

THE APPLICATION OF THE EU-TURKEY AGREEMENT: A CRITICAL ANALYSIS OF THE DECISIONS OF THE GREEK APPEALS COMMITTEES

Mariana Gkliati*

The article discusses the first case law issued on the EU-Turkey deal that authoritatively answers the question whether Turkey constitutes a safe third country for refugees. In 390 out of 393 decisions Greek Asylum Appeals Committees ruled that the safe third country requirements are not fulfilled with respect to Turkey, essentially impeding the application of the EU-Turkey deal. The purpose of this article is, on the first level, through empirical research, to shed light on the reasoning of the decisions of the Appeals Committees and investigate the impact of the EU-Turkey agreement upon them. On a second level, it focuses on evaluating from the perspective of effective legal protection the legislative amendment, subsequent to these decisions, which modifies their composition. The analysis is of significant societal relevance, as it aspires to inform further law, policy, and jurisprudence in the field, especially since it provides access to sources that due to language and other practical barriers would remain far from the reach of legal and policy experts.

Keywords: EU asylum law, EU migration law, EU-Turkey agreement, Asylum Appeals Committees, Greece, Syrian refugees, resettlement, safe third country

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* PhD Candidate at Leiden University and Visiting Fellow at the Refugee Law Initiative, School of Advanced Study, University of London. The author wishes to express her appreciation to Orçun Ulusoy for contributing to this article with sections III and IV.1. concerning the introduction to the EU-Turkey agreement and the Turkish legislative framework.

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I. INTRODUCTION

Since its adoption in March 2016, the EU-Turkey agreement has been in the midst of significant political¹ and legal turmoil. The agreement has been widely criticised by migration experts, especially regarding the presumption that Turkey is a safe third country (STC) for refugees.² Many domestic and

¹ Nikolaj Nielsen, 'EU-Turkey readmission deal in doubt' *EU Observer* (Brussels, 6 June 2016) <<https://euobserver.com/migration/133712>> accessed 15 November 2016.

² Steve Peers and Emanuela Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?' (*EU Law Analysis Blog*, 05 February 2016) <<http://eulawanalysis.blogspot.nl/2016/02/the-eu-turkey-and-refugee-crisis-what.html>> accessed 15 November 2016; Emanuela Roman, Theodore Baird, Talia Radcliffe, 'Why Turkey is Not a 'Safe Country'' *Statewatch Analysis* (London, February 2016) accessed 15 November 2016; Peter Rodrigues, 'EU-Turkey deal: good on paper, bad in practice' (*Leiden Law Blog*, 12 April 2016) <<http://www.leidenlawblog.nl/articles/eu-turkey-deal-good-on-paper-bad-in-practice>> accessed 15 November 2016; For an insight into the structural deficiencies or the Turkish asylum system that does not allow the country to be regarded a safe haven for refugees, see Orçun Ulusoy, 'Turkey as a Safe Third Country?' (*Border Criminologies Blog*, 29 March 2016) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third>> accessed 15 November 2016.

international NGOs have highlighted the deficits of the Turkish system with respect to the protection required by the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and violations with respect to non-refoulement, but also the right to life and freedom from torture and the right to asylum.³

The deal has been in force since May 2016, with hundreds of Syrians having been readmitted to Turkey.⁴ The Greek Asylum Service, the authority responsible for dealing with asylum applications, has been implementing the deal, judging that the return of failed asylum seekers to Turkey is not objectionable, as Turkey is a safe third country and can offer adequate protection to refugees. However, this presumption has been rebutted by the Greek Appeals Committees in 390 out of 393 decisions,⁵ impeding the application of the EU-Turkey agreement.

These decisions have been hailed by several human rights organisations,⁶ while the European Commission officially recognised them as proof that there will not be blanket or automatic returns to Turkey following the agreement, and that the 'safeguards provided by the Asylum Procedures

³ Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey deal' (14 February 2017) <<https://www.amnesty.org/en/documents/eur25/5664/2017/en/>> accessed 16 February 2017.

⁴ European Commission fact-sheet, Implementing the EU-Turkey Statement – Questions and Answers, Brussels, 15 June 2016 <<http://tinyurl.com/grmqab3>> accessed 15 November 2016; Apostolis Fotiadis, 'So the Greece deportations are going 'smoothly'? Take a closer look' *The Guardian Opinion* (London, 04 April 2016) <<https://www.theguardian.com/commentisfree/2016/apr/04/greece-deportations-eu-turkey-refugees>> accessed 15 November 2016.

⁵ 393 decisions have been issued in total by the Greek Asylum Appeals Committees, Amnesty International, 'Blueprint for Despair' (n 3), 14; At the time of writing only 72 decisions had been issued, only two of which considered Turkey a safe third country. Communication from the Commission to the European Parliament, the European Council and the Council Second Report on the progress made in the implementation of the EU-Turkey Statement, COM(2016) 349 final.

⁶ See for instance Amnesty International, 'Greek Decision Highlights Fundamental Flaws in EU Turkey Refugee Deal' (Press Release, 20 May 2016) <<http://www.publicnow.com/view/3B898DE7C36AA20F112DEBAA79F2DE425084E338?2016-05-20-21:00:48+01:00-xxx2372>> accessed 15 November 2016.

Directive [...] are in place and respected'.⁷ However, one month after the first decision of the Appeals Committees, following allegations of lack of objectivity of their members, the Greek Parliament, in a fast-track legislative procedure, adopted an amendment that modifies their composition.⁸

The purpose of this paper is, through empirical research, to shed light on the reasoning of the decisions of the Asylum Appeals Committees as far as the examination of the issue of the safe third country is concerned (in particular, what the Committees conclude on the issue of Turkey as a STC, and what has been the influence of the EU-Turkey deal on these decisions) and evaluate the legislative amendment creating new Appeals Committees focusing on the element of effective legal protection.

The article deals with the first case law issued on the EU-Turkey agreement that authoritatively answers the question of whether Turkey constitutes a safe third country. The analysis is considered of significant societal relevance, as it aspires to inform further law, policy, and jurisprudence in the field, especially since it provides access to sources that due to language and other practical barriers would remain far from the reach of legal and policy experts.

After the description of the situation on the ground on the basis of the latest available information in section II, the applicable EU and national legal framework is presented in sections III and IV. Furthermore, the content of the decisions is described and analysed in section V with particular emphasis on each individual element considered in order to regard a third country as safe. The impact of the EU-Turkey agreement upon these decisions is also examined. Section VI covers the evaluation of the decisions in terms of logical and methodological soundness. The image is completed in section VII with the most recent developments concerning their reorganization and the practice of the new committees so far.

The developments in Turkey following the military coup and its influence upon the situation of Syrians in the country are interesting and necessary to

⁷ Communication from the Commission to the European Parliament, the European Council and the Council, Second Report on the progress made in the implementation of the EU-Turkey Statement, 15.06.2016, COM(2016) 349 final, 6.

⁸ Art. 86 para. 3 of Law 4399/2016.

study as far as the sustainability of the EU-Turkey agreement is concerned.⁹ This nevertheless falls outside the scope of this paper, which focuses on the returns of Syrians to Turkey and the relevant decisions of the Greek Appeals Committees in the period immediately prior to the coup. This article takes into account legal and policy developments that had taken place until 1 January 2017, unless stated otherwise.

II. THE SITUATION ON THE GROUND: GREEK ISLANDS

According to the report of Amnesty International, 'Blueprint for Despair', 27,000 individuals have arrived at the Greek islands from the time of entry into force of the EU-Turkey deal, on 20 March 2016, until 1 January 2017. About 4,500 have been allowed to move to the mainland. Specifically, 2,906 individuals (including family members) have been transferred on account of an identified vulnerability, 1,476 have been reunited with their families on the basis of the relevant Dublin family reunification provisions, 148 have acquired refugee status and 15 have acquired subsidiary protection status.¹⁰

At the other end, 548 individuals have been returned to their countries of origin and 900 have been transferred to removal centres on the mainland pending their deportation. Next to them, 865 individuals, of which 151 Syrians have been returned to Turkey on the basis of the EU-Turkey deal. According to the Greek authorities, none of these returns to Turkey concern asylum seekers whose claim has been rejected at the admissibility stage.¹¹ However, Amnesty International, the UN Refugee Agency (UNHCR), and other organisations have registered a number of returns 'under highly questionable circumstances'. In particular, the UNHCR has reported that 13 individuals returned in April 2016, had communicated their wish to seek asylum on the island of Chios, but their applications were not registered.

Officially, no asylum seeker has been returned to Turkey on the inadmissibility ground that Turkey is a safe third country for them. Such

⁹ Patrick Kingsley, 'Turkish police withdrawal from Greece stalls EU migration pact', *The Guardian*, 31 August 2016 <<http://www.theguardian.com/world/2016/aug/31/turkish-police-withdrawal-greece-stalls-eu-migration-pact-unhcr>> accessed 15 November 2016.

¹⁰ Amnesty International, 'Blueprint for Despair' (n 3) 6.

¹¹ *Ibid* 17.

returns have been essentially blocked by the Appeals Committees that overturned the first instance decisions in an overwhelming majority, but also due to 'the efforts of non-governmental organizations and lawyers in Greece that assisted many asylum-seekers to appeal the first instance inadmissibility decisions'.¹²

Presently, 15,000 individuals remain on the Greek islands in a state of limbo. Out of the 27,000 arrivals on the islands, 10,699 have lodged asylum applications, while further 7,097 have communicated their wish to seek asylum during their registration upon arrival.¹³

On the first instance, 1,701 decisions have been issued on admissibility, of which 1,317 deny the claim on the basis of the EU-Turkey deal. On the second instance the Appeals Committees, until their reorganization, had issued 390 decisions overturning the first instance decisions on the basis that Turkey is not safe for refugees. Only in three cases the Appeals Committees upheld the first instance inadmissibility decision.¹⁴

In a complete change of course, the new Appeals Committees created by legislative amendment on 16 June 2016 (see section VII), in the 20 inadmissibility decisions they have issued so far, uphold the inadmissibility decision, ruling that Turkey is a safe third country.¹⁵

III. THE EU-TURKEY AGREEMENT: A SHORT INTRODUCTION

While the EU-Turkey agreement is being widely discussed in the public sphere since the spring of 2016,¹⁶ the negotiations on the readmission agreement between Turkey and EU were in fact initiated in 2002, following

¹² Amnesty International, 'Blueprint for Despair' (n 3) 17.

¹³ Ibid 12.

¹⁴ Ibid 14; The data presented by the European Commission deviate slightly, stating that in 6 cases the Appeals Committees confirm the first instance inadmissibility decision. Communication from the Commission to the European Parliament, the European Council and the Council Second Report on the progress made in the implementation of the EU-Turkey Statement, COM(2016) 349 final 6.

¹⁵ Amnesty International 'A Blueprint for Despair' (n 3) 15.

¹⁶ European Council, 'EU-Turkey statement' (Press Release, 18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>> accessed 15 November 2016.

the adoption of the related directive by the European Council.¹⁷ The negotiations were suspended in 2006 after four rounds of formal meetings and the parties returned to the negotiating table in 2009. After three years of meetings in Ankara and Brussels, a final draft was prepared and initialled in June 2012. The first roadmap on implementing the agreement was introduced in December 2013 foreseeing the readmission of the third country nationals to Turkey starting at the end of 2016. Yet, the agreement was never implemented officially except for a few symbolic attempts.¹⁸

In 2016, at the peak of the unprecedented cross-border movement towards Europe from Middle Eastern and African countries, EU officials and state representatives, under the pressure of the new arrivals, chose to re-negotiate the agreement with Turkey. After several rounds of intensive negotiations, on 18 March 2016 the EU Heads of State and Turkey agreed on several operational issues aiming to reduce the irregular migration to the EU. The instruments composing the agreement can be gathered under two categories: a) provisions on an extended version of the readmission agreement between EU and Turkey, b) incentives (or carrots) for Turkey to sign and implement the agreement. These include allocation of considerable funds (up to 6 billion Euros) by the EU for refugees in Turkey, accelerating the visa liberalisation roadmap and re-energising the EU accession negotiation. Due to the aim of this article, this section will limit itself to the analysis of the readmission agreement between the EU and Turkey.

The readmission agreement foresees three operational procedures. First, all irregular migrants who crossed from Turkey to the Greek islands are to be returned and readmitted to Turkey. This includes asylum seekers, whose claims have been declared inadmissible. Second, Syrian refugees are to be resettled from Turkey to the EU. The EU is obliged to resettle the same

¹⁷ Proposal for a Council Decision of [...] concerning the conclusion of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, COM/2012/0239 final - 2012/0122 (NLE).

¹⁸ Emanuela Roman, Theodore Baird, and Talia Radcliffe (n 2); Marieke Wissink and Orçun Ulusoy, 'Navigating the Eastern Mediterranean: The Diversification of Sub-Saharan African Migration Patterns in Turkey and Greece' in Belachew Gebrewold & Tendayi Bloom (eds), *Understanding Migrant Decisions: From Sub-Saharan Africa to the Mediterranean Region* (Routledge 2016) 120 – 38.

number of Syrian refugees as those returned to Turkey from the Greek islands. As the third step, a 'Voluntary Humanitarian Admission Scheme' will be activated.

The implementation of the readmission agreement requires certain processes in Turkey and Greece, such as pre-screening and identification of refugees and other migrants in Greece, human rights guarantees and dignified humanitarian conditions for the readmitted migrants in Turkey, as well as a working (and meaningful) resettlement system at the EU level.

As far as the human rights safeguards in Turkey are concerned, several NGO reports raise major concerns about Turkey's capacity to fulfil its obligations towards refugees, as will be discussed in section V. These concerns include Turkey's geographical limitation on the 1951 Refugee Convention, possible violations of the non-refoulement principle, and finally the shortcomings of the Turkish asylum system, which is still in its infancy.¹⁹

Turkey was one of the first countries to sign and ratify the Refugee Convention and become party to its 1967 Protocol, but retains a geographical limitation for non-European asylum seekers. According to this limitation, Turkey grants refugee status only to asylum seekers originating from European countries, which excludes the readmitted Syrian nationals. As noted in the press release of the Turkish NGO Mülteci-Der's²⁰ and its following report in April 2016,²¹ the first non-Syrian migrants readmitted to Turkey under the agreement on 4 April 2016 were immediately transferred to a removal centre to be deported to their country of origin without getting access to international protection. Lawyers were denied access to their clients even when they provided a list of names of people they were representing. Furthermore, in April 2016 Amnesty International's research in Turkey revealed large-scale forced returns of refugees from Turkey to

¹⁹ Orçun Ulusoy (n 2).

²⁰ Mülteci-Der, 'Readmissions from Greece to Turkey: What Happens After Readmission?' <<http://www.multeci.org.tr/haberdetay.aspx?Id=140>> accessed 15 November 2016.

²¹ Mülteci-Der, 'Observations On Refugee Situation In Turkey' <<http://www.multeci.org.tr/haberdetay.aspx?Id=141>> accessed 15 November 2016.

Syria,²² raising concerns about the adherence to the non-refoulement principle. Syrian refugees, including women and children, were denied registration in Turkey and forced to collectively return to Syria.

Finally, in the last two decades, the European Court of Human Rights (ECtHR) has found serious human rights violations regarding the conditions of migrants and asylum seekers in Turkey. The ECtHR underlined the grave situation of asylum seekers in detention and concluded in its landmark decision, *Abdolkhani and Karimnia v Turkey*,²³ that there are no meaningful domestic juridical instruments or safeguards for asylum seekers and other migrants in Turkey.

IV. RELEVANT NATIONAL LEGISLATIVE FRAMEWORK

I. Turkey

Certain legislative developments have marked an improvement in the level of international protection in Turkey in the recent years.

A. Law on Foreigners and International Protection

In 2014 Turkey adopted a new Law on Foreigners and International Protection (LFIP), which provides guarantees for asylum seekers and refugees.

The adoption of LFIP was one of the key achievements of the Europeanization process of the Turkish asylum and migration system.²⁴ It guaranteed basic rights for asylum seekers and refugees in Turkey and paved the way for establishing a civilian body for the management of migration: the

²² Amnesty International, 'Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal' (1 April 2016) <<http://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>> accessed 15 November 2016.

²³ *Abdolkhani and Karimnia v Turkey* App no 30471/08 (ECtHR, 22 September 2009).

²⁴ Kristen S Biehl, 'Migration 'securitization' and its everyday implications: an examination of Turkish asylum policy and practice', (2009) CARIM IV Summer School on Euro-Mediterranean Migration and Development Best Participant Essays Series No. 2009/, <<http://hdl.handle.net/1814/11761>> accessed 15 November 2016.

Directorate General for Migration Management (DGMM). The system faces serious gaps in capacity and expertise, while supporting bodies and mechanisms, such as appeals committees and a country of origin information system have still not been put in place.

B. Temporary Protection Regime

Since the beginning of the Syrian refugee crisis in 2011, Turkish governmental officials insisted on defining the Syrian refugees as 'guests'.²⁵ However, the terminology of 'guest' is meaningless both within international and within Turkish law. This deliberate policy, aiming at evading responsibilities towards refugees, resulted in lack of protection and an uncertain future for Syrian nationals.

In 2014, following criticism by the UNHCR and other international actors, the Turkish Government officially revised its position and introduced the Temporary Protection Regulation (TPR), according to which Syrian refugees became beneficiaries of a 'temporary protection' regime.²⁶ It is important to underline that the TPR is loosely inspired by the EU Temporary Protection Directive, regulating situations of mass influx. The TPR is an implementing legislative act, enforcing in practice Article 91 of the LFIP.

The TPR was based on three principles: a) Turkey's borders shall remain open to border-crossers seeking safety in Turkey; b) no Syrian national shall be sent back to Syria against their will (non-refoulement principle); and c) basic humanitarian needs of persons arriving from the conflict in Syria shall be met.²⁷

²⁵ Umut Uras, 'Erdogan: Syrian refugees could become Turkish citizens' *Al-Jazeera* (4 July 2016); <<http://www.aljazeera.com/news/2016/07/erdogan-syrian-refugees-turkish-citizens-160703133739430.html>> accessed 15 November 2016.

²⁶ Refugee Rights Turkey, '2011-2014: Temporary protection based on political discretion and improvisation' *AIDA* <<http://www.asylumineurope.org/reports/country/turkey/2011-2014-temporary-protection-based-political-discretion-and-improvisation>> accessed 15 November 2016.

²⁷ Ibid; UNHCR Turkey, 'Information Notice Regarding Syrian Nationals Seeking International Protection' (Ankara, 23 November 2011) <http://archiv.proasyl.de/fileadmin/proasyl/fm_redakteure/Newsletter_Anhaenge/181/UNHCR_Turkey_Syrian_Information_Note_Nov_2011.pdf> accessed 15 November 2016.

2. Greece

In Greece asylum and subsidiary protection requests are dealt with by the Asylum Service, which was created with L. 3907/2011.²⁸ The law was adopted following the infamous case *M.S.S. v Belgium and Greece*,²⁹ where the European Court of Human Rights (ECtHR) noted several breaches of the European Convention on Human Rights and Fundamental Freedoms (ECHR), due to the fundamental deficiencies of the Greek asylum system.³⁰ This judgment has caused the suspension of the implementation of the Dublin II Regulation³¹ with respect to returns of asylum seekers to Greece.

One of the breaches found by the Court concerned the lack of an effective remedy at second instance, while the Court requested Greece to adopt general measures to prevent similar violations in the future on the basis of Art. 46 ECHR.³² In response to this obligation, an Appeals Authority was established by the same law, which is responsible for the examination at second instance of asylum and subsidiary protection requests.³³ An action for annulment against the decision of the Appeals Committees, albeit one that does not have an automatic suspensive effect, may be brought before the national administrative courts.

²⁸ The official translation in English of L. 3907/2011 is available at: <<http://www.yptp.gr/images/stories//2011/law%203907.pdf>> accessed 15 November 2016.

²⁹ Mariana Gkliati, 'Blocking Asylum: The Status of Access to International Protection in Greece' (2011) 4(1) *Inter-American and European Human Rights Journal* 85, 101-103.

³⁰ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011). Violations were found with respect to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 3, and Art 3 in conjunction with Art 13; The outcome was confirmed by the CJEU in Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865.

³¹ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

³² *M.S.S. v Belgium and Greece* (n 30), para 400.

³³ Art 3 Law 3907/2011.

In accordance with Art. 33(2)(c) of the Asylum Procedures Directive,³⁴ as it has been transposed in national law by Art. 18 PD 113/2013, a claim for international protection may be considered inadmissible if a country, which is not a Member State, is considered to be a safe third country for the applicant. The requirements for considering a third country safe have been laid down in national law. Pursuant to Art. 20(1) PD 113/2013, a country is considered as a safe third country when a person seeking international protection will be treated there in accordance with the following principles:

- a) The applicant's life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b) The country respects the principle of non-refoulement in accordance with the 1951 Refugee Convention;
- c) The applicant is not at risk of suffering serious harm as described in [the Qualification Directive];
- d) The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment as laid down in international law, is respected by this country;
- e) The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention.
- f) The applicant has a link with the third country concerned, which would reasonably allow him or her to move to that country.

In accordance with EU law, criteria a-e correspond word-by-word to Article 38(1)(a-e), and criterion f corresponds to Art. 38 (2)(a) of the Asylum Procedures Directive.

³⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60.

V. THE APPEALS COMMITTEES DECISIONS

1. Methodological Note

The Appeals Committees have issued 393 decisions, since the EU-Turkey agreement came into force, reviewing first instance decisions that have ruled at the admissibility stage that Turkey constitutes a safe third country for the individual applicants. This made the examination of the merits of the requests unnecessary.

For the purposes of the present article, eight out of these decisions have been studied. The examination of the total number of decisions was not deemed possible for reasons of time management, while it should also be noted that the Committees continued issuing decisions during the time of writing and editing of the publication. Most importantly the responsible authorities refused to disclose the decisions for the purpose of academic research, in spite of the privacy and data protection safeguards offered, pleading reasons of protection of the sensitive personal data of the applicants. In conformity with domestic and EU law, in particular the need for confidentiality and data protection, the cases have been acquired through field workers' networks and have been used in an anonymized form for the purposes of this article. All necessary measures have been taken in order to protect the privacy of asylum seekers and all other parties involved. The cases are referred to here as *Case 1*, *Case 2*, etc.³⁵ The personal information regarding the applicants is restricted to nationality (all applicants are Syrians), ethnicity, gender, and family relations where relevant. All elements that could lead to the identification of the applicants have been omitted. The cases studies are deposited to an offline depository, which ensures long-term preservation and accessibility to curated scientific data and guarantees their security and recoverability.

³⁵ The first case issued has become available in the public domain. The original case number is Case 05/133782, but for reasons of simplicity it is referred in this article as *Case 1*. The translated summary is available here: <https://www.eerstekamer.nl/bijlage/20160603/griekse_uitspraak_inzake_het_niet/document3/f=vk4m914hdass.pdf> accessed 15 November 2016. The full text in Greek can be found here: <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Backlog%20Committees%20decision_inadmissibility.pdf> accessed 15 November 2016.

Access to the data can be granted by the author to interested researchers for the purpose of verification of the research.

Notwithstanding the practical hindrances, this random sample is representative and is sufficient to provide a basic understanding of the reasoning of the Committees and of the circumstances in which the legislative change concerning the composition of the Committees took place. The decisions follow a similar line of reasoning, while often the text is transferred word-by-word from one decision to others, even when the committees are composed of different members.³⁶

At this point, it is necessary to note that the most important decisions have been included in the sample. These are a) the first decisions following the entry into force of the EU-Turkey agreement, published on 17 May 2016, which consider Turkey not to be a safe third country and create the first precedent, laying down the argumentation for the decisions that followed, and b) two out of the only three decisions that differentiate from the rest, agreeing with the first instance that Turkey is indeed a safe third country.

The article employs, to a large extent, the method of analytical description in order to illustrate in a clear and comprehensive manner the reasoning of the decisions. For this purpose, the relevant indicators/criteria have been clearly identified in the following section and the tools of simple typology (e.g. negative v positive decisions), taxonomy (e.g. Figure I), and configurational typology (e.g. Table II) have been used in sections V and VI. These sections include the synthesis of the relevant indicators/criteria providing the answer of the Appeals Committees to the central question of whether Turkey constitutes a safe third country. This is complemented by the evaluation of the decisions in terms of methodology and argumentation rather than on the basis of the substantive evidence. The second and shorter part of the article is characterised by analytical and persuasive writing, as the re-organisation of the Appeals Committees is evaluated mainly in terms of independence and the right to an effective remedy.

³⁶ Eg, *Cases 8 and 7*.

2. Analytical Description of the Decisions

Out of the 393 decisions, 390 are *positive*, in the sense that they overturn the ruling of the first instance and decide that *the applicant's claim is admissible*. The admissibility decision is based on a ruling that Turkey cannot constitute a safe third country for the applicant and therefore, his or her claim is admissible and needs to be considered on its merits.³⁷ Six of these decisions are examined here. These are: *Case 4*, *Case 1*, *Case 5*, *Case 6*, *Case 7*, and *Case 8*.

Only 3 out of the 393 decisions are *negative*, upholding the ruling of the first instance, considering Turkey a safe third country, thus, deciding that *the applicant's claim for international protection in Greece is inadmissible*. The two of these decisions studied here are: *Case 2* and *Case 3*. The applicants of these cases have lodged an appeal before the national administrative courts to challenge their return to Turkey. Pending the outcome of the appeals, the Administrative Court of First Instance of Mytilene has suspended the applicants' returns to Turkey.³⁸ One of the two applicants had also applied for interim measures against their deportation before the ECtHR. The Court responded negatively to the request. However, the Court has not made available its reasoning, since it is not under the obligation to issue motivation of decisions concerning Rule 39 (interim measures) of the Rules of the Court.

This section deals with a qualitative study of the eight judgments, aiming at providing a conclusive picture of the argumentation of the Committees with respect to the issue of Turkey as a safe third country. The analysis is made on the basis of the examination of each of the cumulative conditions of Art. 20(1) PD 113/2013, which need to be fulfilled in order for a third country to be considered safe.

There are three features of interest, concerning the safe third country issue, which concern conditions b) and d), dealing with the principle of non-refoulement, e) regarding refugee protection, and finally, f) concerning the link of the applicant with the third country. The other conditions of Art.

³⁷ Art 18 PD 113/2013, Art. 33(2)(c) Asylum Procedures Directive. These cases have been referred back to the responsible Asylum Offices in accordance with Art. 26(6) PD 113/2013, in order to be considered in their merits.

³⁸ Dimitris Angelidis, 'Παράταση ελπίδας για δύο Σύρους πρόσφυγες', *EFSYN* (Athens, 29 July 2016) <<http://www.efsyn.gr/arthro/paratasi-elpidas-gia-dyo-syroys-prosfyges>> accessed 15 November 2016.

20(i) PD 113/2013 were either regarded fulfilled or their examination was deemed unnecessary by the Appeals Committees. This is clearly demonstrated in Table II.

An overview of the decisions, including the conditions that were found not to be fulfilled, is provided in Table I. The table can be read from left to right, showing the votes of each member/affiliation, or from right to left, showing the final outcome of each decision and whether it was a unanimous or a majority decision (where the cell vote/conditions is not split the decision was unanimous).

The Appeals Committees are composed of one public servant (Ministry of Interior), one human rights expert selected by the government from a list compiled by the National Commission on Human Rights (NCHR), and one UNHCR representative. For reasons of protection of personal data, the names of the members of the Committees have been encoded.

Table I: Overview of the Appeals Committees decisions

Committee Member	Affiliation	Vote per condition (Art.18 PD 113/2013)	Outcome	Case
Min ₁	Ministry	Criteria fulfilled	STC	Case 2 Case 3
UN ₁	UNHCR			
NC ₁	NCHR			
Min ₁	Ministry	Criterion f not fulfilled	Not STC	Case 4
UN ₁	UNHCR			
NC ₁	NCHR			
Anonymous	Ministry	Criteria b and d not fulfilled. Criterion e fulfilled	Not STC	1 (first case issued, 17.05.2016)
Anonymous	UNHCR			
Anonymous	NCHR			
Min ₂	Ministry	Criteria b, d, e, and f not fulfilled	Not STC	Case 5, Case 6
UN ₂	UNHCR			
NC ₂	NCHR			
Min ₃	Ministry	Criteria fulfilled	Not STC	Case 7
UN ₃	UNHCR	Criteria e, and f not fulfilled		
NCHR ₃	NCHR			
Min ₁	Ministry	Criteria fulfilled	Not STC	Case 8
UN ₄	UNHCR	Criteria e, and f not fulfilled		
NCHR ₄	NCHR			

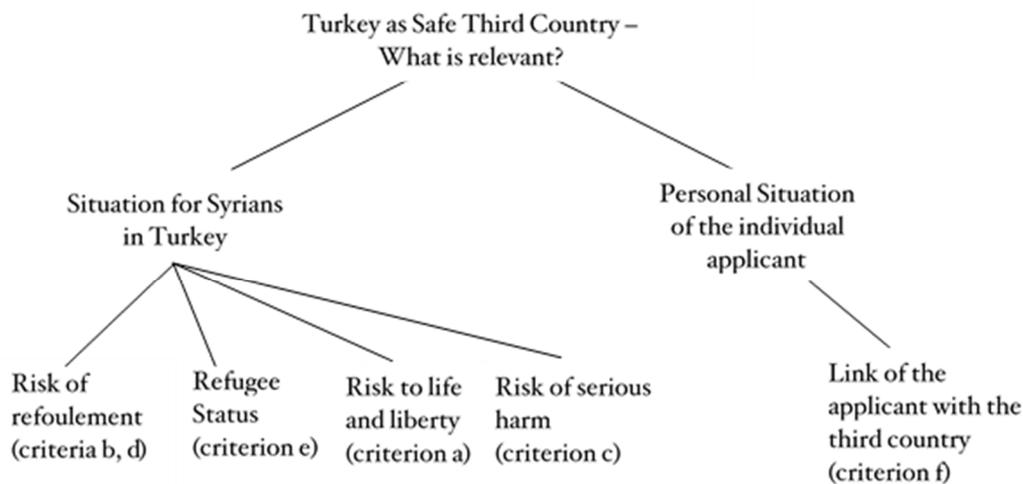
(Source: Mariana Gkliati, August 2016.)

All cases concern Syrian refugees that arrived in Greece through Turkey in order to seek asylum. In some cases, the applicants had only transited through Turkey, while in others they had spent a considerable amount of time living in Turkey before they attempted to reach the EU. In a number of cases, particular circumstances completed the profile of the applicants, such as ethnicity, religion, state of health, sexuality, and adulthood. These were taken into account in the examination of the admissibility of their request.

The following part focuses on the description of the reasoning of the decisions on the issue of whether Turkey is a safe third country. As can be

observed in Figure I, the Committees based their decisions on arguments concerning the general situation of Syrians in Turkey (criteria a-e Art. 20(1) PD 113/2013) or the circumstances of the individual applicant. Here, each factor is examined separately in order to provide a comprehensive picture of the reasoning of the decisions. In the footnotes, the sources used and referenced by the Committee decisions are cited along with the respective case number. Since the decisions are not publicly available, reference to the direct sources is deemed essential.

Figure I: Qualitative Categorization – Relevant Factors for the Decision on whether Turkey is a STC



A. The Principle of Non-refoulement

Different instances of the prohibition of refoulement, as it is enshrined in the ECHR³⁹ and the Refugee Convention⁴⁰, are expressed in criteria b and d of Art. 20(1) PD 113/2013, which for this reason are examined together in the case law of the Appeals Committees. In particular, criterion b explicitly states that a country is considered safe if it respects the principle of non-refoulement, while criterion d makes implicit reference to chain-refoulement requiring from the country that is to be considered safe that it

³⁹ Mainly Arts 2, 3 and 8 ECHR.

⁴⁰ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150, Article 33.

prohibits removal in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment.

Examining criteria b and d of Art. 20(1) PD 113/2013, the Committees ruled in three decisions that the criteria are not fulfilled with respect to Turkey (Table II).⁴¹ In two cases the criteria concerning refoulement were fulfilled,⁴² and in one case the examination of these criteria was deemed unnecessary, as the Committee had already ruled that Turkey does not fulfil other criteria.⁴³ Finally, in the cases where the Appeals Committees agreed with the first instance that Turkey is the safe third country that is responsible for the examination of the claims,⁴⁴ the issue of non-refoulement is not examined separately and in detail. The members of the Committees contented themselves to mentioning that the fears of the applicants are not substantiated and that the applicants are not credible.

As it becomes obvious in Table I, in all cases the conclusion on the issue of refoulement was unanimous. In all three positive cases, the Presidents of the Committees, representing the Ministry, voted that Turkey is not a safe third country because the principle of non-refoulement is not respected.

The first decision issued, *Case 1*, concerned a Syrian man of military age who fled to Turkey out of fear that he would be forced to join the fight either on the side of ISIS or on that of the Syrian army. Circumstances in Turkey did not reassure him of his safety from recruitment and from persecution by the Assad regime.

In this case, the Committee acknowledges that protection from refoulement is established in Art. 4 of the Turkish LFIP, and Art. 6(1) of the Turkish TPR.⁴⁵ According to the Asylum Information Database AIDA,⁴⁶ the new legislative framework in the country provides protection notwithstanding

⁴¹ *Cases 5, 6 and 1.*

⁴² *Cases 7 and 8.*

⁴³ *Case 4.*

⁴⁴ *Cases 1, and 3.*

⁴⁵ *Case 1*, p 11.

⁴⁶ *Case 1*, p 11; Oktay Durukan, 'Country Report, Turkey' *AIDA* (December 2015), 19 <http://www.asylumineurope.org/sites/default/files/report-download/aida_tr_up date.i.pdf> accessed 15 November 2016.

the fact that the applicants do not originate from a European country.⁴⁷ However, it distinguishes between law in the books and law in action and concludes that there is a serious chance of non-fulfilment of these criteria. It notes that recent NGO reports show that the principle of non-refoulement is systematically violated in Turkey, recalling incidents of violent rejection at the borders and mass deportations to Syria.⁴⁸

In *Cases 5* and *6* the Committees also first look at the law in Turkey. They reiterate that Turkey maintains the geographical limitation to the Refugee Convention, however Syrians are protected by the new law from refoulement and are afforded legal stay. They note that in the beginning, Turkey had an open borders policy towards Syrians, with more than 2 million Syrians having found refuge there. They go on, however, to note that more recent reports provide adequate proof of a new state of closed borders, reporting multiple incidents of push-back operations, opening fire to border-crossers including children, torture and inhuman treatment, and even deaths.⁴⁹ The Committees make particular mention of collective expulsions and systematic

⁴⁷ As already mentioned in section IV, Turkey still upholds the geographical limitation to the Refugee Convention, being bound by it to afford asylum only to asylum seekers from countries of origin that are members of the Council of Europe, as it has not signed the New York Protocol to the Refugee Convention.

⁴⁸ *Case 1*, p 12; Amnesty International, 'Turkey: illegal mass returns' (n 22).

⁴⁹ *Case 5*, p 10 and *Case 6*, p 9; Amnesty International, 'Turkey: Struggling to Survive: Refugees from Syria in Turkey' (20 November 2014), 12-13 <http://www.amnestyusa.org/sites/default/files/eur_440172014_0.pdf> accessed 15 November 2016; Will Worley, 'Turkey 'shooting dead' Syrian refugees as they flee civil war' *The Independent* (London, 31 January 2016) <<http://www.independent.co.uk/news/world/middle-east/turkey-shooting-dead-syrian-refugees-flee-civil-war-a6960971.html>> accessed 15 November 2016; Amnesty International, 'Injured Syrians fleeing Aleppo onslaught among thousands denied entry Turkey' (19 February 2016) <<http://www.amnesty.org/en/latest/news/2016/02/injured-syrians-fleeing-aleppo-onslaught-among-thousands-denied-entry-to-turkey/>> accessed 15 November 2016; Human Rights Watch, 'Turkey: Open border to displaced Syrians shelled by government' (20 April 2016) <<http://www.hrw.org/news/2016/04/20/turkey-open-border-displaced-syrians-shelled-government>> accessed 15 November 2016.

violations of the principle of non-refoulement,⁵⁰ and find that conditions b and d are not fulfilled.

At this point, the argumentation in the cases where no violation was found needs to be noted as well, in order to allow for the examination of both sides of the argument.

The ruling in *Case 7* that Turkey is not safe is based on criteria other than the principle of non-refoulement. As far as the latter is concerned, the Committee takes into account reported systematic incidents of refoulement.⁵¹ However, it concludes in the end that the prohibition of refoulement is respected, putting forward the argument that the Turkish authorities had detained the applicants, and although they were threatened that they would be returned to Syria, they were eventually let go, without the threat actually materializing. This incident provides, according to the Committee in this case, sufficient evidence to rule that there is no risk of violation of the principle of refoulement. The Committee in *Case 8* repeated the same argumentation, adding that the evidence provided by the NGO reports is not sufficient to establish risk of refoulement in the individual case.

B. Refugee Protection Equivalent to the Refugee Convention

In order for a non-EU-country to be considered safe, it is essential, according to criterion e of Article 20(1) PD 113/2013 for the applicant to have the

⁵⁰ *Case 5*, p 10 and *Case 6*, p 9; Human Rights Watch (n 49); Amnesty International, 'Turkey: Illegal mass returns' (n 22).

⁵¹ *Case 7*; ProAsyl, 'Im Transit. Zur Lage von Flüchtlingen in der Türkei' (Berlin, May 2012) <http://archiv.proasyl.de/de/themen/eupolitik/detail/news/ueberleben_im_transit_zur_lage_von_fluechtlingen_in_der_tuerkei/>; Amnesty International, 'Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey' (16 December 2015) <<https://www.amnesty.org/en/documents/eur44/3022/2015/en/>>; Amnesty International, 'The human cost of Fortress Europe: human rights violations against migrants and refugees at Europe's borders in Turkey' <<https://www.amnesty.org/Pn/documents/EUROS/001/2014/en/>>; Amnesty International, 'Report 2015/16 – Turkey' (24 February 2016); Amnesty international, 'Turkey 'safe country' sham revealed as dozens of Afghans forcibly returned hours after EU refugee deal' (23 March 2016) <<http://www.amnesty.org/en/press-releases/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/>> all accessed 15 November 2016.

possibility to request and receive asylum in accordance with the Refugee Convention.

It is not necessary for a country to be signatory to the Refugee Convention, as long as equivalent protection is provided by the national legislation. Turkey is party to the Refugee Convention, but has not signed the additional New York Protocol that abolishes the geographical limitation to the Convention. As a consequence, the Refugee Convention is applicable and binding upon Turkey only as far as European applicants are concerned. Nevertheless, the recent national legislation provides protection to Syrians that seek refuge in the country. The question that is raised in this respect is whether the protection afforded in Turkey is equivalent to the standards of the Refugee Convention. Such protection goes beyond the prohibition of refoulement and constitutes fully-fledged refugee protection.

In all cases that Turkey was not regarded safe, the Committees agreed on the non-fulfilment of this criterion, with the exception of *Case 4*, where, since the Committee found criterion f not fulfilled, it considered it unnecessary to discuss the other questions including that of the possibility to request and receive refugee protection (Table II).

In the examination of this condition, the Committee in *Case 1* examines closely the legal framework in Turkey, noting that the new LFIP reaffirms Turkey's obligations towards refugees regardless of the non-European origin of the applicant. Moreover, the Temporary Protection Regulation governs the protection of Syrians, which are afforded temporary protection as a group, rather than through individual examination of their claims.

Particular attention is paid to the fact that the refugee system established with the amended LFIP and the TPR constitute two separate and mutually exclusive legal frameworks.⁵² In particular, according to Article 16 of the TPR, the individual claim for international protection will not be examined for the period of the duration of the temporary protection, while those entitled to temporary protection that have arrived in Turkey since 28.04.2011 (when the TPR came into action) are excluded from issuing a separate claim for international protection.

⁵² *Case 1*, pp 14-17.

Next to that, the Committee finds that the temporary protection status is considerably inferior to that of a fully-fledged refugee status.⁵³ It notes, for instance, that the temporary protection status guarantees legal stay in Turkey, protection from criminal prosecution for irregular entry and stay and protection from refoulement.⁵⁴ However, the possibility of long-term integration is excluded,⁵⁵ while the temporary protection card does not constitute a residence permit or a basis for one.⁵⁶ Moreover, the time of residence in Turkey may not be calculated for the purposes of naturalization. The facilitation of the assimilation and naturalization of refugees, envisaged in Article 34 of the Refugee Convention is apparently not satisfied in Turkish law.

An element that weighed considerably in the decision is that the temporary protection status may be restricted or suspended for reasons of national security, public order, public safety or public health by decision of the Council of Ministers.⁵⁷ In this case, there is no guarantee that the beneficiaries will acquire access to the regular international protection procedure. The duration of the temporary protection is also determined by the Council of Ministers.⁵⁸ It is upon the discretion of that authority to decide, following the termination of the temporary protection, whether all former beneficiaries are returned to their country of origin, whether they will be afforded *prima facie* international protection status, whether their claims are examined individually, or whether they will be allowed to stay under conditions.⁵⁹

Moreover, the Committee observes, refugees that have been afforded temporary protection are subject to restrictions of movement prohibited under Article 26 of the Refugee Convention. Beneficiaries may be required to stay in an assigned province, temporary residence centre, or other location, while in August 2015 the Turkish authorities issued guidelines on controls and restrictions of movement exceptionally of Syrians in Turkey, including

⁵³ *Case I*, pp 17-18.

⁵⁴ Arts 31 and 33 Refugee Convention.

⁵⁵ Art 25 TPR.

⁵⁶ Arts 42 and 43 LFIP.

⁵⁷ Art 15 TPR.

⁵⁸ Art 10 TPR.

⁵⁹ Art 11 LFIP.

systematic document checks throughout the country.⁶⁰ In another case,⁶¹ the Committee noted that Syrians may leave their assigned area only with prior permit.⁶²

Last but not least, the right to wage-earning employment was taken into account. According to Turkish law, employers cannot hire more than one Syrian for every 10 Turkish employees, while the ratio for other foreign nationals is 1 to 5. The ratio places Syrians at a disadvantage compared to other aliens, and therefore fails to rise to the standards of Articles 17-19 of the Geneva Convention that provides that refugees are accorded the most favourable treatment accorded to foreign nationals.⁶³

Taking due regard of the aforementioned legal framework, the Committee draws the conclusion that the Turkish protection system affords considerably fewer rights compared to the Refugee Convention. The Committee reaffirms its findings referring to Resolution 2109 of Parliamentary Assembly of the Council of Europe that states that returns of Syrians or non-Syrians to Turkey under the safe third country presumption are not compatible with EU and international law, since Turkey does not provide protection equivalent to that of the Refugee Convention and several incidents of push-backs have been registered.⁶⁴

The findings were confirmed in four other cases,⁶⁵ while in *Case 5*, the Committee added that access to the labour market may be facilitated by the LFIP, but is not guaranteed,⁶⁶ while several restrictions and strict requirements⁶⁷ result in the majority of applicants not having access to wage-earning employment. Only 3,673 out of 2 million Syrians present in Turkey have managed to acquire a work permit in a period of four years.⁶⁸ Those that

⁶⁰ *Case 1*, pp 14, 18 and 19.

⁶¹ *Case 5*.

⁶² *Case 5*, p 12; European Council on Refugees and Exiles, 'National Country Report: Turkey, December 2015' *AIDA*, 128; United States Department of State, 2015 Country Reports on Human Rights Practices – Turkey, 13 April 2016, section b.

⁶³ *Case 1*, p 19.

⁶⁴ *Case 1*, p 19.

⁶⁵ *Cases 5, 6, 7, and 8*.

⁶⁶ Art. 89 (4)a, c LFIP.

⁶⁷ *Cases 5 and 14*; European Council on Refugees and Exiles (n 62) 83 - 5.

⁶⁸ EC on Refugees and Exiles (n 63).

have managed to become employed, work in exploitative conditions, being discriminated against *vis-à-vis* their Turkish co-workers.⁶⁹

In this case, the application concerned a Syrian family with three underage children, the mother of which was in need of medical care. This gave the opportunity to the Committee to examine other relevant issues concerning the living conditions of Syrian refugees in Turkey.

To begin with, the Committee notes that only the children that live in state-managed refugee camps (15% of all the children of school age) and 25% of the rest of the children that live in the cities go to school.⁷⁰ Among the reported reasons are overpopulation in schools and Temporary Education Centers, tuition fees, but also high rates of child labour among Syrian children.⁷¹

Concerning access to healthcare, beneficiaries of temporary protection have no right to free access to public healthcare, with the exception of emergencies, while there are no interpreters to facilitate the process.⁷²

The Committee also noted several other economic and social problems that have arisen due to the high number of refugees residing in Turkey that impede their long-term integration in the country, and often lead to stereotyping, discrimination, tensions or even violence by the locals.

⁶⁹ *Case 5*, p 15; United States Department of State (n 62) section d; Danish Refugee Council, International Rescue Committee, Norwegian Refugee Council, OXFAM, Save the Children and World Vision, 'Joint Agency Briefing Paper, Right to a Future: Empowering refugees from Syria and host governments to face long-term crisis' (9 November 2015) 7 <<http://www.savethechildren.net/sites/default/files/Report%20ofinal%20Syria.pdf>> accessed 15 November 2016; Emanuela Roman, Theodore Baird and Talia Radcliffe (n 2).

⁷⁰ *Case 5*, p 15; Human Rights Watch, 'When I Picture My Future, I See Nothing'- Barriers to Education for Syrian Refugee Children in Turkey' (8 November 2015) 5, 6, 19, 22 <http://www.hrw.org/sites/default/files/report_pdf/turkey1115_brochure_web.pdf> accessed 15 November 2016.

⁷¹ *Ibid* 19, 21, 35; *Case 5*, p 15; Integrated Regional Information Networks (IRIN), 'School's out for Syrian children in Turkey' (4 November 2015) <<http://bit.ly/2kO8Bc7>> accessed 15 November 2016.

⁷² *Case 5*, p 16; Athina Gkouti, 'Women at Risk: Syrian Refugees and Healthcare in Turkey' *Research Turkey – Center for Policy and Research on Turkey* (16 November 2015) <<http://bit.ly/2kQAAna>> accessed 15 November 2016.

With respect to legal aid, although the law provides for the possibility of free legal aid,⁷³ in practice, this happens in very few cases, while public safety and public order restrictions considerably impede the beneficiaries and their lawyers from being fully informed about their case.⁷⁴

Concerning the right to housing, TPR does not guarantee housing by the state. In practice a very small proportion, namely 263.134 out of the 2 million Syrians present in Turkey, is hosted in the 25 camps,⁷⁵ where living conditions are appalling⁷⁶ and basic humanitarian needs are not met.⁷⁷

These circumstances illustrate, according to the Committee in this case, that the temporary protection regime cannot be considered equivalent to the protection of the Refugee Convention, due to its discretionary and precarious character, lack of guarantees, and limited rights, including housing (Article 21), education (Article 22), access to courts (Article 16) and wage-earning employment (Articles 17-19).⁷⁸

C. Link of the Applicant with Turkey

The final criterion for the consideration of a third country as safe, the link of the individual to the country, has also played a role in the Appeals Committees' decisions.

The examination of criterion f of Article 20(1) PD 113/2013 does not as such add to the debate on whether Turkey constitutes a safe third country in general terms and the application of the EU-Turkey deal, since it concerns

⁷³ Art 53 TPR.

⁷⁴ *Case 5*, p 12; European Council on Refugees and Exiles (n 62) 121.

⁷⁵ *Ibid* 128.

⁷⁶ *Case 5*, p 13; Matt Broomfield, 'Pictures of Life for Turkey's 2.5 million Syrian Refugees' *The Independent* (London, 5 April 2016) <<http://www.independent.co.uk/news/world/europe/pictures-of-life-for-turkeys-25-million-syrian-refugees-crisis-migrant-a6969551.html>>; Eric Reldy, 'Syrian Refugees in Turkey Face Uncertain Future in Informal Encampments' *The Huffington Post* (New York, 22 April 2016) <http://www.huffingtonpost.com/entry/torbali-refugee-trail_us_571a86e0e4bod4d3f7236083> both accessed 15 November 2016.

⁷⁷ *Case 5*, p 13; Mosab al-Shihab, 'Syrian Refugees Forced to Share Housing in Turkey' *Institute for War and Peace Reporting* (21 January 2015) <<https://iwpr.net/global-voices/syrian-refugees-forced-share-housing-turkey>> accessed 15 November 2016.

⁷⁸ *Case 5*, pp 21 - 22.

the personal situation of the applicants (Figure I). However, the fact that some of the cases have been decided on this criterion, and the issue of legal interest that arises, cannot be neglected in this analysis.

The provision states that there needs to be a link between the applicants and the third country that would reasonably allow them to move there. This link was found to be absent in five⁷⁹ out of the eight cases examined here, while one of the decisions was solely based on the non-fulfilment of this criterion, with the Committee considering the examination of further criteria superfluous. In these cases, the Committees found that the applicants had only transited through Turkey on their way to Europe. In one case the Kurdish ethnicity of the applicants was also considered as an obstacle for establishing a link with Turkey.

In one of the remaining three cases,⁸⁰ the Committee found it unnecessary to examine this criterion, since it had already overturned the first instance decision based on other criteria (Table II).

In only two decisions,⁸¹ namely the ones that upheld the first instance rulings, considering Turkey as a safe third country, the Committees found that the applicant had established an adequate link that would justify their return to Turkey with the expectation to seek protection and establish themselves there. Both cases concerned male applicants who had lived for more than a year in Turkey before they crossed the border to Greece. One of them had already received protection status in Turkey.

In the analysis of criterion f, we observe a tension with respect to the interpretation of the 'link', in particular the circumstances under which that is established. The antagonism between the two opposing views becomes most vividly apparent in *Case 8*, where it is made explicit in the main decision of the Committee on the one hand and in the dissenting opinion of its President on the other.

⁷⁹ *Cases 4, 5, 6, 7, and 8.*

⁸⁰ *Case 1.*

⁸¹ *Cases 2 and 3.*

The Committee, in a majority decision, takes into account the views of the UNHCR concerning the concept of the safe third country,⁸² according to which transit alone through a country cannot establish such a link as it is often coincidental. The same holds for the right to enter a country. A substantial link could be established due to the presence of family members in the third country, or links to the wider community there, such as studies or linguistic and cultural bonds. The Committee holds that such circumstances should be examined together with the fact of transiting.⁸³ In this particular case two family members of the applicant were residing in Turkey but were considered to be there coincidentally and were planning to leave the country. Moreover, the applicant was found to not have linguistic, cultural or other links with Turkey.

In her dissenting opinion, the President of the Committee started from a different premise by referring to the opinion of the European Commission that transit through Turkey can be considered sufficient to establish a link with the country.⁸⁴ She furthermore considers that the applicant's relatives had been residing in Turkey for an adequate time so that they could be considered the 'link' of the applicant to the country, notwithstanding that they were planning to leave the country.

The underlying arguments based on the two lines of interpretation coming from the UNHCR and the European Commission appear either explicitly or implicitly in all decisions that deal with the question of the fulfillment of criterion f (Table II). The influence of the policy document issued by the European Commission suggesting that transit suffices to substantiate a link with Turkey seems to have decisively influenced the two decisions

⁸² *Case 8*, pp 16 - 17; UNHCR, 'Legal Considerations on the return of asylum-seekers from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept' (23 March 2016) <<http://www.unhcr.org/56f3ec5a9.pdf>> accessed 15 November 2016.

⁸³ *Case 8*, pp 16 - 17; United Nations High Commissioner for Refugees 'Section 12: The safe third country concept' 18 <<http://www.refworld.org/cgi-bin/texis/vtx/rw/main/opendocpdf.pdf?reldoc=y&docid=4bab55e22>> accessed 15 November 2016.

⁸⁴ *Case 8*, pp 20-21; Communication from the Commission to the European Parliament, the European Council and the Council Next Operational Steps in EU-Turkey Cooperation in the Field of Migration, COM (2016) 166 final, 3.

considering Turkey safe, as well as the dissenting opinions of the Presidents of the Committees in *Cases 7 and 1* (Table I).

Table II: Quantitative Categorization – Basis for the Decision 'Is Turkey Safe Third Country?'

Safe Third Country Criteria	Case 1	Case 2	Case 3	Case 4	Case 5	Case 6	Case 7	Case 8	Cases where the criterion was not fulfilled	Cases where the criterion was fulfilled
<i>No risk of refoulement (b,d)</i>	X				X	X	X	X	3	2
<i>Refugee Status (e)</i>	X				X	X	X	X	5	0
<i>Link with the country (f)</i>		X	X	X	X	X	X	X	5	2
<i>Risk to life or liberty (a)</i>	X	X			X	X		X	0	5
<i>Risk of harm (c)</i>	X	X			X	X		X	0	5
STC		X	X							
Not STC	X			X	X	X	X	X		

Source: Mariana Gkliati, August 2016.

D. Criteria that are Fulfilled: a) Persecution, c) Subsidiary Protection

The criteria of Article 20(i) PD 113/2013 concerning a direct risk to the life and liberty of the applicant on account of race, religion, nationality, membership of a particular social group or political opinion (criterion a) and the risk of suffering serious harm, as defined in the Qualification Directive, were considered separately and were found to be fulfilled in some cases, while in others they were not mentioned separately (Table II).

In the leading *Case 1* the Committee concluded that the general situation of Syrians in Turkey does not suggest such a risk. Notably 2,290,000 Syrians live currently in Turkey with temporary protection status, from which 263,000 stay in 25 refugee camps and the rest stay in rented houses. Based on recent reports of Amnesty International, Human Rights Watch, and the United States Department of State, the Committee finds that there are no incidents of violence against Syrians in Turkey.⁸⁵ Furthermore, those that enjoy a temporary protection status are in principle not subject to detention. Finally,

⁸⁵ *Case 1*, p 9.

with respect to criterion c, the Committee notes that the evidence does not suggest a state of generalised violence that would justify finding an indiscriminate serious risk of harm.⁸⁶

The Committee in *Case 5* added that, according to the European Council on Refugees and Exiles,⁸⁷ the beneficiaries of temporary protection status are in principle not detained, but the TPR provides for the possibility of administrative detention,⁸⁸ while there is no judicial remedy against the relevant decisions. Furthermore, one of the camps in Duzici has been reformed into a *de facto* detention centre, and Amnesty International has reported detentions and mistreatment in the hands of the authorities.⁸⁹ Nevertheless, the Commission expressed doubts as to whether the evidence presented in the reports is adequate to conclude that the individual applicants would face risk to their life, liberty or physical integrity.⁹⁰

In no decisions from the sample studied here have the Committees found that criteria a and c are not fulfilled.

E. Intermediate Summary

At this point, it would be useful to summarise the findings of the analysis of the Appeals Committees decisions on the question of whether Turkey is a safe third country for Syrian refugees.

First of all, the Committees agree that the dangerous situation in the country is not generalised to the extent that every return to Turkey would be prohibited *a priori*.⁹¹ The individual circumstances of the applicants still play a role as to whether Turkey is safe for them. The Committees also rule that

⁸⁶ *Case 1*, p 13.

⁸⁷ *Case 5*, p 8; European Council on Refugees and Exiles (n 62).

⁸⁸ Arts 6 and 8 TPR; Arts 57 and 68 LFIP.

⁸⁹ *Case 5*, p 8; Amnesty International, 'Turkey: EU risks complicity in violations as refugees and asylum-seekers locked up and deported' (16 December 2015) <<http://www.amnesty.org/en/latest/news/2015/12/turkey-eu-refugees-detention-deportation/>> accessed 15 November 2016.

⁹⁰ *Case 5*, p 9; COM (2016) 166 final (n 84), 3.

⁹¹ *NA v the United Kingdom* App no 25904/07 (ECtHR, 17 July 2008); *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011).

the evidence provided is not substantial enough to suggest direct risk to the life and liberty of Syrian refugees or risk of serious harm.

On the issue of refoulement, the Committees in three out of the five cases in which it is examined, find unanimously that the principle of non-refoulement is systematically violated in Turkey, recalling incidents of violent rejection at the borders and mass deportations to Syria. In the two cases where no risk of refoulement is found, the Committees refer to reported systematic incidents of refoulement, but base their final conclusion on the fact that the Turkish authorities had detained the applicants, and although they were threatened that they would be returned to Syria, they were eventually let go without the threat actually materializing. The main weakness of this argument is that it fails to explain how this incident guarantees the safety of the applicants from being arbitrarily returned to Syrian upon their readmission to Turkey in the face of the general situation of collective expulsions and violent rejection at the borders.

3. Impact of the EU-Turkey Agreement

At this stage, it is relevant to examine what the impact of the EU-Turkey agreement has been upon the Appeals Committees' decisions following its adoption.

It follows from the examination of the sample that the adoption of the agreement was seen by the Appeals Committees as an important development that sets the circumstances for their rulings. They have, nevertheless, also taken into account other decisive factors. In most cases the Committee explicitly takes into account the EU-Turkey agreement as well as important policy documents related to it, such as the first progress report on the implementation of the EU-Turkey Statement,⁹² the Commission Communication on the next operational steps in EU-Turkey cooperation in the field of migration,⁹³ and a letter by the European Commission (DG Migration and Home Affairs) to the Greek Secretary General of Migration Policy on the same topic. According to this letter, following the legislative

⁹² Communication from the Commission to the European Parliament, the European Council and the Council, First Report on the progress made in the implementation of the EU-Turkey Statement COM(2016) 231 final.

⁹³ COM (2016) 166 final (n 84).

changes in Turkey, the protection afforded is equivalent to that of the Refugee Convention, and Turkey has taken all the necessary measures for it to be considered safe for the purposes of returns from Greece.⁹⁴

Only in *Cases 5, 6, and 8* was the EU-Turkey agreement not mentioned by the Committee, besides pointing out that the Committee adopts the opinion of the UNHCR that the safe third country question cannot be answered in a general manner, for instance through legislation, but needs to be determined on a case-by-case basis,⁹⁵ which is also required by Article 38 of the Asylum Procedures Directive.⁹⁶

It is important to note that the representative of the Ministry and President of the Committee in *Case 8* based her decision that criterion e, concerning refugee status, is fulfilled, explicitly and solely on the EU-Turkey deal. The dissenting opinion noted that Turkey has provided assurances that all those returned will benefit from the temporary protection regime and that the ECtHR recognises that such assurances are an important factor in the determination by the Court of the risk of refoulement.⁹⁷ The President considers the guarantees provided by the Turkish law, combined with the assurances, to be protection equivalent to that of the Refugee Convention.

In the leading *Case 1*, the issue of the EU-Turkey agreement is discussed in detail. The Committee holds (in majority) that the notion of safe third country needs to be interpreted by the authority that decides on the claim for international protection. The national legislature or administration or EU institutions are in principle empowered to establish the presumption that a third country is safe. However, such an act would limit the discretion of the asylum authorities and would shift the burden of proof to the applicant.

⁹⁴ Letter from Matthias Ruetem Director General Migration and Home Affairs to Vasileios Papadopoulos, Secretary-General, General Secretariat for Population and Social Cohesion, Ref. Ares(2016)2149549 - 05/05/2016 <<http://statewatch.org/news/2016/may/eu-com-greece-turkey-asylum-letter-5-5-16.pdf>> accessed 15 November 2016.

⁹⁵ *Case 5*, p 19; *Case 6*, p 16; *Case 8*, p 10; United Nations High Commissioner for Refugees (n 83) 12.

⁹⁶ *Case 5*, p 19.

⁹⁷ *Case 8*, pp 19-21; *Othman (Abu Qatada) v the United Kingdom* App no 8139/09 (ECtHR, 9 May 2012); *Tarakbel v Switzerland* Appl no. 29217/12 (ECtHR 2 November 2014).

Because of the shifting of the burden of proof, this presumption should be able to be challenged at court with respect to the correct application of EU law.⁹⁸

Regardless of the legal nature of the EU-Turkey agreement (the Committee does not directly engage in this discussion),⁹⁹ the Committee, in an alternative interpretation, holds that the agreement does not concern the application of the concept of the STC to Turkey, but instead the obligation of Turkey to accept Syrians whose claim for international protection has been denied. If it were to be concluded that the presumption that Turkey is a STC had been established by the deal, the Committee continues, it would have been a necessary requirement for this presumption to be included in a legislative or administrative act that could be challenged before courts.¹⁰⁰

It can be concluded that, although the Committees take into account the EU-Turkey deal, they do not accept an umbrella presumption of Turkey as a safe third country for Syrians. This becomes obvious from the explicit interpretation of the leading *Case I*, but also from the fact that in all the cases, while acknowledging the deal, the situation is examined on an individual basis. With respect to the two exceptional cases that recognise Turkey as safe, we could argue that the lack of in depth discussion and argumentation on the basis of institutional and state reports shows that the Committees in these two cases heavily relied on the EU-Turkey agreement. Their members seem to accept a strong presumption that is, however, not irrebuttable. This can be deduced from the fact that the possibility of serious risk of persecution is at least superficially examined and rejected. However, it is difficult to draw any definitive conclusions, due to the fairly limited argumentation that does not allow for an adequate examination of the motivation of the decisions.

⁹⁸ *Case I*, p 8.

⁹⁹ See Steve Peers and Emanuela Roman (n 2); Maarten den Heijer and Thomas Sprijkerboer, 'Is the EU-Turkey refugee and migration deal a treaty?' (*EU Law Analysis Blog*, 07 April 2016) <<https://eulawanalysis.blogspot.nl/2016/04/is-eu-turkey-refugee-and-migration-deal.html>> accessed 15 November 2016.

¹⁰⁰ *Case I*, p 9.

VI. TURKEY AS STC FOR THE GREEK APPEALS COMMITTEES

This section will cover the evaluation of the decisions in terms of logical and methodological soundness. An evaluation on the substantive level would be exceeding the scope of this article.

The most important basis for considering that Turkey is not a safe third country for the Committees seems to be the possibility to apply for, receive, and enjoy refugee status, as that is provided in the Refugee Convention. All Committees in the positive decisions agreed that this requirement is not fulfilled. Two of the Committees ruled unanimously on the issue,¹⁰¹ while in the remaining three it was the President of the Committees that issued a dissenting opinion (Table I). This is perhaps the most stable ground for considering Turkey not safe for two further reasons. First, because the outcome is based on a large number of grounds, and second, because the analysis does not solely rely upon the situation on the ground, as described in NGO and institutional reports, but relies greatly upon the examination of the legal framework itself.

We should not omit to comment on the decisions, where the basic factor was not the general situation in the country, but the personal situation of the individual applicant (Figure I). In *Case 4* the Committee avoided getting into the issue of discussing the general situation concerning Syrians in Turkey by basing its decision on the link of the applicant with Turkey. Also, the negative decisions were based on the fact that the applicants had established a link with the country, paying little to no attention to the other criteria.¹⁰² This does not allow us to draw conclusions about their position on the issues of refoulement and the refugee status of Syrians in Turkey. It is relevant to note that all three decisions were issued by the same Committee (Table I). It seems that these three members (Table I) chose to focus on the existence of the link with the third country, avoiding a discussion based on evidence on widespread refoulement of Syrians and the issue of their refugee status.

¹⁰¹ *Cases 5 and 6.*

¹⁰² In both cases in identical wording, the Committees find the applicants' claim with respect to condition a not credible, while they rule that all other criteria are fulfilled in Turkey for Syrian refugees that reside and work in Turkey since 2014, face no risk of persecution, and do not belong to a vulnerable group, citing a letter sent by the UNHCR to the Asylum Service.

Although this approach is methodologically sound in *Case 4*, since the non-fulfilment of one condition suffices to reach a conclusion on the issue of the safe third country, one cannot say the same about the two negative decisions. The conditions in Article 20(1) PD 113/2013 and Article 38 Asylum Procedures Directive are cumulative and not alternative. In other words, the superordinate category of the 'safe third country' needs to contain all the attributes included in the Article. Thus, having decided that a condition is fulfilled the responsible authority needs to consider the other conditions, and only in the case that all of them are fulfilled, finally decide that a country is to be considered safe for the purposes of return.

This methodological error fundamentally challenges the quality of these two decisions, while combined with the limited emphasis on the motivation of the decisions,¹⁰³ creates uncertainty as to the precise legal reasoning.

Another element that puts the quality of these decisions at a disadvantage is their documentation. Their members placed confidence in the declaration of Turkey as a STC by the EU-Turkey agreement, while failing to take into account the general situation in law and practice concerning Syrian refugees, as this has been documented by NGO, institutional, and academic sources.

At the other end of the spectrum, the positive decisions are well informed about Turkish law and are thoroughly documented concerning the situation on the ground. The Committees, in order to examine the credibility of the claims of the applicants, resorted to NGO and institutional reports, as well as academic articles often presenting a clash between law and practice in Turkey.

The first decision, *Case 1*, seems to be the most clearly reasoned with well-structured and elaborate explanations and references to the legal framework. It also laid the groundwork and produced the research and the basic argumentation that was used by the decisions that followed.

VII. THE RE-ORGANIZATION OF THE APPEALS COMMITTEES

One month after the first decision of the Appeals Committees the Greek Parliament, in a fast-track legislative procedure, adopted an amendment that

¹⁰³ The negative decisions are in average half in size compared to the positive ones.

modifies the composition of the Committees (Art. 86 of Law 4399/2016).¹⁰⁴ Up until then the administrative Committees were composed of one representative of the Ministry of Interior, one human rights expert selected by the government from a list compiled by the National Commission on Human Rights (NCHR), an official consultative organ to the state, and one UNHCR representative.

Following political pressure on the Greek government from the European Council¹⁰⁵ and the Commission to expedite returns to Turkey and to 'rethink this system with the committees',¹⁰⁶ the legislative amendment created new Appeals Committees. These were renamed 'Independent Appeals Committees' and are composed of two judges of the Administrative Courts and one member proposed by the UNHCR or the NCHR in case the former has not proposed one within the deadline.

The Greek government supports this change on the basis of reinforcement of independence and the right to an effective remedy, arguing that this brings Greece closer to European safeguards.¹⁰⁷

On a substantive level, the analysis of the decisions above disproves the responsible Minister's accusations of bias by the 'members of civil society' composing the Committees.¹⁰⁸ Next to the fact that the UNHCR and the NCHR do not represent civil society but are respectively a UN body and an official consultative organ to the state, there are several arguments that support the unbiased nature of the decisions.

¹⁰⁴ Article 86 of Law 4399/2016 amending Article 5 Law 4375/2016. The new Law 4375/2016 governing the Asylum Service and the Appeals Authority had been adopted two months prior to the sudden amendment included in an unrelated piece of legislation.

¹⁰⁵ Irene Kostaki, 'EU Council: Why Greece should consider Turkey safe for Syrian refugees', *New Europe* (9 June 2016) <www.neweurope.eu/article/eu-council-greece-consider-turkey-safe-syrian-refugees/> accessed 15 November 2016.

¹⁰⁶ Eszter Zalan, 'EU pushes Greece to set up new asylum committees', *EU Observer* (Brussels, 15 July 2016) <<https://euobserver.com/migration/133841>> accessed 15 November 2016.

¹⁰⁷ Petros Katsakos, 'Γιάννης Μουζάλας: Το Brexit και η άδικη κριτική', *AVGI Newspaper* (Athens, 26 July 2016) <www.avgi.gr/article/10842/7020509/to-brexit-kai-e-adike-kritike#> (in Greek) accessed 15 November 2016.

¹⁰⁸ *Ibid.*

In particular, in 3 out of the 5 relevant cases examined here the decisions were unanimous with the Ministry representative holding that Turkey is not a safe third country. The two negative decisions were also unanimous, with all three members agreeing that Turkey is safe for the applicants concerned.

As far as the legislative framework is concerned, EU law and the ECHR leave sufficient discretion to member states to develop their domestic asylum systems. However, this must be done in a way that is compatible with the right to an effective remedy. For the practical and effective implementation of this right the ECHR in Art.13 requires a review before a national authority that is not necessarily a tribunal.¹⁰⁹ Under EU law, Art. 47 of the EU Charter of Fundamental Rights, however, provides a stricter interpretation requiring that the right to an effective remedy is guaranteed by 'a court or tribunal'.¹¹⁰

Many EU member states, such as Germany, Bulgaria, the Netherlands, Ireland, Slovenia, Italy, and Finland, have assigned the review of asylum decisions in the second instance to judicial authorities, while France has a specialised Asylum Court.

At this point it should be noted that judicial review is not absent in the Greek system, as under Greek administrative law administrative courts can review the decisions of the Appeals Committees.

The involvement of a judicial authority is, in principle, an important safeguard of objectivity and independence. However, it is not an absolute one. The ECtHR has established several elements that constitute an 'independent' tribunal for the purposes of Article 6 (1), including safeguards against external pressures. With respect to the impartiality of the tribunal, one of the tests applied by the ECtHR is whether there are legitimate reasons

¹⁰⁹ *Klass and Others v Germany*, App no 5029/71, (ECtHR, 6 September 1978); *Silver v the United Kingdom*, App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (ECtHR, 25 February 1983).

¹¹⁰ Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), Explanation on Art. 47, 29 and 30 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>> accessed 15 November 2016.

to fear that the impartiality is compromised, in particular whether this fear can be objectively justified.¹¹¹

At this stage the question of whether the new national authority remains a quasi-judicial body or constitutes a tribunal for the purposes of Article 47 of the Charter needs to be addressed. The issue is not a matter of definition by the constituting national authorities, but is determined in the context of EU law. Article 39 (1)(a) of the Procedures Directive states that Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision taken on their application for asylum.¹¹² The Court of Justice of the European Union (CJEU) has set out a number of criteria that serve as requirements for an authority to be considered as 'a court or tribunal' in *H. I. D. and B. A. v Refugee Applications Commissioner and Others*.¹¹³ Some of these criteria are whether the body is established by law, whether its jurisdiction is compulsory, whether it applies rules of law and whether it is independent. In the context of this test the CJEU deemed it necessary 'to assess as a whole the Irish system of granting and withdrawing refugee status in order to determine whether it is capable of guaranteeing the right to an effective remedy'.¹¹⁴

The issue has been at the centre of a heated debate on the constitutionality of the legislative amendment, with members of the Greek Parliament, and the National Commission of Human Rights¹¹⁵ having expressed doubts as to whether the new body constitutes a judicial authority.¹¹⁶ The Council of

¹¹¹ *Gautrin and Others v France*, App nos 21257/93, 21258/93, 21259/93 et al. (ECtHR, 20 May 1998).

¹¹² Art 47 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

¹¹³ Case C-175/11 *HID and BA v Refugee Applications Commissioner and Others* EU:C:2013:45.

¹¹⁴ *Ibid*, para 102.

¹¹⁵ National Commission on Human Rights, 'Δημόσια Δήλωση για την τροπολογία που αλλάζει τη σύνθεση των ανεξάρτητων Επιτροπών Προσφυγών', (Athens, 17 July 2016) <http://nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/Dimosia%20dilwsi%20EEDA.pdf> (in Greek) accessed 15 November 2016.

¹¹⁶ ECRE, 'Greece amends its asylum law after multiple Appeals Board decisions overturn the presumption of Turkey as a 'safe third country'' (Brussels, 24 July 2016)

State, the highest administrative court, has ruled on the issue of the participation of judges in Committees, holding in its established case law that the latter do not constitute a judicial authority in the meaning of Article 89(2) of the Greek Constitution, since they issue decisions on administrative acts, following the rules of administrative procedure, which do not afford fair trial guarantees, such as public hearings, cross examination, and the right to be heard.¹¹⁷ This issue is raised among others in a case brought recently before the Council of State, challenging the reorganization of the Appeals Committees.

The Appeals Committees have been part of the asylum system in Greece since 2012. Until then the Council of State was responsible for the review of asylum decisions in the second instance. In this period, the ECtHR held in *M.S.S. v Belgium and Greece* that serious deficiencies made the system of appeals ineffective, whilst the protection it provided was theoretical and illusory.¹¹⁸ One of the factors taken into account by the ECtHR when judging the fairness of the procedure was the recognition rates of refugee status under the Geneva Convention, which were as low as 2.87% in 2008, and of humanitarian reasons or subsidiary protection, which were 1.26%, according to the UNHCR. By comparison, the average success rate in first instances was 36.2% in the five countries which, along with Greece, received the largest number of applications that year.¹¹⁹ In implementing the *M.S.S.* judgment the Greek Government established the Asylum Service, which dealt with claims in the first and the second instance. In 2015 the recognition rates of the Appeals Committees were around 23%, according to Eurostat.¹²⁰

<<http://www.ecre.org/greece-amends-its-asylum-law-after-multiple-appeals-board-decisions-overturn-the-presumption-of-turkey-as-a-safe-third-country/>> accessed 15 November 2016.

¹¹⁷ Greek Council of State 3503/2009 and 717/2011 Department B, 449/2012 Department F, 629/2012 Department D, 1770/2012 Department E, 99/2015 Department E; Greek Council of State 3503/2009 and 99/2015 Department E.

¹¹⁸ *M.S.S. v Belgium and Greece* (n 30).

¹¹⁹ *Ibid*, paras 125 - 7.

¹²⁰ Eurostat, 'EU Member States granted protection to more than 330 000 asylum seekers in 2015 Half of the beneficiaries were Syrians' (20 April 2016) <<http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/34c4f5af-eb93-4ecd-984c-577a5271c8c5>> accessed 15 November 2016.

Thus, the analysis of the legal framework and the domestic practice, indicate that judicial review is not an absolute and exclusive safeguard for effective legal protection. Moreover, the empirical research did not show signs of bias by the members of the 'civil society'. To the contrary, the decisions were well argued and thoroughly documented. Furthermore, many of them were unanimous. By contrast, the negative decisions are not equally sealed from accusations of bias. Finally, the issue of the impartiality and independence of the new body cannot be judged with scientific certainty without access to the text of the decisions of the new Appeals Committees. However, the timing of the amendment, which coincides with decisions of the Appeals Committees blocking returns to Turkey, is alarming and must certainly result in the question being raised. All the more so, since the first indication of the practice of the new Appeals Committees confirms their alignment with the EU-Turkey deal and the opinion of the Greek government and the European Commission. As mentioned already in section II, the new Appeals Committees have issued so far 20 decisions, all of which uphold the inadmissibility decision of the first instance, ruling that Turkey is a safe third country.

A development that is worth mentioning is that two appeals are pending currently before the Greek Council of State that challenge the administrative acts establishing the new Appeals Committees and one of their decisions considering Turkey a safe third country.¹²¹ At the regional level, the first case regarding the implementation of the EU-Turkey Joint Statement is pending before the ECtHR.¹²² The ECtHR has also issued interim measures to stop the deportation of an Iranian applicant on the basis of the EU-Turkey deal.¹²³ In a parallel development, the CJEU, has distanced itself from the EU-

¹²¹ With Decision 477/2017 the responsible chamber of the Greek Council of State referred on 21 February 2017 the issue to the Grand Chamber.

¹²² The European Court of Human Rights communicated the case of *B.f. v. Greece* and has addressed the Greek government with specific questions (30 May 2017) <<http://bit.ly/2sdZC6O>> accessed 26 July 2017.

¹²³ EFSYN, 'Μήνυμα ΕΔΔΑ κατά των απελάσεων' (02 May 2017) <<http://www.efsyn.gr/arthro/minyma-edda-kata-ton-apelaseon>> accessed 26 July 2017

Turkey agreement, ruling that that was in fact not an EU act, and therefore not subject to the jurisdiction of the court.¹²⁴

Furthermore, it should be noted that, in a common report, ECRE, the Dutch Refugee Council, the Greek Refugee Council, the Nationale Postcode Lotterij, ProAsyl, and the Italian Refugee Council point out that the excessive application of the 'safe third country concept' at the admissibility stage of the review of the asylum applications has resulted in a sort of 'filtering of newly arrived migrants before they enter the asylum procedure'.¹²⁵ This new trend at the admissibility stage, which appeared after the entry into force of the EU-Turkey agreement, essentially preselects those that can enter the asylum system, blocking access to the asylum procedure for the rest.

The EU-Turkey agreement provides for the readmission to Turkey of all new irregular migrants that crossed from Turkey to Greece, including asylum seekers whose applications have been refused. The readmission, according to the agreement, comes as a result of holding the asylum application inadmissible or unfounded. Nevertheless, the agreement is systematically used at a prior stage in order to exclude access to the asylum procedure itself.

VIII. CONCLUSIONS

To sum up, in 390 out of the 393 decisions issued by the Greek Asylum Appeals Committees, the requirements of national law and the Asylum

¹²⁴ Orders of the General Court in Cases T-192/16, T-193/16, and T-257/16, *NF, NG and NM v European Council*, EU:T:2017:128, EU:T:2017:129, and EU:T:2017:130. The General Court of the European Union ruled on 28 February 2017 that it lacks jurisdiction to hear actions against the EU-Turkey deal. The order of the General Court came in response to the actions for annulment brought by three asylum seekers in Greece lodged on 22 April 2016. The General Court in a rather unconvincing creative interpretation held that the EU-Turkey deal was not a measure adopted by the Union, but it was in fact an agreement between its Member States and Turkey. The applicants have lodged an appeal against the judgment.

¹²⁵ ECRE, Dutch Council for Refugees, Greek Council for Refugees, Nationale Postcode Lotterij, ProAsyl, and Italian Council for Refugees, 'The implementation of the hotspots in Italy and Greece – A Study' (05 December 2016) <<https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016.pdf>> accessed 15 November 2016.

Procedures Directive in order to consider Turkey a safe third country are not fulfilled.

From the sample of the decisions analysed here, it can be concluded that the main issues, on the basis of which the Appeals Committees draw their conclusions, concern the risk of refoulement and the lack of protection equivalent to that provided by the Refugee Convention.

Another core issue that results from the analysis of the decisions studied here concerns the impact of the EU-Turkey agreement upon them. The Appeals Committees take into consideration the EU-Turkey deal. They do not however consider it binding as to the interpretation of the safe third country requirement. They hold that national authorities have autonomy on the interpretation of the concept, which should be carried out on a case-by-case basis taking into account the particular circumstances of each case.

With respect to the two exceptional decisions that consider Turkey a safe third country, it would be safe to conclude that the Committees heavily relied on the EU-Turkey agreement. They seem to accept a strong presumption of Turkey as safe, that is, however, not irrebuttable.

These decisions have essentially impeded the application in practice of the EU-Turkey agreement, as the applicants could not be returned to Turkey. As a result, the decision was made for the reorganisation of the Committees and they were essentially replaced by new Committees that are composed of two administrative law judges and one person proposed by the UNHCR or the NCHR. The hypothesis on which that decision was based, i.e. that this would bring greater objectivity and independence and would provide more effective judicial protection is not substantiated by the conclusions of this empirical study or by the analysis of the legal framework. Next to the fact that the allegations that motivated the amendment are not confirmed here, the timing of the amendment itself, which coincides with decisions of the Appeals Committees blocking returns to Turkey, is also alarming. All the more so, since the first indication of the practice of the new Appeals Committees confirms their alignment with the EU-Turkey deal and the opinion of the Greek government and the European Commission. Hence, although no concrete scientific conclusions can be drawn as to the impartiality and independence of the new Committees without access to the text of their decisions, there are enough arguments to support that the

decision for the reorganization of the Committees was purely political aiming to circumvent the legal obstacles blocking the application of the EU-Turkey deal.

In the light of the challenges concerning migration management in Europe, this contribution aspires to inform the discussion concerning one of the most controversial topics amongst scholars, policy makers, and the general public, i.e. the EU-Turkey agreement. The effective application of this agreement is of broader importance, since cooperation with third countries is one of the main priorities for migration policy at the national (e.g. cooperation agreements of Italy with Gambia and Sudan) and at the EU level (e.g. Commission agreements, Frontex working arrangements) for the coming period.

By delving into the untapped and highly inaccessible resource of the decisions of the Greek Asylum Appeals Committees, this study examines issues concerning the interpretation and the enforcement of the EU-Turkey agreement. This can essentially contribute to the debate that started at the policy level, has moved to the field, and is to be continued before the courts.