.

ECCHR filed a second submission to the European Ombudsman in January 2018. In light of EASO's evasive response to the issues raised, ECCHR provided further factual and legal arguments and evidence to substantiate the initial complaint. ECCHR was supported by the non-profit organization [HIAS Greece](#). HIAS lawyers authored an expert opinion drawing on their experience on Lesbos and their analysis of a second series of EASO-conducted interviews. The report criticizes the generalized application of the safe third country concept in inadmissibility procedures, emphasizes the decisive importance of the vulnerability concept and exposes EASO's ongoing failure to adequately consider vulnerability indicators. In this second submission, ECCHR was also able to further ground its complaint on its careful analysis of disclosed key EASO documents, as detailed in the next section.

## **Demanding transparency: Access to documents requests to EASO**

Based on [EU Regulation 1049/2001](#) on public access to documents issued by EU institutions, ECCHR made several access to documents requests to EASO in the course of 2017. The purpose of these requests was to counteract the lack of transparency around the agency's conduct of admissibility interviews and vulnerability assessments. Some of the documents disclosed confirmed the significance of the agency's influence on decisions made by the Greek Asylum Service. These documents also point to a lack of fairness in the conduct of interviews, in particular concerning the inadequate examination of individual cases and potential vulnerabilities.

Crucially, the documents disclosed by EASO reveal a procedural framework within which the assessment of vulnerability – despite its utmost importance – constitutes merely an optional part of the admissibility interview (cf. Interview Transcript Templates). This is not the only discretionary power which EASO officials exercise in relation to vulnerability assessments. The whole vulnerability procedure is grounded on such discretions, from the initial identification of vulnerability, to the decision to refer the case to a vulnerability expert, to the assessment of vulnerability itself, up until the drafting of a concluding recommendation to the Greek Asylum Service. Moreover, early internal guidelines and templates are clearly lacking both in giving instructions to EASO officials on vulnerability assessments and in providing applicants with the necessary information about this important step at the beginning of the admissibility interview.

Thus, the documents obtained from EASO by ECCHR confirm the concerns raised in its complaint and as such were provided to the European Ombudsman as part of ECCHR's second submission in January 2018.

## **Lack of Action: European Ombudsman refuses to hold EASO to account**

The European Ombudsman issued a [decision](#) in July 2018. In this decision, the Ombudsman acknowledges both points raised in ECCHR's complaint and voices "genuine concerns about the extent of the involvement of EASO personnel in assessing asylum applications in the Greek hotspots and about the quality of, and procedural fairness in, the conduct of admissibility interviews." Nevertheless, the inquiry was closed without making a clear finding on past maladministration and without any concrete recommendations to address the ongoing misconduct during interviews with asylum-seekers in the Greek Hotspots.

However, EASO must be held to account for the blatant failures in its work in the Greek Hotspots. Therefore, ECCHR submitted a Request for Review in early September 2018 (pursuant to Article 10 of the European Ombudsman's [Implementing Provisions](#) and Article 1 of the [Rules on Requests for Review](#)). The request highlights that holding an EU agency accountable on issues of legality and fundamental rights falls squarely within the mandate of the European Ombudsman.

None of the reasons provided justify the decision to close the inquiry. First, the European Ombudsman emphasizes that ultimate authority for decisions rests with Greek authorities and that any shortcomings are best addressed with them. This assertion is legally irrelevant and factually flawed. ECCHR's complaint explicitly and exclusively addresses maladministration by EASO as an EU agency, for which the appropriate forum is the European Ombudsman. The claim that any shortcomings in the interview process are best addressed in the course of individual appeals in Greek courts also fails to take into account the legal situation in Greece (cf. recent jurisprudence from the [Greek Council of State](#)) and the significant practical obstacles

hindering access to remedies in national proceedings for applicants for international protection in Greek Hotspots.

Second, the European Ombudsperson points to possible future amendments to EASO's founding Regulation to provide a basis for EASO's activities. However, the applicable legal framework are the rules currently in place and not a potential future amendment. Moreover, the proposed recast of the current EASO Regulation to establish a new European Union Agency for Asylum (EUAA) remains unclear both as to its substance and entry into force. On the question of competence, the Ombudsperson states that "EASO is being encouraged politically to act in a way which is, arguably, not in line with its existing statutory role" as defined in Article 2(6) of EASO's founding Regulation. However, political pressure on EASO to act *ultra vires* cannot be an argument against an explicit decision on maladministration. To the contrary, it is precisely because the agency deferred to such political pressure and ignored criticism for a considerably long period of time that the institution of the European Ombudsperson is crucial as an arbiter of accountability.

However, in April 2019 the Ombudsperson rejected ECCHR's request for review. Strikingly, her response not only reiterated the concerns as to the fairness of interviews and the extent of EASO's involvement. It also acknowledged the practical obstacles to remedying EASO's failures through individual appeals in national proceedings under Greek law. Nevertheless, she confirmed her previous conclusions, again arguing that shortcomings are best addressed with Greek authorities. The Ombudsperson invoked her wide discretion in handling complaints for maladministration. Instead of using the options at her disposal to address the ongoing violations of fundamental rights in the Greek Hotspots, with this final decision the Ombudsperson perpetuates the lack of accountability when it comes to the activities of EU agencies.

## TABLE OF DOCUMENTS DISCLOSED BY EASO

### **A. EASO Standard Operating Procedures for the implementation of the EU-Turkey statement**

- 1) Standard Operating Procedures (“Instructions for managing asylum applications in the context of the pilot project of the Asylum Service-EASO for the implementation of the EU-Turkey Agreement of 18 March 2016”), 7 April 2016
- 2) Standard Operating Procedures (“Instructions for managing asylum applications in the context of the project of the Asylum Service-EASO for the implementation of the EU Turkey Agreement of 18 March 2016”), 29 July 2016
- 3) Standard Operating Procedures (“Standard Operating Procedures for the implementation of the Border asylum procedures in the context of the EU Turkey Statement 18/03/2016”), 31 March 2017
- 4) Standard Operating Procedures (“Standard Operating Procedures for the implementation of the Border asylum procedures in the context of the EU Turkey Statement 18/03/2016”), 30 June 2017

### **B. Forms and Templates for EASO’s admissibility interviews**

- 5) Interview Transcript Template used for admissibility interviews and Concluding Remarks of EASO Expert concerning admissibility, 3 April 2016
- 6) Interview Transcript Template used for admissibility interviews, undated
- 7) Interview Transcript Template used for admissibility and eligibility interviews, 30 March 2017
- 8) Interview Transcript Template used for admissibility and eligibility interviews, 12 June 2017
- 9) Concluding Remarks Template of EASO Expert concerning the admissibility of the application, undated
- 10) Concluding Remarks Template of EASO Expert concerning the admissibility of the application, 30 January 2017

### **C. Vulnerability Reports**

- 11) Vulnerability Identification Report (“Annex I - Report on initial identification of persons with special needs in the context of border procedures in Greece”), used between 18 March 2016 and 11 June 2017
- 12) Vulnerability Identification Report (“Annex I - Report on initial identification of persons with special needs in the context of border procedures in Greece”), 12 June 2017
- 13) Vulnerability Assessment Report (“Annex II - Report on ‘second line’ assessment of special needs in the context of border procedures in Greece), used between 18 March 2016 and 11 June 2017

14) Vulnerability Assessment Report (“Annex II - Report on ‘second line’ assessment of special needs in the context of border procedures in Greece), undated

## **D. Best Interests Assessments**

15) Best Interests Assessment in the context of border procedures in Greece, 30 March 2017

16) Best Interests Assessment in the context of border procedures in Greece, undated

## **E. Miscellaneous**

17) Proof of notification, art. 60, par. 4, undated

18) Appeal and proof of submission, art. 60, par. 4, undated

19) Code of Conduct for persons participating in EASO operational support activities, October 2016

20) Code of Conduct and Confidentiality Agreement for persons participating in EASO operational support activities, undated

## **G. EASO Training and Guidance on Admissibility Interviews**

21) EASO Training Curriculum, Handbook on the Inclusion module, March 2014

22) EASO Training Curriculum – Handbook on the Interview Techniques, December 2014

23) Quality Feedback, Guidance, v.2, January 2017 [REDACTED]

24) Operational Training for EASO Experts, Border Procedures – Country of Origin Information (COI), 27 September 2017

## **H. EASO Training and Guidance on Vulnerability Assessment**

25) Risk Factors, Handout, undated

26) Vulnerability Guidance Note for EASO Experts, June 2017 [REDACTED]

27) How to establish rapport with an applicant with special needs, undated

28) Tips on how to manage difficult situations, undated

## **I. Documents relating to Country of Origin Information used by EASO**

29) Country Background Info (Version 1), 22 February 2016, Algeria, Morocco, Tunisia

30) Country Background Info (Version 1), 22 February 2016, Côte d'Ivoire, Ghana

31) Country Background Info (Version 1), 24 February 2017, Haiti, Sierra Leone, Togo

32) Country Background Info (Version 1), 24 February 2017, Bangladesh, Dominican Republic, Gambia, Senegal

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**Correct as of: April 2019**

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