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The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees

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The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees

MARIANA GKLIATI

Abstract: This article discusses the first case law issued on the EU-Turkey deal from April to June 2016, which authoritatively answers the question whether Turkey constitutes a safe third country for refugees. In 390 out of 393 decisions, the Greek Asylum Appeals Committees ruled that Safe Third Country (STC) requirements were not fulfilled with respect to Turkey, essentially impeding the application of the EU-Turkey deal. Through empirical research, this article sheds light on the reasoning of the decisions of the Appeals Committees and investigates the impact of the EU-Turkey deal on them. This analysis is highly relevant to society today 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 deal, Greece, safe third country

For more than a year since its adoption, the EU-Turkey deal has been at the center of significant political (Nielsen 2016) and legal turmoil. The deal has been widely criticized by migration experts and NGOs regarding the presumption that Turkey is a safe third country (henceforth STC) for refugees (Peers/Roman 2016; AI 2017; Roman/Baird/Radcliffe 2016; Ulusoy 2016). The latest upheaval was caused by a ruling by the Court of Justice of the European Union (CJEU) stating that the EU-Turkey deal was not in fact an EU act, and therefore the court would have no jurisdiction to rule on the lawfulness of the deal on the basis of an action for annulment brought by three asylum seekers that were affected by the deal (CJEU 2017).

The Greek Asylum Service, the first instance authority responsible, has been implementing the deal, determining that the return of failed asylum seekers to Turkey is not objectionable as Turkey can offer adequate protection to refugees. However, the Committees have overturned these rulings in 390 out of 393 decisions, impeding the application of the EU-Turkey deal on the ground.

In this article, I present a summary of a longer paper (Gkliati 2017) that aims to shed light on the reasoning of the decisions of the Appeal Committees. In particular, the paper investigates the reasoning of these decisions with regards to the issue of Turkey as a safe third country and the influence of the EU-Turkey deal on the Committees. The article deals with the first judgements issued on the EU-Turkey deal since its entry into force in April 2016 until the reorganization of the Committees in June 2016, which authoritatively answers the question whether Turkey constitutes an STC. Such an analysis is highly relevant for society at this time, as it aspires to inform further law, policy, and jurisprudence, especially since it provides access to sources that, due to practical barriers, would remain far from the reach of legal and policy experts.

THE EU-TURKEY DEAL AND THE ›SAFE THIRD COUNTRY‹ CONCEPT

The EU-Turkey deal aims to curb irregular border crossings via one of the basic sea routes into the EU — that between Turkey and Greece. Central to the deal is the readmission agreement, according to which all third-country nationals crossing irregularly from Turkey to the Greek islands after March 2016 that are not in need of international protection would be returned to Turkey on the premise that Turkey is safe for them.

Given that most of the people arriving through that route come from Syria and other refugee-producing countries, the EU-Turkey deal would not be able to significantly reduce arrivals. However, a blanket application of the STC principle runs the risk of extending the rule to any third country national arriving from Turkey (Peers/Roman 2016).

The STC concept expresses the principle that refugees should seek asylum in the first safe country they are able to reach. It is based on a strict and heavily criticized interpretation of Art. 31(1) of the Refugee Convention, which excludes asylum seekers from penalization for entering the territory of a state unlawfully when coming ›directly‹ from a territory where they face persecution (Roman/Baird/Radcliffe 2016). The safety of the country to which a refugee is returned is necessary if it is to fulfill the protection standards of the Refugee Convention and the European Convention on Human Rights (ECHR). This principle has been transposed into EU law in the EU Asylum Procedures Directive, which puts common procedures for EU Member States in place for granting and withdrawing international protection. Art. 33(2)(c) stipulates that a claim for international protection does not need to be considered on

its merits and may be considered inadmissible if a country that is not a Member State (third country) is considered to be an STC.

The requirements for considering a third country ›safe‹ have been laid down in national law (PD 113/2013), which incorporates the text of Art. 38 of the Procedures Directive. According to Art. 20(1) of the PD 113/2013, a country is considered a ›safe third country‹ when a person seeking international protection would 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 Greece, asylum and subsidiary protection requests are first examined by the Asylum Service and, on appeal, by the Committees. Only after a claim has passed the admissibility stage can it be considered on its merits, where its substance is evaluated. The EU-Turkey deal operates under the presumption that Turkey constitutes an STC, and thus all asylum applications submitted in Greece should be considered inadmissible, and all applicants should be returned to Turkey to claim protection there.

Since its entry into force, the Greek Asylum Service has been implementing the deal, rejecting all asylum applications without examination of the merit on the grounds of Turkey being an STC. However, this presumption has been rejected by the Committees in 390 out of 393 decisions (AI 2017: 14), blocking the application of the EU-Turkey deal in practice.

These decisions have been hailed by several human rights organizations (e.g. AI 2016), while the European Commission has officially recognized them as proof that there are no blanket or automatic returns to Turkey following the deal, arguing that the ›safeguards provided by the Procedures Directive [...] are in place and respected‹ (European Commission 2016a).

However, one month after the first decision of the Committees, following allegations of lack of objectivity of their members, the Greek Parliament adopted an amendment in a fast-track legislative procedure on 16 June 2016 that modified the composition of these committees (Art. 86 (3) of Law 4399/2016). Up until then, the administrative Committees were composed of one representative from 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 representative of the UN High Commissioner for Refugees (UNHCR). Following political pressure at the EU level on the Greek government (Gkliati 2016), new Appeals Committees were created, composed of two judges and one member proposed by the UNHCR or the NCHR, shifting the majority of votes to the state.

In a complete change of course, the ›new‹ Appeals Committees have since upheld the first-instance inadmissibility decision in all 20 inadmissibility decisions they have issued so far, ruling that Turkey is in fact an STC (AI 2017: 15).

It has become apparent that the need to study the content of the decisions of the original Committees extends beyond legal-historical interest into informing the constantly developing law, policy, and practice in the field, towards an issue that affects the life and freedom of thousands of individuals. In fact, according to Amnesty International (AI), 27,000 individuals have arrived on the Greek islands since the EU-Turkey deal has entered into force; more than half of which have applied or expressed their wish to apply for asylum. Until now, only 1,476 individuals have been reunited with their families, and 163 have received international protection in Greece. Furthermore, 865 individuals, of whom 151 are Syrians, have been returned to Turkey on the basis of the EU-Turkey deal (ibid.: 6–14).

An analysis of these decisions, moreover, indicates that these are not simply a parenthesis to the universal and unhesitating implementation of the EU-Turkey deal (Gkliati 2016). According to the Greek authorities, none of these returns to Turkey concern asylum seekers whose claim has been rejected at the admissibility stage, on the grounds of Turkey being regarded an STC (AI 2017: 17). Such returns have essentially been blocked by the Committees that overturned the first instance decisions by 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« (ibid.).

METHODOLOGICAL NOTE

For the purposes of this study, a random sample of eight of the first decisions made by the Committees was reviewed. This sample is representative and sufficient to provide a basic understanding of the reasoning of the Committees. The decisions follow a similar line of reasoning. Indeed, often the text of one is copied to another, even when the committees are composed of different members. At this point, it is necessary

to note that the most important decisions have been included in the sample. These include the first decision following the entry into force of the EU-Turkey deal, which created precedent and laid down the argumentation for the decisions that followed, and two out of the only three decisions issued that differentiate from the rest, agreeing with the first instance that Turkey is indeed an STC.

As far as the collection of data is concerned, the responsible Asylum Authority declined a request for disclosure of the documents, despite guarantees of confidentiality and data protection offered by the author. The first case issued is available in the public domain,¹ and the other cases were acquired through experts in the field and used in an anonymized form for the purposes of this article.

The article employs the method of analytical description in order to illustrate the reasoning of the decisions in a clear and comprehensive manner. To do so, the following section, making use of simple typology (e.g. negative vs. positive decisions), identifies the relevant indicators/criteria. The evaluation of the decisions is made on the basis of methodology and argumentation rather than on the basis of the substantial evidence. Based on the above, the paper describes a synthesis of the relevant indicators/criteria to provide the answer of the Committees to the central question of whether Turkey constitutes an STC. An in-depth evaluation of the decisions, in terms of methodology and argumentation, as well as a substantiated critical analysis of the re-organization of the Committees, can only be presented in the longer publication (Gkliati 2017).

This article takes into account legal and policy developments until 1 January 2017, unless stated otherwise.

EXAMINING TURKEY AS AN STC

Out of the 393 decisions issued, 390 are positive, in the sense that they overturn the ruling of the first instance and decide that the applicant's asylum claim is admissible. Only three out of the 393 decisions are negative, upholding the ruling of the first instance that Turkey is safe for the applicant and regarding his/her claim inadmissible.

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

1 | Decision 05/133782 (2016). URL: eerstekamer.nl [15.11.2016].

enough to suggest »direct risk to the life and liberty« of Syrian refugees or »risk of serious harm.«

On the issue of *refoulement* (criterion (b)), in three out of the five cases in which it was examined, the Committees unanimously held 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 the issue of *refoulement* was discussed but no risk was found, the Committees refer to systematic incidents of *refoulement*. However, they base their final conclusion on the fact that the Turkish authorities had detained the applicants, and although they were threatened with return to Syria, they were eventually let go, without the threat actually materializing. The main weakness of this argumentation is that it fails to explain how this incident guarantees the safety of the applicants from being arbitrarily deported in the face of the general situation of collective expulsions and violent rejection at the borders.

The most important basis for rejecting Turkey's status as an STC seems to be whether it is possible to obtain »refugee status,« (criterion (e)) as provided in the Refugee Convention. All Committees in the positive decisions agreed that this requirement had not been fulfilled. Two of the Committees ruled so unanimously, while in the remaining three the president of the Committee issued a dissenting opinion. This is perhaps the most stable basis for considering Turkey as not »safe« for two reasons: first, the outcomes are based on a wide variety of reasons; and second, the reasoning in the judgements is not solely founded on the situation on the ground, as described in NGO and institutional reports, but also, significantly, on the legal framework itself.

As mentioned above, the Committees focused on the personal situation of each applicant, rather than the general situation in the country. In Case 3², the Committee avoided discussing the general state of Syrians in Turkey, basing its decision on the »link of the applicant« with Turkey. In addition, the negative decisions were also based on the fact that the applicants had a »link with the country,« paying little to no attention to the other criteria. This does not allow us to draw conclusions about their position on the issues of *refoulement* and »refugee status« for Syrians in Turkey. It is relevant to note that all three decisions were issued by the same Committee. It seems to have been the choice of these three members to focus on the existence of the link with the third country, avoiding a discussion on evidence on widespread *refoulement* of Syrians and the issue of their refugee status. Although this approach is method-

2 | The case names have been encoded for the purpose of data protection, with the exception of the first case issued, which is available in the public domain.

ologically sound in Case 3, since the non-fulfillment of one condition suffices to reach a conclusion on the issue of the STC, this is not the same with the two negative decisions. The conditions in the law are cumulative and not alternative. In other words, the superordinate category of the STC needs to contain all the attributes included in the law. Thus, even if one condition is fulfilled, the other conditions nevertheless still need to be considered to decide that a country is safe. This methodological error fundamentally challenges the quality of these two decisions, while combined with the limited emphasis on the motivation of the decisions — the negative decisions are on average half the size of positive ones — creates uncertainty as to the precise legal reasoning.

Another element that reveals the lack of quality in these decisions is their documentation. The Committee members placed confidence in the declaration of Turkey as an STC by the EU-Turkey deal, while failing to take into account the general situation in law and practice concerning Syrian refugees, as documented in NGO, institutional, and academic sources. In contrast, the positive decisions are well informed about Turkish law and are thoroughly documented concerning the situation on the ground. The Committees referred to NGO and institutional reports, as well as academic articles, often presenting a clash between law and practice in Turkey. The first decision, *Case 05/133782*, 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 used by the following decisions.

IMPACT OF THE EU-TURKEY DEAL

One further important question concerns the impact of the EU-Turkey deal on the Committees' decisions. An examination of the sample reveals that the adoption of the deal was seen by the Committees as an important factor that set the circumstances for their rulings, but not the only one.

In most cases, the Committee explicitly takes the deal into account, as well as important policy documents related to it, such as the first progress report on the implementation of the EU-Turkey Statement (European Commission 2016b), the Commission Communication on the next operational steps in EU-Turkey cooperation in the field of migration (European Commission 2016c), and a letter by the European Commission (Ruete/DG Migration and Home Affairs 2016) to the Greek Secretary General of Migration Policy on the same topic. According to this letter, following the legislative 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 (*ibid.*).

Only in Cases 5, 6, and 8 was the EU-Turkey deal not mentioned, though they pointed out that the Committee had adopted the opinion of the UNHCR that the STC question cannot be answered in a general manner (such as through legislation), but would have to be determined on a case-by-case basis (UNHCR 2003: 12), which was also required by Article 38 of the Procedures Directive (Case No. 29047: 19).

It is important to note that the President of the Committee in Case 8 based her decision regarding fulfillment of the ›refugee status‹ criterion explicitly and solely on the EU-Turkey deal. Her dissenting opinion noted that Turkey had provided assurances that all those returned would benefit from the temporary protection regime.

In the first case, *Case 05/133782*, the issue of the EU-Turkey deal is discussed in detail. The Committee held (by a majority) that the notion of the STC needed to be interpreted by the authority that decided on the claim for international protection. The national legislature or administration or EU institutions could in principle 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. Because of this shifting of the burden of proof, this presumption should be able to be challenged in court with respect to the correct application of the Procedures Directive.

Regardless of the legal nature of the deal (Peers/Roman 2016; den Heijer/Spijkerboer 2016), the Committee, in an alternative interpretation, held that the deal did not concern the application of the concept of STC to Turkey as such, but rather the obligation of Turkey to accept Syrians whose claim for international protection had been denied. If the deal had established a conclusion that presumed Turkey's status as ›safe,‹ then it would have been necessary to include this presumption in a legislative or administrative act that could be challenged before courts.

It can be concluded that, although the Committees have taken into account the EU-Turkey deal, they do not accept an umbrella presumption of Turkey as an STC. This becomes obvious from the explicit interpretation of the precedent-establishing *Case 05/133782*, but also from the fact that in all cases, while acknowledging the deal, the situation is examined on an individual basis. With respect to the two exceptional cases that characterize Turkey as ›safe,‹ we could argue that the lack of an in-depth discussion and argumentation on the basis of institutional and state reports shows that the Committees in these two cases relied heavily on the EU-Turkey deal. Their members seem to accept a strong presumption that is, however, not irrefutable. This can be deduced from the fact that the possibility of serious risk of persecution is at least superficially examined and rejected.

CONCLUDING THOUGHTS

To sum up, in 390 out of the 393 decisions issued by the Greek Appeals Committees, the requirements of national and EU law to consider Turkey an STC have not been fulfilled. From the analysis of the decisions, it can be concluded that the main issues, on the basis of which the Committees have drawn their conclusions, concern the risk of *refoulement* and the lack of protection equivalent to that provided by the Refugee Convention.

Another core issue that emerges from the analysis of the decisions studied here concerns the impact of the EU-Turkey deal upon the Committees themselves. The Committees take the deal into consideration; they do not, however, consider it binding regarding the interpretation of the STC requirement. They have held that national authorities have autonomy concerning 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 considered Turkey an STC, it would be safe to conclude that the Committees heavily relied on the EU-Turkey deal. They seem to accept a strong presumption of Turkey as safe, which is, however, not irrefutable.

The 390 decisions not considering Turkey an STC have significantly hindered the application of the EU-Turkey deal in practice, as the applicants could not be returned to Turkey. As a result, a decision was made to reorganize the Committees, and they were essentially replaced by new Committees that are now controlled in the majority by the state. 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. Issues surrounding the impartiality and independence of the new body can be investigated as the subject of future work that would focus on an analysis of the decisions of the new Committees. However, it can already be pointed out that the timing of the amendment, which coincides with decisions of the Committees blocking returns to Turkey, is alarming and suggests direct political intervention. This is all the more the case as the first indications of the behavior of the new Committees confirm their alignment with the EU-Turkey deal and the opinion of the Greek government and the European Commission.

This can prove detrimental to the rights of asylum seekers, and can lead to the responsibility of Greece for violations of ECHR decisions and the EU Charter of Fundamental Rights. In fact, the first case regarding the implementation of the EU-Turkey deal, is already pending before the European Court of Human Rights (ECtHR

pending; see also RSA 2017). The case concerns the Syrian applicant in one of the two negative decisions of the Committees discussed in this article. The applicant has filed a complaint regarding the violation of Articles 3 and 13 of the ECHR, concerning his deportation to a country where he may be subject to inhuman and degrading treatment. The Court has also temporarily suspended the deportation to Turkey of an Iranian national until the completion of the appeal proceedings, and has asked the Greek authorities for guarantees that the applicant will not be sent back to Iran.

In the light of the challenges concerning migration management in Europe, this contribution, by delving into an untapped and largely inaccessible resource — the decisions of Greece’s Asylum Appeals Committees — 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 deal. The implementation in practice of this deal 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. the EU-Libya deal) for the foreseeable future (European Commission/High Representative of the Union for Foreign Affairs and Security Policy 2017). This is still an open discussion, which started at the policy level, has moved to the field, and is continuing in the courts.

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