

“Turkey as a safe third country (?) - Remarks on the Agreement EU – Turkey”

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*3d Asylum Independent Appeal
Committee*

One of the most recent examples of the application of the concept of safe third country is the return of irregular migrants from Greece to Turkey within in the framework of the agreement between the Heads of State or Government of the European Union and Turkey set out in the EU-Turkey Statement of 18 March 2016.

According to this agreement 1) All new irregular migrants crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey; 2) For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled to the EU; 3) Turkey will take any necessary measures to prevent new sea or land routes for irregular migration opening from Turkey to the EU; 4) Once irregular crossings between Turkey and the EU are ending or have been substantially reduced, a Voluntary Humanitarian Admission Scheme will be activated; 5) The fulfilment of the visa liberalisation roadmap will be accelerated with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016. Turkey will take all the necessary steps to fulfil the remaining requirements; 6) The EU will, in close cooperation with Turkey, further speed up the disbursement of the initially allocated €3 billion under the Facility for Refugees in Turkey. Once these resources are about to be used in full, the EU will mobilise additional funding for the Facility up to an additional €3 billion to the end of 2018; 7) The EU and

Turkey welcomed the ongoing work on the upgrading of the Customs Union. 8) The accession process will be re-energised, with Chapter 33 to be opened during the Dutch Presidency of the Council of the European Union and preparatory work on the opening of other chapters to continue at an accelerated pace; 9) The EU and Turkey will work to improve humanitarian conditions inside Syria.

On what legal basis will asylum seekers be returned from the Greek islands to Turkey? It was agreed that people who apply for asylum in Greece will have their applications treated on a case by case basis, in line with EU and international law requirements and the principle of non-refoulement. There will be individual interviews, individual assessments and rights of appeal. There will be no blanket and no automatic returns of asylum seekers. Specifically, the EU asylum rules allow Member States in certain clearly defined circumstances to declare an application “inadmissible”, that is to say, to reject the application without examining the substance. There are two legal possibilities that could be envisaged for declaring asylum applications inadmissible, in relation to Turkey: 1) first country of asylum (Article 35 of the Asylum Procedures Directive), 2) safe third country (Article 38 of the Asylum Procedures Directive): where the person has not already received protection in the third country but the third country can guarantee effective access to protection to the readmitted person. Specifically according to art 56 of the Greek law a) The applicant's life and liberty are not threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion; b) This country respects the principle of non-refoulement, in accordance with the Refugee Convention’, c) The applicant faces no risk of suffering serious harm according to Article 15 PD 141/2013, transposing the recast Qualification Directive; d) The country prohibits the removal of an applicant to a country where he or she risks to be subject to torture or cruel, inhuman or degrading treatment or punishment, as defined in international law; e) The possibility to apply for refugee status exists and, if the applicant is recognised as a refugee, to receive protection in accordance with the Refugee Convention; and f) The applicant has a connection with that country, under which it would be reasonable for the applicant to move to it.

Immediately after the conclusion of the agreement, the *Greek Asylum Service*, an autonomous institution in our country that is in charge of the examination of international protection claims at the first instance, started the application of the concept in the context of the Fast-Track Border Procedure under Article 60(4) L 4375/2016. By the end 2016, only applications lodged by Syrians national were examined under the safe third country concept while, in December 2016, fast-track admissibility procedure, including under the safe third country concept, started for nationalities with a recognition rate over 25%. There is no list of safe third countries in Greece. On August 2016, the first appeals against the admissibility decisions were brought before the newly established at the time *Independent Appeals Committees*, a second instance body composed of 2 administrative Judges and a member indicated by the UNCHR.

The applicants challenged the first instance decisions on the basis that none of the conditions of Art. 38 APD (Art. 56 G.L.) are met in their case and therefore Turkey is not a safe third country for them. The Committee's judgments were issued, and were severely criticized by international and national NGOs and legal experts. Appeals were lodged immediately against them before the Supreme Administrative Court. The Fourth Section of the Council of the State (panel of 7) after expressing its opinion on some aspects of the subject, referred the case to the Council of State Plenary, given the importance of the case. The Council of State Plenary a few days ago, on 22 September 2017, issued its long – awaited decisions.

Facts

The applicant, a Syrian national submitted an application requesting refugee status and asylum in Greece. He stated that a) he left Syria on 15 April 2016, passed the border with Turkey on foot, with the help of a trafficker without facing any problems, he stayed in Turkey for almost 1 month and arrived in Greece on 11 May 2016, b) he left Turkey because he was oppressed by the Turks for reasons of nationality. He specifically stated that since he couldn't speak the Turkish language, he could not study there, he did not have a future and even at the supermarkets or restaurants foreigners are

not being served unless they speak Turkish. The interviewer asked him to specify whether he faced another problem in Turkey and why he is unwilling to return there. The applicant answered that he did not face another problem beside the language and that he cannot return there not because he is afraid of something personally but because there is no life and future for him in Turkey.

The reasoning

The core questions were a) what is the meaning of “in accordance with the GC”, b) what did the legislator wanted by using the term “the possibility to apply for refugee status exists and, if the applicant is recognised as a refugee, to receive protection in accordance with the Refugee Convention” and c) when a connection exists.

The Committee noted that:

- a) In order to determine whether the third country is safe, the national authorities should carry out **a control conducted in two stages**. In the first stage, they should investigate whether, in view of the general social, legal and political circumstances of the third country, the conditions of Art. 38 are fulfilled and consequently the third country can be considered safe in general, having for that purpose a general burden of proof. Should the national authorities have established that the third country is not safe in general, then there is no need to examine the second stage. But since the safety of the country has been established, at a general level, and under the obvious condition that the applicant claims that the third country is not safe to him, having for this purpose a special burden of proof, the national authorities proceed to the second stage. And in case when after the individual assessment of the applicant’s claims they consider that there are valid reasons for the country not to be safe under the specific circumstances for the applicant the characterization of the country as safe can no longer be valid, so far as he is concerned.

- b) The third country **is not required to have ratified the Geneva Convention (and without geographical limitation)**, but it suffices if in that country the refugee protection is equivalent to the protection accorded by the Geneva Convention. This is particularly apparent from a comparison of Article 38 of Directive 2013/32 / EU (which transposed Article 56 of I. 4375/2016), which does not provide that in order for a third country to be considered as safe the latter must have ratified the Geneva Convention, the provisions of Article 39 of the Directive on the "concept of European safe third country" which explicitly states that a European country may be considered a safe third country for the purposes of paragraph 1 only if, inter alia, has ratified and observes the provisions of the Geneva Convention without any geographical limitations.
- c) A country cannot be a priori considered as not being a safe third country only on the ground that despite being a party to the ECHR, the country lawfully **derogates** from the obligations set out in the convention, in accordance with the restrictions under Art. 15 of the Convention.
- d) From the wording of Art. 38, it is concluded that the legislature intended to ensure that the applicant will have **access to an asylum system** which, regardless of its individual characteristics, will eventually provide him protection equivalent and consistent with that of the GC but without requiring that the protection offered should be in substance identical to that of the Convention. Because if the legislature wanted something like that, he would have expressly set it or he would refer to specific articles of the GC, as in Art. 9 of the Dir. 2011/95/EU, where, in order to determine which act constitutes persecution, the legislature made a specific reference to the particular Article of the Convention and the definition therein contained.

e) The IAC noted that the Greek legislature failed to lay down in national the rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country. Having in mind the duty to interpret national legislation in a manner consistent with the EU law and the fact that the term “connection” cannot be interpreted in a way so as to make it practically impossible to apply the concept of 'safe third country' or in other words a country which is considered as safe third because it fulfills the criteria laid down in Article 38 by the EU legislator, cannot ultimately be rendered unsafe because of the interpretation given to those notions, the IAC concluded that a passage of the applicant from a third country may, in conjunction with the specific circumstances of the applicant (such as, inter alia, the residence time in this) and the general conditions in that country (such as, inter alia, the prevailing general moral, social and cultural beliefs which do not contradict significantly to the cultural and social consciousness of the applicant) be considered as a connection of the applicant with the third country, under which it would be objectively reasonable for him to travel to that country.

In the light of the above mentioned and bearing in mind that

a) the legal regime in Turkey expressly provides that returnees Syrians are protected from refoulement, automatically enjoy the protection of "temporary protection" status, have legal right of residence while enjoying free access to basic health and education services and can freely work under arrangements similar to Turkish citizens, without suffering any discrimination against them,

b) a comparative overview of the available information sources shows that Turkey does not apply a systematic policy of deportations,

c) the European Commission in its May 2016 report attests that in some cases, delays occur on cases of persons entering Turkey and seeking protection, coming from Iraq and Syria, but in such cases, ultimately, taking

into consideration the safety and health status of these people, permission was given to them to cross the border and considering

a) the content of the 12.04.2016 and 29.05.2016 Letters of Turkey, in which enacted laws are mentioned and also the Turkish government's intention to fully implement what they have agreed to, b) that those letters were given from the Ambassador of the Permanent Mission of Turkey to the EU, who is expressing the political will of Turkey's government, which is party to the European Convention on Human Rights, have specific content which is confirmed, in the current period, from reliable sources such as the European Commission (see. from the 05.05.2016 and 29.07.2016 related letters) and the UNCHR and other available sources for Turkey and since access is provided for the UNCHR to monitor the practices of the country in relation to international protection procedures,

c) that the abovementioned diplomatic assurances of Turkey, fulfill the conditions and are being presented as reliable, having special probative value,

the IAC decided that the legislative framework of protection in Turkey, meets, at the present stage of examination, the conditions in order to determine that, in principle, provides protection equivalent to the protection provided in the Geneva Convention. Moreover, since the applicant failed to claim any reason from which it can be derived that he has a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, his appeal was dismissed.

A few days ago, on 22 September 2017, the Council of State Plenary has issued the long awaited judgments No 2347 and 2348/2017 on the STC. The Supreme Administrative Court has rejected the appeal declaring Turkey as a STC for the applicant.

So a long period of uncertainty is finally over. But the refugee crisis is not.