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## **A critical approach of the concept of Turkey as a safe-third country under the scope of the EU-Turkey ?Common Statement? as interpreted by the Greek Council of State and two different Independent Appeal Committees**

### **Date:**

Tuesday, July 10, 2018

On 18<sup>th</sup> of March 2016, EU and Turkey concluded a controversial ?[Common Statement](#) [1]? (the Statement hereafter), which has been [widely criticised](#) [2] by [academics](#) [3] and [N.G.O.s](#) [4]. According to this Statement, the asylum application of all irregular migrants who entered the Greek islands from Turkey after the 20<sup>th</sup> of March 2016 can be ruled inadmissible on the grounds that Turkey can be considered [a safe third country](#) [5]. In this case, [they will be returned to Turkey](#) [6].

In addition to those developments, on 3<sup>rd</sup> of April 2016, the Greek Parliament adopted a new law ([Law No 4375/2016](#) [7]), transposing the provisions of the [2013/32/EU Directive](#) [8] (APD hereafter) into Greek legislation. This amendment introduced several crucial changes in the Greek asylum system. Amongst the most relevant for the purposes of the implementation of the Statement was, first the adoption of the fast-track procedure at the borders (Article 60(4) of the Law No 4375/2016) and second the introduction of an initial admissibility test for asylum applications at the borders (Articles 54-56 of the Law No 4375/2016). These provisions apply to all irregular migrants who arrived in the Greek islands after the 20<sup>th</sup> of March 2016 from Turkey. Thus, if Turkey is considered a safe third country for them, their asylum application is rejected as inadmissible [Article 54(1)(d)] of the Law No 4375/2016) and they face expulsion to Turkey. Noteworthy, in this respect, is that [Greece has not formulated a list of safe third countries](#) [9] and the concept is only applied in the context of Article 60(4) Law No 4375/2016, for those who fall under the Statement.

In September 2016 two Syrian asylum seekers lodged an application for annulment before the Greek Council of State against the negative decisions of the Independent Appeals Committees which rejected their application in the second instance and additionally against the expulsion decisions which were issued for both the appellants. Following this development, the Appeal Committees decided to put [on hold their decisions](#) [10] on the appeals of Syrian asylum seekers until the final judgment of the Full Chamber of the Greek Council of State was made.

### **The 2347/2017 Full Chamber of the Greek Council of State Judgment.**

The above mentioned long-awaited decision in the cases [2347/2017 and 2348/2017](#) [11] of the Full Chamber of the Greek Council of State, was finally made on the 22nd of September 2017. The Greek Council of State rejected the application for annulment and upheld the 4159/8.9.2016

decision of the Third Independent Appeals Committee, which had rejected the appeal against the decision 38839/17.8.2016 of the Regional Asylum Office of Lesbos, stating that Turkey is a safe third country for the Syrian appellant. This decision concerned important elements of the Statement, such as the concept of Turkey as a safe third country for the Syrian appellant and various provisions of the new Greek asylum system, introduced with the Law No 4375/2017. Amongst the most important of them, the role of the European Asylum Support Office (EASO) in Greek asylum procedures, [fast-track border procedures](#) [12] and the question if [the three Ministerial Decisions regulating the Independent Appeals Committees](#) [13] are in conformity with the relevant provisions of the Greek Constitution.

The Council of State (the GCS hereafter) rejected (in paragraphs 44, 45, 51 and 52 of the judgment) the arguments regarding violations of the [non-refoulement](#) [14] principle by the Turkish authorities and the allegations of detention of Syrians who were returned to Turkey. More specifically, the GCS ruled that there was no threat to the applicant's life or freedom in Turkey based on his nationality and it rejected the applicant's allegations that Turkey violates the principle of *non-refoulement* in practice. The GCS based its reasoning (in paragraphs 47-48) on the large number of Syrian refugees residing in Turkey, on [the assurances](#) [15] provided by the Turkish authorities to the Commission regarding the situation of Syrians in Turkey and to the fact that the appellant remained in Turkey for one and half months without facing any problems with the Turkish authorities. Furthermore, in the GCS's view, the developments that followed the failed coup d'état did not negatively influence the protection provided to Syrian refugees in Turkey. The GCS also carried out an interpretation of the requirements set by Article 38(1) of the APD and ruled that Turkey fulfills them and is a safe third country. According to the GCS's interpretation, the protection provided in Turkey is in accordance with the [1951 Geneva Convention on the Status of Refugees](#) [16] (hereafter the Refugee Convention) and the 1967 New York additional Protocol despite the fact that the temporary protection provided [can be withdrawn](#) [17]. Furthermore, according to the GCS, under Article 38(1) APD, the safe third country is not required to have ratified the Refugee Convention without geographical limitations and it is sufficient to provide protection of certain fundamental rights of refugees such as the right to health care and employment. Finally, the GCS also ruled that in cases of transit through a third country, a 'sufficient connection' between an asylum seeker and a third country could be concluded after examining the duration of the stay and the third country's proximity to the country of origin.

Finally, it is worth mentioning that the judges of the GCS decided with a narrow majority (13 against to 12 in favor) not to refer a preliminary question to the Court of Justice of the EU regarding the meaning of Article 38 APD, despite the fact that the CJEU had never ruled on the aforementioned Article and notwithstanding the provision of Article 267(3) of the Treaty of Functioning of European Union ([TFEU](#) [18]) which provides that 'Where any such question [regarding the interpretation of the treaties] is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal [shall](#) [19] bring the matter before the Court?.'

### **The Eleventh Independent Appeals Committee 14011/2017 and the Ninth Independent Appeals Committee 15602/2017 Judgments.**

Two different Greek Appeals Committees have given a further interpretation of [the safe third country concept](#) [20] in appeals against the negative first instance decisions concerning Syrian asylum seekers. The judgment of the Eleventh Committee preceded, while the judgment of the Ninth Committee followed, approximately one week after the judgment of the GCS. In their judgments, both Appeals Committees elaborated on the 'sufficient connection' concept. Interestingly, their interpretation diverged from the GCS's approach. In the following part, the content of those two judgments will be analysed.

### [The Eleventh Appeals Committee Judgment 14011/2017](#) [21].

In this case, the Appeals Committee reached the conclusion that Turkey could not be considered as a safe third country for the appellants. As a result, the Committee accepted their appeal and proceeded on the examination of the merits of their application for international protection.

In its decision, the Committee stressed the importance of an individual determination of every asylum application, acknowledging the eminent vulnerable position of the appellants and their four minor children. The Committee rejected the existence of a 'sufficient connection' despite the existence of a protection system in Turkey, determined by the following factors. On the one hand, the significantly short period that the appellants remained in Turkey before arriving in Greece,<sup>[1]</sup> the absence of any possibility of accessing a support network (such as family or community ties) and the fact that their right of residence in one of the available accommodation centers was rejected. On the other hand, the fact that the appellants did not have any other contact with the Turkish authorities or any previous bond with Turkey, such as previous long-term visits, studies or language, family and cultural bonds. The Committee stressed that only transit is not enough in order to state that there is a sufficient or important connection on the basis of which they could be expected to return there.<sup>[2]</sup> Additionally, the right of entry does not constitute by itself a 'sufficient connection'. Finally, the Committee referred to [the interpretation of UNHCR regarding the safe third country concept](#) [5], which the GCS did not consider in its aforementioned decision.

### [The Ninth Appeals Committee Judgment 15602/2017](#) [22].

[In this case](#) [23], the appellant was a Syrian asylum seeker, who stayed in Turkey for eight days before arriving to the Greek islands. The Appeals Committee in its judgment followed the line of the aforementioned 2347/2017 ruling of the GCS, regarding the interpretation of the requirements set by Article 38(1) and (2) of the APD in order for a third country to qualify as a safe third country and held that transit through a third country, in conjunction with specific circumstances such as the length of stay or the geographical proximity of the country to the country of origin, may form a 'sufficient connection'. Despite that, the Committee in its decision additionally focused on the requirement of a 'sufficient connection' of the applicant with Turkey, interestingly diverging from the GCS's reasoning and provided a further interpretation of the 'sufficient connection' concept. The Committee ruled that the geographical proximity of the country of origin to a third country alone cannot justify the existence of a sufficient connection under the relevant legal provisions. Such an approach would violate the duty to evaluate applications for international protection on an individual basis, (as required by the relevant provisions of both APD and Law No 4375/2016), since that would lead to a homogenous treatment of all nationals of the country with the geographical proximity to that neighbouring country without considering the individual characteristics of each asylum seeker such as the length of stay or the existence of a supporting friendly network in that third country. Transit *per se*, without the fulfillment of those specific conditions, may not constitute a coherent connection to a safe third country. Subsequently, in the light of the very short stay of the appellant and the absence of any supporting network, the Committee ruled that there was not a 'sufficient connection' with Turkey and as a result, the application for international protection had been unlawfully rejected as inadmissible by the Regional Asylum Office of Samos.

### Conclusion

The aforementioned judgments are extremely important both from a legal and political perspective, since the Greek Courts were the first competent bodies of an EU Member State called upon to interpret the concept of Turkey as a safe third country under the Statement. Interestingly, in their decisions, the Appeals Committees followed a different line of reasoning from the GCS regarding the interpretation of the requirement of 'sufficient connection' as laid down in Articles 38(2)(a)

and 58(1)(f) of APD and Law No 4375/2016 respectively.<sup>[3]</sup> This deviation becomes more important as regards the decision of the Ninth Committee, which was subsequent to the 2347/2017 judgment in contrast with that of the Eleventh Committee and the several decisions of the [previous Appeals Committees](#) [13] (before their June 2016 reformation with Article 86 of the Law No 4399/2016), which preceded the binding judgment of the Full Chamber of the Highest Greek Administrative Court.

The majority of the judges of the GCS provided an interpretation which is in line with [the Commission's proposal for the recast of APD](#) [24] and the [Commission's view as expressed in a letter addressed to the Greek Ministry of Interior on 5 May 2016](#) [25] according to which transit through Turkey suffices for a sufficient connection to be established. On the other hand, the Committees rejected the view that mere transit or geographical proximity are enough for a sufficient connection to be established. In addition, both Committees stressed the importance of an individual examination and a case by case assessment of the individual characteristics of each asylum seeker (in respect of the principle of individual assessment). Furthermore, the decision of the Ninth Committee seems to agree with the dissenting opinion of the vice president of the GCS (Mr. Ch. Rammos) as provided in paragraph 62 of the 2347/2017 judgment according to which 'the applicant's mere transit from Turkey and the non-voluntary stay of the applicant only for one and a half months in that country in conjunction with his intention to seek protection elsewhere, cannot create a 'sufficient connection' between him and that third country as required by Article 56(1)(f) Law No 4375/2016'. The jurisprudential backdrop is therefore divergent and it will be important to monitor how future case-law of the competent Greek Courts will be framed on the topic of Turkey as a Safe Third Country for asylum applicants.

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This blog was first published in Dutch and can be accessed at this link:  
<http://verblijfblog.nl/?p=2570>. [26]

*The views expressed herein are those of the authors and do not necessarily reflect the views of ECRE or EDAL.*

<sup>[1]</sup> The family remained for fifteen days in Turkey before arriving in the Greek island.

<sup>[2]</sup> 'Transit can be based on random circumstances and does not necessarily mean the existence of important connection or bound with that country'.

<sup>[3]</sup> It's worth mentioning that while Article 56 Law No 4375/2016 transposes Article 38 APD regarding the safe third countries concept, in Greek legislation, there is an important difference between them. More specifically, while the 'sufficient connection' criterion is laid down in paragraph 2 of Article 38 as an additional requirement to those (five) laid down in paragraph 1, the Greek legislator included it in paragraph 1 of Article 56, as one of the (six) requirements that must be fulfilled cumulatively for a country to be considered safe under the provision.

**Keywords:**

Safe third country

Individual assessment

Procedural guarantees

Effective access to procedures

Accelerated procedure

### Links:

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- [2] [https://rechten.vu.nl/en/Images/UlusoyBattjes\\_Migration\\_Law\\_Series\\_No\\_15\\_tcm248-861076.pdf?subject=https://rechten.vu.nl/en/Images/UlusoyBattjes\\_Migration\\_Law\\_Series\\_No\\_15\\_tcm248-861076.pdf](https://rechten.vu.nl/en/Images/UlusoyBattjes_Migration_Law_Series_No_15_tcm248-861076.pdf?subject=https://rechten.vu.nl/en/Images/UlusoyBattjes_Migration_Law_Series_No_15_tcm248-861076.pdf)
- [3] <http://eulawanalysis.blogspot.nl/2016/04/is-eu-turkey-refugee-and-migration-deal.html>
- [4] <https://www.amnesty.org/en/latest/news/2017/03/eu-turkey-deal-a-shameful-stain-on-the-collective-conscience-of-europe/>
- [5] <http://www.unhcr.org/56f3ec5a9.pdf>
- [6] <http://www.statewatch.org/news/2017/nov/eui-greece-turkey.pdf>
- [7] <http://www.refworld.org/docid/573ad4cb4.html>
- [8] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0032>
- [9] <http://asylumineurope.org/reports/country/greece/asylum-procedure/safe-country-concepts/safe-third-country>
- [10] <http://www.efsyn.gr/arthro/ste-asfalis-triti-hora-i-toyrkia>
- [11] <http://www.asylumineurope.org/news/04-10-2017/greece-ruling-council-state-asylum-procedure-post-eu-turkey-deal>
- [12] <http://www.asylumineurope.org/reports/country/greece/asylum-procedure/procedures/fast-track-border-procedure-eastern-aegean>
- [13] <http://www.asylumineurope.org/reports/country/greece/asylum-procedure/procedures/regular-procedure>
- [14] <http://www.unhcr.org/4d9486929.pdf>
- [15] <http://asylo.gov.gr/wp-content/uploads/2016/10/scan-file-mme.pdf>
- [16] <http://www.refworld.org/docid/3be01b964.html>
- [17] <http://www.refworld.org/docid/5167fbb20.html>
- [18] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT>
- [19] <http://eulawanalysis.blogspot.com/2015/09/final-courts-obligations-to-refer.html>
- [20] [http://www.asylumineurope.org/news/22-10-2017/greece-further-interpretation-safe-third-country-concept?mc\\_cid=fb97f9dcff&mc\\_eid=008e176e7b](http://www.asylumineurope.org/news/22-10-2017/greece-further-interpretation-safe-third-country-concept?mc_cid=fb97f9dcff&mc_eid=008e176e7b)
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- [24] <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>
- [25] <http://statewatch.org/news/2016/may/eu-com-greece-turkey-asylum-letter-5-5-16.pdf>
- [26] <http://verblijfblog.nl/?p=2570>