



THE EU-TURKEY STATEMENT AND THE GREEK HOTSPOTS

A FAILED EUROPEAN PILOT PROJECT IN REFUGEE POLICY



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ACRONYMS

APD	Asylum Procedure Directive
CEAS	Common European Asylum System
CJEU	Court of Justice of the EU
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
EU	European Union
LGBTI	Lesbian, Gay, Bisexual, Transsexual and Intersex
LFIP	Law on Foreigners and International Protection
MSF	Médecins Sans Frontières
NGO	Non-governmental organization
PD	Presidential Decree
RICs	Reception and Identification Centres
RIS	Reception and Identification Service
RSD	Refugee status determination
SOPs	Standard Operating Procedures
TFEU	Treaty on the Functioning of the European Union
TPR	Temporary Protection Regime
UNHCR	United Nations High Commissioner for Refugees

FOREWORD

by Eva Joly, Ska Keller, Jean Lambert, Barbara Lochbihler,
Michel Reimon, Judith Sargentini and Bodil Valero

The Greens/EFA Group in the European Parliament has criticised the EU-Turkey statement since its adoption in March 2016. Our main concerns include the violation of international and European law by delegating the responsibility to ensure access to international protection for refugees to a third country and the circumvention of democratic oversight and public scrutiny through the adoption of informal deals instead of official agreements on which the European Parliament shall be consulted.

The implementation of the EU-Turkey statement is closely interconnected with the implementation of the so-called “hotspot approach” in Greece. At the end of 2015, new hotspots were established as registration and reception centres for more effective asylum procedures. Subsequent to the implementation of the EU-Turkey statement, Greek hotspots have now become places of de facto detention, where fast-track asylum and return procedures are being carried out with the aim of achieving an expedited return of asylum seekers to Turkey.

The present study focuses on the detrimental impact that the EU-Turkey statement and the implementation of the hotspot approach is having on the rights of refugees and migrants arriving in Greece. The findings of the study demonstrate that the current procedures and practices for processing asylum applications on the Greek islands under the EU-Turkey statement violate the applicants’ right to asylum and due process. We find particularly worrying that the EU-Turkey statement and the procedures on the Greek islands, based on the generalised assumption that a third country could be considered “safe” for asylum applicants, may serve as a model for similar informal arrangements with other third countries.

The EU-Turkey statement was adopted in the total absence of democratic oversight. It was agreed upon by EU leaders without the involvement of the European Parliament. As the statement is not formally legally binding and cannot be defined as an official EU agreement, the General Court of the European Union excluded its competence

to intervene concerning the legality of the statement. Making use of informal agreements to define cooperation on issues that bear a very high human cost, such as migration and asylum, creates a vacuum of accountability and undermines the rule of law.

The European Commission and the European Council consider the EU-Turkey statement a success and refer to a significant decline in the number of arrivals on the Greek islands. It is claimed that return procedures under the statement have kept refugees from risking the perilous passage across the Mediterranean. However, the lower number of spontaneous arrivals in Greece has to be analysed in conjunction with the increased in-country apprehensions of undocumented migrants, the patrolling of the Aegean coast and land borders carried out by the Turkish authorities, the continued arrivals occurring along the Central Mediterranean route, and with the renewed arrivals at the Southern borders in Ceuta and Melilla. As EU Member States keep refusing to urgently establish safe channels for regular and orderly migration, irregular travel will remain the only option available. This keeps causing suffering, despair and exposure to violence for those wishing to flee armed conflicts and repression.

Drawing on the analysis of 40 case studies of Syrian asylum seekers lodged and examined in the hotspots on the Greek islands, this report assesses the implementation of the EU-Turkey statement. It provides a detailed analysis of the various procedures carried out at the five hotspots on the Greek islands of Lesbos, Samos, Chios, Kos and Leros. The study shows how the hotspot approach, coupled with the implementation of the EU-Turkey statement, violates the rights of refugees and migrants and still fails to achieve its underlying dual aim, namely to contain migrants and refugees in order to deter potential new arrivals and to facilitate returns from Greece to Turkey.

Based on the results of the present study we developed the following recommendations:



RECOMMENDATIONS TO THE EU INSTITUTIONS AND THE MEMBER STATES

Urgently establish channels for safe and regular access to Europe for refugees and migrants;

In the absence of safe, regular and orderly routes into Europe, asylum seekers and migrants will continue to attempt to cross the EU borders irregularly, at a very high human cost and risk to their families' and their own lives. In order to effectively counter migrant smuggling and prevent further loss of lives, EU Member States have to urgently set up realistic channels for safe and regular access to the EU, both for individuals who wish to seek international or humanitarian protection and for legal migration, including flexible channels for family reunification, work and studies.

End systematic detention as a tool for migration control;

The systematic detention of asylum seekers and migrants as a tool for migration control violates the applicants' rights to a due process and protection against unlawful deprivation of liberty. Detention has proven not to be effective as a tool for deterring irregular migration. Minors shall never be detained as a result of their or their parents' migration status as detention can never be in a child's best interests. Children and their families shall be hosted in open, non-custodial reception facilities instead.

Refrain from restricting asylum applicants' freedom of movement to specific geographical areas;

Restricting applicants' freedom of movement to specific geographical areas, e.g. on an island, may amount to a situation of de facto detention in violation of the applicant's right to liberty and protection from arbitrary detention.

Establish fair asylum procedures that are fully compliant with fundamental rights;

The *hotspot* approach and asylum procedures have to be revised to ensure that applicants'

fundamental rights are not violated. The idea of an ultra-rapid *hotspot* procedure, designed to be concluded in only a few days, violates the applicants' right to a due process and proved not to be effective in practice.

Grant access to free legal assistance and representation at all stages of the asylum procedure;

Access to free legal assistance and representation is crucial to realise the applicants' right to a due process. Of specific importance is access to legal aid during the early stages of the procedure, including in preparation of asylum interviews and applications.

Establish a fair and mandatory relocation system based on the principle of solidarity through the amendment of the current dysfunctional Dublin Regulation;

The Dublin Regulation should be reformed to ensure the realisation of the principle of solidarity within the EU. Member States should cooperate on a mandatory, automatic relocation system that would give priority to family reunification and asylum seekers' agency, to ensure a higher rate of compliance with the asylum procedures and a fair distribution of asylum seekers in the EU.

Ensure democratic oversight and proper monitoring of all readmission agreements with third countries; ensure transparency and sound data collection for evidence-based policy making;

Due parliamentary scrutiny over agreements and cooperation with third countries shall be ensured. The adoption of informal agreements cannot be undertaken at the expenses of democratic oversight. Proposed policy reforms and agreements shall be founded on a solid evidence-base, supported by appropriate implementation assessments of existing policies and practices as well as proper impact assessments accompanying initiatives for policy reform.

RECOMMENDATIONS TO GREECE

Turkey cannot be considered a 'safe third country' for asylum applicants;

Asylum seekers should not be returned to Turkey under the EU-Turkey statement, on the basis that Turkey can be considered a 'safe third country' or a 'first country of asylum' for applicants. Full access to international protection cannot be guaranteed in Turkey, a country which frequently violates the principle of non-refoulement in relation to Syrian asylum seekers.

Stop the current practice of systematic detention of asylum-seekers;

The systematic detention of asylum seekers and migrants, including summary detentions in police stations, violates the applicants' rights to a due process and protection against unlawful deprivation of liberty.

Refrain from restricting asylum applicants' freedom of movement to the islands;

Restricting applicants' freedom of movement to specific geographical areas, e.g. on an island, amounts to a situation of de facto detention in violation of the applicant's right to liberty and protection from arbitrary detention.

Ensure due process;

Asylum seekers should not be subject to discrimination based on their nationality. Asylum applications must be assessed according to international standards and to the applicant's individual claim, irrespective of their nationality.

Establish fair and fundamental rights-centred asylum procedures;

Access to interpretation services, information and legal aid for asylum applicants shall be ensured at all stages of the asylum procedure. Applicants shall have the right to an effective remedy against return decisions and all decisions relating to an asylum claim. The suspensive effect of appeals should be granted on the enforcement of a return decision.

Ensure dignified reception conditions;

Restrictions on the freedom of movement of asylum seekers arriving on the Greek islands shall be lifted and their adequate reception on the mainland outside of detention facilities shall be ensured. This is of particular importance in order to ensure that asylum applicants have access to dignified reception conditions, including access to education, healthcare, accommodation and justice.

Ensure accountability at all stages of the asylum procedure, especially when cooperating with EU agencies deployed in the hotspots;

Accountability of the national authorities of Greece should be ensured at all stages of the asylum procedure. Cooperation with EU agencies in the *hotspots* should not lead to a vacuum of liability in case of violations before and during the asylum procedures. Furthermore, national authorities should not outsource their responsibilities to EU agencies.



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EXECUTIVE SUMMARY

In the light of the increased numbers of protection seekers during the last few years, EU Member States have fallen short of solidarity among themselves and with refugees. European leaders have failed to establish a much needed orderly system providing for safe avenues for people that seek protection in Europe. Instead they have opted to focus on attempting to reduce irregular arrivals through ad hoc and informal cooperation with third countries.

The EU-Turkey statement is the first informal agreement of this kind; it was published solely in the form of a press release issued by the European Council on 18 March 2016. As such, it is not strictly legally binding and not subject to any form of democratic scrutiny or parliamentary oversight, despite having a considerable impact on asylum procedures as currently applied in practice in the five *hotspots* on the Greek islands of Lesbos, Chios, Samos, Kos and Leros. Furthermore, the recent proposals for the reform of the Common European Asylum System presented by the European Commission in 2016, raise concerns over the possibility to extend the logic of the EU-Turkey statement to other countries in the near future.

Building on the analysis of a sample of 40 case files of Syrian asylum seekers, lodged and examined in the *hotspots* on the Greek islands under the terms of the EU-Turkey statement, the report sheds light on the lack of procedural safeguards and dignified treatment for asylum seekers in the *hotspots*.

Chapter 2 of the report focuses on the failure of the EU relocation system agreed by EU Member States in September 2015. According to the system, in line with the EU principle of solidarity, a total of 160,000 asylum seekers should have been relocated from Greece and Italy to other EU Member States over a period of two years. After the adoption of the EU-Turkey statement two years later, not only the target number of relocations was far from having been reached; the Relocation Decisions were also amended to point out that Syrian asylum seekers who entered the EU after 20 March 2016 had to be excluded from the relocation scheme. As a result, a policy

of containment of Syrian and other asylum applicants in the Greek *hotspots* is applied and refugees on the Greek islands are de facto deprived of their liberty in deplorable conditions and for a considerably long time. The process that Syrian asylum applicants undergo in the *hotspots* consists of a return decision, which is automatically issued upon their arrival, followed by an asylum procedure. The asylum procedure, however, is characterised by a lack of proper justification of its outcome as well as by insufficient verification of the factual, individual and legal circumstances. Decisions to return applicants to Turkey as a 'safe third country' are thereby based on a process that, overall, does not meet standards of fairness.

Chapter 3 provides an analysis of the '*hotspot* approach' on the basis of 40 case studies. The chapter outlines the different elements of the asylum procedure and their practical implementation in the *hotspots*. Particular attention is paid to the procedures of identification and nationality assessment, return, confinement, registration of asylum and examination of asylum claims, as well as to the interviews conducted by the European Asylum Support Office (EASO). The report highlights practices that raise concern with regard to the rule of law and respect of fundamental human rights. Out of the 40 case files assessed, 30 were rejected with final decisions merely based on grounds of admissibility, as Turkey was considered a 'safe third country' for the respective applicants. Those decisions were neither preceded by a fair and effective assessment of their individual circumstances and protection needs, nor did they take into account their legal and factual situation in Turkey. None of the 30 Syrian asylum seekers involved had been informed at any stage that they were subject to a return procedure under the EU-Turkey statement, instead of being protection seekers in an asylum procedure. The chapter also provides specific data on the implementation of the EU-Turkey statement and highlights that, according to the Greek Police, until 26 April 2018 only 275 Syrians in total were readmitted to Turkey on the basis of the EU-Turkey statement. This indicates that one of the main objectives of the EU-Turkey statement, namely to conduct efficient and fast returns to Turkey, has not been achieved.

Chapter 4 focuses on the identification of vulnerable persons in the *hotspots*. EU and Greek legislation grant procedural guarantees to vulnerable persons so that their individual needs are properly taken into account. The report highlights how acquisition of the status of a vulnerable person is significantly hampered by procedures that lack proper and effective operation, especially when assessing individual vulnerability, resulting in de facto non-recognition of asylum seekers in the *hotspots* as vulnerable persons. For the specific case of Syrian asylum seekers in the Greek *hotspots* this also implies, that their applications are rejected as inadmissible on the basis of Turkey being considered an alleged 'safe third country' for them, in the absence of proper vulnerability assessments. The analysis of the cases illustrates that the identification of vulnerability cannot effectively be managed in a fast-track "mode" for persons arriving en masse, as envisaged by the '*hotspot* approach'. In the context of the Greek *hotspots*, it resulted in an arbitrary and non-transparent flawed process.

Chapter 5 analyses the implementation of the right to appeal under the '*hotspot* approach'. The report highlights that at the appeals stage minimum rule of law standards are not met. For instance, in none of the 40 case studied the applicant was granted a hearing, even though the necessary conditions for a hearing were clearly met according to Greek and EU law. Furthermore, and although provided for by law, access to free legal assistance at the appeals stage is only partially implemented in practice. Moreover, the report illustrates the obstacles the asylum seekers in the *hotspots* face in practical and legal terms with regard to recourse to administrative courts.

Chapter 6 shows – based on the 40 case studies – how in the '*hotspot* procedure' the conclusion that Turkey is a 'safe third country' for the applicants is reached in the absence of any specific assessment of the individual circumstances of the case that would justify the rightfulness of this assumption. Moreover, the concept of 'safe third country' is used as the cardinal justification for the rejection of asylum applications on inadmissibility grounds without further examining the merits or

substance of the claims. In their respective decisions, the actors involved in the asylum procedure explicitly referred to the EU-Turkey statement. Worryingly, the analysis of the 40 case studies shows that the legal status of Syrians in Turkey is overestimated and misunderstood by most of the EASO staff and the Greek Asylum Service. For instance, officials seem to systematically confuse the temporary protection granted to Syrians in Turkey with international protection. The alarming underlying premise is that, since the EU is funding the returns of Syrian refugees to Turkey, the Greek authorities are strongly encouraged to conduct the asylum examinations according to a predetermined outcome, on the basis of political rather than legal considerations.

In a nutshell, the analysis clearly shows that the fast-track '*hotspot* procedure' has failed to achieve the dual objective of the EU-Turkey statement: to conduct efficient and fast returns to Turkey and, thereby, to deter potential new arrivals. The procedures implemented as part of the EU-Turkey statement present significant democratic, legal and procedural deficiencies. The procedures carried out in the *hotspots* systematically violate the fundamental rights of refugees and migrants and critically endanger fundamental principles and practices of international law, replacing the rule of law with policy-driven, discriminatory, non-transparent and incoherent asylum procedures conducted by the Greek authorities in cooperation with EU authorities, including EASO and Frontex, mostly in the absence of a formal legally binding regulatory framework, and of a clear and transparent distribution of competences among the different authorities involved.

The report concludes that the adoption of the '*hotspot* approach' as a blueprint for future amendments to the Common European Asylum System (CEAS) and asylum procedures would constitute a considerable setback for European democracy, rule of law and for international as well as intra-EU solidarity.

1. INTRODUCTION

For a considerably long time now, the European Union (EU) Member States have been receiving persons fleeing Iraq, Syria and Afghanistan due to war and protracted crises. In recent years however, when larger numbers of protection seekers fled Syria, the principles of solidarity and ‘burden sharing’ have been falling short while forming an EU-response. EU-institutions and national governments promoted *soft law*¹ policies in order to seal off borders and externalise responsibility for providing international protection, at the same time excluding the democratic control of the European Parliament.

The EU-Turkey statement, as applied in the Greek *hotspots*, serves as the basis for the denial of protection to Syrian refugees in the EU – on admissibility grounds without examination of the merits of the case – and their readmission to Turkey, where they receive temporary protection. It is used as a model of deterrence and containment. It violates the principle of non-refoulement and the obligation to respect and protect human rights and human dignity. It externalises substantive and procedural safeguards and protection to Turkey, where the EU *acquis*² is not applicable. It disregards solidarity resulting in ‘burden dumping’ on Member States at the external borders of the EU, such as Greece.

In parallel to the launch of the EU-Turkey statement, political negotiations for the reform of the Common European Asylum System (CEAS) are taking place. The current informal asylum procedures applied in the Greek *hotspots*, which constitute the implementation of the statement, serve as a blueprint for proposed controversial CEAS amendments regarding denial of protection on procedural grounds and return to non-EU countries.

1 ‘Soft law’ refers to non-binding persuasive instruments instead of obligations deriving from binding legislative measures (‘hard law’). Within the EU legislative regime such measures are often used in order to demonstrate the effect of pilot projects and illustrate possibilities for further legislation. Legally binding provisions cannot by any means be altered by ‘soft law’ instruments.

2 The body of intergovernmental agreements and EU regulations and directives that governs almost all asylum-related matters in the EU.

The present study³ constitutes an in-depth analysis of the asylum procedures on the basis of a purposive sample of 40 cases of asylum seekers originating from Syria, lodged and examined in the Greek *hotspots* after the implementation of the EU-Turkey statement. This purposive sample includes anonymised asylum files (interview transcripts, administrative and judicial decisions) which were provided to the authors of this study by the asylum applicants themselves and/or by their legal representatives and reviewed by the authors. The sample comprises persons originating from Syria of different ethnicity (Arab/Kurdish/Armenian), religion (Muslim Sunni, Christian, Atheist) and family composition (family with minors, single male, single female, unaccompanied minor). The cases were examined at all the *hotspots* of Lesbos, Samos, Chios, Kos, and Leros. Out of the 40 cases, 30 have been completed up to a final second instance rejection; 10 more recent cases are still pending in first or second instance. The Syrians concerned had their asylum applications rejected as the EU actors involved in the asylum procedure and the Greek authorities decided that they can receive protection in Turkey instead of Greece.

The purposive sample is considered sufficient to provide an in-depth understanding of the issues. From the first two rejected Syrians on May 2016 – included in the sample – until today, a similar line persists in terms of practice in the Greek *hotspots*. The study refers to sources, legal and policy developments available until 8 April 2018, unless stated otherwise. Based on a thorough assessment of the *hotspot* procedures after the implementation of the EU-Turkey statement, the study demonstrates the failure of this approach in legal and moral terms and its ineffectiveness as an asylum and return model. The findings of the study show that the *hotspot* asylum procedures should by no means be replicated or serve as a framework for future CEAS amendments.

3 The authors wish to express their appreciation to Kelly Grivakou and Carsten Gericke for their support and contribution.

2. EXTERNALISATION OF PROTECTION RESPONSIBILITIES

2.1 From 'burden sharing' to 'burden dumping'

In September 2015, the EU Member States agreed on a two-year plan to relocate a total of 160,000 asylum seekers – including 106,000 that had arrived in Greece and Italy – to other European countries in order to ease the pressure on front-line states (Council Decisions 2015/1523 and 2015/1601, also known as Relocation Decisions).

In February 2016, the Western Balkan route was closed down as strict border control measures were introduced. This radical action led to an immediate and drastic increase of the number of third country nationals in Greece. As of 17 March 2016, 37,397 persons were hosted at official sites on the Greek mainland and 7,931 at sites on the Greek islands.⁴

On 7 March 2016, the Heads of State or Government of the EU met with the Prime Minister of Turkey in order to evaluate the progress regarding the implementation of the Joint Action Plan of 15 October 2015, relative to a "coordinated effort to address the crisis created by the situation in Syria"⁵. They agreed to cooperate according to a certain set of principles, including: "to return all new irregular migrants crossing from Turkey into the Greek islands with the costs covered by the EU"⁶. In undisclosed negotiations during the days that followed, the Turkish Government and some EU Member States, supported by the European Commission, came to a further agreement.⁷ On 16 March 2016, the European Commission issued a Communication to the European Parliament, the European Council and the Council regarding the "next operational

steps in EU-Turkey cooperation in the field of migration". It indicates that "all new irregular migrants and asylum seekers" crossing from Turkey into the Greek islands should be returned to Turkey following the examination of their asylum claims under an expedited procedure. The procedure examines only the admissibility of the claims according to the concepts of 'safe third country' and 'first country of asylum', without need to examine the substance of the claims.⁸

On 18 March 2016, the European Council publicly disclosed the EU-Turkey statement in the form of Press Release No 144/16, reflecting the political will that "all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey" as "a temporary and extraordinary measure which is necessary to end the human suffering and restore public order".⁹ The European Parliament's consent was not requested, although according to Art 218(6) of the Treaty on the Functioning of the European Union (TFEU) the Council – not the European Council¹⁰ – may conclude readmission agreements only after having obtained the consent of the European Parliament.¹¹ Member States have not yet transposed the EU-Turkey statement into their domestic law, thereby avoiding public debates in their respective parliaments as well. Despite its invoked temporary and extraordinary character,

⁸ European Commission, Communication to the European Parliament, to the European Council and the Council Next operational steps in EU-Turkey cooperation in the field of migration, (COM (2016) 166 final), 16 March 2016, available at: ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-166-EN-F1-1.PDF

⁹ European Council, EU-Turkey statement, Press Release No 144/16, 18 March 2016, available at: www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/

¹⁰ The Council or Council of the European Union, often still referred to as the Council of Ministers, is the EU institution where the Member States' government representatives sit, i.e. the ministers of each Member State with responsibility for a given area. The institution is not to be confused with the European Council, which brings together the heads of state or government of the EU Member States, determining the EU's guidelines and political priorities.

¹¹ M. Gatti, The EU-Turkey statement: A Treaty That Violates Democracy (Part 1 of 2), in EJIL Talk!, 18 April 2016 and M. Gatti, The EU-Turkey statement: A Treaty That Violates Democracy (Part 2 of 2), in EJIL Talk!, 19 April 2016, both available at: www.ejiltalk.org

⁴ UNHCR, Presence per site – Greece, 18 March 2016, available at: data2.unhcr.org/en/documents/download/47196

⁵ European Commission, EU-Turkey joint action plan, 15 October 2015, available at: europa.eu/rapid/press-release_MEMO-15-5860_de.htm

⁶ European Council, Statement of the EU Heads of State or Government, 7 March 2016, available at: www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/

⁷ Nielsen N., Greek verdict hangs over EU-Turkey migrant deal, EU Observer, 17 March 2017, available at: euobserver.com/migration/137277

the EU-Turkey statement is still in force to date (May 2018, more than two years later), in practice modifying the EU asylum *acquis*. Therefore, for the purpose of the present study, the politically agreed return clause contained in the EU-Turkey statement is considered as an atypical agreement in the form of a deal, leading the EU asylum policies.

At the time of writing, the Greek government has neither transposed the EU-Turkey statement as such into national law, nor has it designated Turkey as a safe country. Further, it has not laid down rules concerning the methodology by which the competent authorities satisfy themselves that the 'safe third country' or 'first country of asylum' concepts may be applied to a particular asylum applicant and/or that the required connection between the applicant and the third country concerned is met.¹² In fact, both concepts are envisaged in Greek law since the transposition of Directive 85/2005 via Presidential Decree (PD) 90/08, but had never been applied until the conceptualisation of the EU-Turkey statement. Therefore, the initial official legal considerations of the United Nations High Commissioner for Refugees (UNHCR) expressed after the publication of the EU-Turkey statement are still valid. UNHCR stated in particular that Greece cannot apply the 'safe third country' and 'first country of asylum' concepts in conformity with the Asylum Procedures Directive 2013/32 (APD).¹³ Likewise, Greece has, so far, not amended its legislation on returns, deportations and readmissions subsequent to the EU-Turkey statement.

The EU relocation scheme of September 2015, which meant to relocate a total of 160,000 asylum seekers within the EU, was officially concluded, on schedule, in September 2017. However, of the targeted 66,400 asylum seekers that were to be relocated from Greece to other EU countries, only 21,994 were effectively transferred to other EU member states.¹⁴ UNHCR therefore

¹² As required by APD Arts 35, 38.

¹³ UNHCR, Legal considerations on the return of asylum-seekers and refugees 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, available at: www.unhcr.org/56f3ec5a9.pdf

¹⁴ For detailed statistics consult European Migration Law, Relocation of asylum seekers from Italy and Greece,

called for the relocation scheme to be extended beyond the deadline of 26 September 2017.¹⁵

Yet, quite the opposite was the case. In the aftermath of the EU-Turkey statement, the Relocation Decisions were implicitly amended to the effect that the criterion of entrance to the EU prior to 20 March 2016¹⁶ was added. As a result, refugees – such as Syrians – were arbitrarily excluded from the relocation scheme.¹⁷ Thus, a scheme designed for a degree of 'burden sharing' among Member States was overrun by a policy of 'burden dumping' on Greece.

2.2 The proposed reforms of the Common European Asylum System (CEAS)

By adopting EU Regulation 604/2013 (Dublin III), the EU Member States have established a mechanism of international cooperation among themselves, based on mutual trust and a harmonised legislative regime. It acts on the assumption that all other EU Member States are 'safe' in terms of the 'safe third country' and the 'first country of asylum' concepts. It is assumed that every other EU Member State is safe, if protection has already been granted or can be granted there. However, scrutiny by domestic and international courts has made clear that even within the EU 'non-rebuttable trust' is not allowed, if it jeopardises the protection of the fundamental rights of the individual.¹⁸

On 4 May 2016, the European Commission adopted a proposal for the reform of the Dublin III Regulation¹⁹ including compulsory inadmissibility procedures, providing for the externalisation

3 April 2018, available at: www.europeanmigrationlaw.eu/en/articles/datas/relocation-from-italy-and-greece

¹⁵ UNHCR, UNHCR calls for the EU relocation scheme to continue, 26 September 2017, available at: www.unhcr.org/news/press/2017/9/59ca64354/unhcr-calls-eu-relocation-scheme-continue.html

¹⁶ The European relocation program, in practice, was not applied to Syrian asylum seekers that entered the EU after said date.

¹⁷ Greek Council for Refugees, AIDA Greece report, p. 106-109, March 2018, available at www.asylumineurope.org/reports/country/greece

¹⁸ ECtHR, *M.S.S. v Belgium and Greece*, appl. no. 30696/09, 21 January 2011 and CJEU, Case C-411/10, *NS v SSHD*, 21 December 2011.

¹⁹ European Commission, COM(2016) 270, procedure 2016/0133(COD), 4 May 2016.

of refugee protection to non-EU countries. Under the proposed mechanism, refugees and migrants entering the EU via a 'safe third country' shall not be granted the opportunity to present their grounds for fleeing in the framework of an asylum procedure; instead they shall only be examined on procedural (admissibility) grounds.²⁰

On 13 July 2016, the European Commission put forward a proposal for a new Regulation to replace the Asylum Procedure Directive (APD). The following section will address the provisions within said proposal with regards to the returning of asylum seekers to non-EU countries after having rejected their asylum applications on procedural grounds (inadmissibility procedures)²¹.

a. The 'first country of asylum' concept

In the proposed Regulation, the term 'first country of asylum' refers to a country outside the EU in which an asylum seeker has already found accessible and effective international protection. It requires the protection in the first country of asylum to be "in accordance" with the Geneva Convention on Refugees.²² It thereby lowers the standards of protection, as in the current regime, the concept of 'first country of asylum' can only be applied if the person concerned has been recognised as a refugee in the first country.²³

b. The 'safe third country' concept

According to the currently still applicable APD Art 38, a non-EU country can be designated as safe if the following strict preconditions are satisfied in the country concerned: no persecution as defined in the Geneva Convention, no risk of serious harm, respect of non-refoulement as well as provision of obtaining protection under the Geneva Convention. Furthermore, the Member States have the discretion to determine within the framework of their domestic laws, whether there is a sufficient connection between the asylum seeker and the third country concerned on the basis

of which it would be reasonable for the asylum seeker to return to that country. The proposed Regulation lowers these standards as well. It provides that protection received in the country concerned is sufficient, if substantive standards of the Geneva Convention are met or if sufficient protection is granted as its definition is laid down in the concept of the 'first country of asylum'. The proposed definition of effective protection does not guarantee that protection is effective and available in practice. There is a risk that the relevant legal framework in the country concerned will be overemphasised and refugees are returned to a country where their rights are not guaranteed in practice, as is currently the case with Turkey.²⁴ The proposed Regulation further envisages that, if the third country concerned is geographically close to the country of origin of an applicant, mere transit through its territory can establish his/her reasonable connection to the third country.

The European Parliament has already rebutted many of these proposals.²⁵ However, until the necessary political agreement is reached between the institutions involved in the EU legislative process, unofficial mechanisms such as the EU-Turkey statement are ruling asylum policies to the detriment of democracy, the rule of law and fundamental human rights.

2.3 Topography of the hotspots

EU agencies provided specialised personnel in order to support Greece in initiating and managing the 'hotspot areas', which serve the implementation of the EU-Turkey statement.²⁶

20 Pro Asyl, Statement by Pro Asyl on the planned EU asylum package, 22 November 2016, available at: www.proasyl.de/wp-content/uploads/2015/12/Kommentar_Asylpaket-EU-PRO-ASYL.pdf

21 Proposed Art 36.1(a-b).

22 Proposed Art 44(1)(a).

23 APD, Art 35.

24 Amnesty International, Position Paper on the proposed asylum procedures regulation, March 2017, available at: www.amnesty.eu/content/assets/AI_position_paper_on_APR_proposal.pdf

25 European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 6 November 2017 and European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft report on the proposal establishing a common procedure for international protection in the Union, 12 May 2017.

26 European Commission, European Agenda on Migration – Factsheets, uploaded on March 2018, available at: ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en

Since April 2016, the European Border and Coast Guard Agency (Frontex) supports the Greek authorities in the initial registration and the returning of migrants.²⁷ On 1 April 2016, a new measure called ‘HEL 4: Support with the implementation of the admissibility procedure’ was added to the ‘EASO Hotspot Operating Plan to Greece’. It since offers supplementary technical support to the Greek authorities. Under the scope of said activity, the European Asylum Support Office (EASO) deployed experts and interpreters in order to conduct admissibility interviews and recommend decisions to the Greek Asylum Service.²⁸ On 15 December 2016, measure ‘HEL 4’ was amended. It was added that “support is to be provided [to the Greek authorities] to undertake eligibility/full asylum examination procedure for nationalities with low recognition rates”.²⁹

EASO’s mandate and responsibilities remain unclear to this day. Its participation in the Greek asylum procedures is governed through internal non-public instructions and Standard Operating Procedures (SOPs), and not through the domestic legal regime, applied to the Greek Asylum Service.³⁰ Although Ministerial Decision 3385/18 regarding the procedures of the Greek Asylum Service – in force since 14 February 2018 – added the EASO staff to its scope, the actions of EASO are solely guided by its internal SOPs to this day. According to the latter, different procedures apply

depending on the nationality of the applicants. Such discrimination based on nationality is not prescribed by EU or Greek law, as will be illustrated in more detail in Chapter 3.

On 3 April 2016, Law 4375/2016 was published in the Greek Official Government Gazette. The term ‘hotspot’³¹ does not occur in said law. The Lesbos, Samos, Chios, Kos, and Leros ‘hotspot areas’ are among the six officially established ‘Reception and Identification Centers’ (RICs)³² and have unofficially been chosen as the five areas where the procedures for implementing the EU-Turkey statement are taking place.

Law 4375/2016 added an exceptional ultra-rapid procedure to the Greek asylum system, applicable when large numbers of asylum seekers arrive at the RICs. It operates in parallel to the accelerated borders procedures. Vulnerable persons and individuals, to which Arts 8-11 of the Dublin III Regulation apply, are exempted from the ultra-rapid procedure.³³ These exceptional procedures are still applicable in the hotspots and became the norm. The fact that the ‘exceptional’ ultra-rapid procedure is applied even at times when the number of new asylum applicants is not exceptionally high, gives reason to presume that the main objective behind the hotspot accelerated procedures in the course of the EU-Turkey statement is not the effective processing of asylum applications, but the return of refugees and the deterrent of possible future refugees.

Pursuant to an amendment of Law 4375/2016 of 22 June 2016, it is provided that EASO personnel may conduct asylum interviews exclusively when said ultra-rapid procedure is applicable.³⁴ EASO personnel conducts interviews in the hotspots and issues ‘concluding remarks’ to the Greek Asylum Service, specifying whether Turkey can

27 Frontex, Risk Analysis for 2017, February 2017, available at: frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf

28 EASO, EASO Hotspot Operating Plan to Greece – Amendment No 2”, 1 April 2016, available at: www.easo.europa.eu/sites/default/files/20160401%20Hotspot%20Operating%20Plan%20-%20Amendment%20No%202.pdf

29 EASO, EASO Special Operating Plan to Greece, 15 December 2016, available at: www.easo.europa.eu/sites/default/files/easo%20special%20operating%20plan%20to%20greece%202017_%2014122016.pdf

30 EASO, Instructions for managing asylum applications in the context of the pilot project of the Asylum Service – EASO for the implementation of the EU Turkey agreement of 18 March 2016, versions of 7 April 2016 and 29 July 2016; EASO, SOPs for the implementation of the Border Asylum Procedures in the context of the EU Turkey Statement 18/03/2016, versions of 31 March 2017 and 30 June 2017. The instructions and SOPs are not non-public and were disclosed to the authors by the European Center for Constitutional Rights (ECCHR) that obtained access to them by EASO, pursuant to the Agency’s obligation under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents. For further information see ECCHR, Case report, EASO’s involvement in Greek Hotspots exceeds the agency’s competence and disregards fundamental rights, status as of: March 2018, available at: www.ecchr.eu

31 According to Regulation 2016/1624 on the European Border and Coast Guard (Art 10.2) ‘hotspot area’ means an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders.

32 Law 4375/16 Arts 8-10.

33 Law 4375/16, Art 60.4.

34 Law 4399/16, Art 86.13; amended Law 4375/16, Art 60.4(b).

be considered a 'safe third country'. This course of action is not provided by Greek law, but rather founded on EASO operational activity 'HEL 4' and its internal SOPs. Thereby, EASO exceeds its power under Regulation No 439/2010 (EASO Regulation)³⁵ and, thus, violates fundamental refugee status determination standards.

The UN Special Rapporteur on the human rights of migrants estimates that the *hotspot* fast track regime is "problematic due to the lack of individual assessment of each case, and the risk of violating the non-refoulement principle is consequently very high"³⁶.

Before said amendment, Law 4375/2016 further envisaged three-member Appeals Committees, entitled to examine administrative appeals regarding asylum cases and decide in the second and final instance. The law required a certain set of qualifications from the Appeals Committees' members. Moreover, their nomination was to be preceded by an open competition and a strict selection procedure. During the transitional period, the competence to examine appeals remained with the existing Appeals Committees under PD 114/2010. These had developed a well-established case law, according to which Turkey can neither be considered as a 'safe third country', nor as a 'first country of asylum' for Syrians. Thus, the application of the EU-Turkey statement was impeded and no forced returns of Syrians to Turkey were implemented. The establishment of the three-member Appeals Committees was never actually enacted, as the law was already amended before respective procedures could take place.³⁷

³⁵ According to Regulation No 439/2010 (Preamble §14 and Art 2.6): "The Support Office shall have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection".

³⁶ United Nations Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Greece, A/HRC/35/25/Add.2, Par 82, 24 April 2017, available at: www.refworld.org/docid/593a8b8e4.html,

³⁷ For further analysis on the Appeals Committees' case law on the issue: Gkliati, M., The application of the EU-Turkey agreement: a critical analysis of the decisions of the Greek appeals committees, European journal of legal studies, Vol. 10, No. 1, pp. 80-123, 2017, available at: cadmus.eui.eu/bitstream/handle/1814/48070/Gkliati.pdf?sequence=1&isAllowed=y

As a consequence of the amendment of Law 4375/2016 on 22 June 2016, wholly new 'Independent Appeals Committees' were introduced, which were comprised of three members: two administrative judges and one member indicated by UNHCR. They were appointed following a different procedure, which did not include an open competition. These new Committees started operating at the end of July 2016. Concerns with regard to the constitutionality of the composition of the newly introduced Independent Appeals Committees had already been raised beforehand by the National Commission for Human Rights, in June 2016.³⁸ The issue was brought before the Greek Council of State that judged that the Committees constitute a quasi-judicial body, whose composition is in accordance with the Greek Constitution.³⁹

Under this policy and legal regime, the five islands Lesbos, Samos, Chios, Kos, and Leros evolved from initial transit arrival places to the EU to geographical areas of deprivation of liberty. All newly arrived migrants, asylum seekers and *prima facie* refugees are confined in the *hotspots* with a dual aim: to serve as a deterrent and to return to Turkey those who do not apply for asylum, Syrian refugees and non-Syrian rejected asylum seekers. Thus, the '*hotspot* area' is the place where screening, registration and vulnerability / 'safe third country' / refugee status determination procedures are conducted and return operations are initiated – all carried out with a complete lack of a clear legal framework to regulate the procedures and the competencies of the persons and actors involved.

At present, Syrians arriving in Greece after 20 March 2016 face the following inconsistent terms: If they are apprehended and/or rescued at the sea, they are guided to the nearest '*hotspot* area' and their protection needs are examined under

³⁸ National Commission for Human Rights, 'Public Statement regarding the amendment of the composition of the Independence Appeals Committees', 17 June 2016, available at: nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/Dimosia%20dilwsi%20EEDA.pdf and ECRE, 'Greece amends its asylum law after multiple Appeals Board decisions overturn the presumption of Turkey as a "safe third country"', 24 June 2016, available at: www.ecre.org/greece-amends-its-asylum-law-after-multiple-appeals-board-decisions-overturn-the-presumption-of-turkey-as-a-safe-third-country/

³⁹ Council of State, Grand Chamber Decisions 2347/2017 and 2348/2017, 22 September 2017.

the unofficial regime established in the framework of the EU-Turkey statement. Consequently they are automatically subjected to returning to Turkey and their international protection applications are rejected as inadmissible because Turkey is considered a 'safe third country'. However, if they reach the north of Greece through the northern Evros river/land border, the southern islands or directly via the Greek mainland, their international protection applications are examined according to the regular asylum procedure and they are granted international protection.⁴⁰ In the case of non-Syrian asylum seekers, the asylum procedure is completed while they are confined in the *hotspots* and they are returned to Turkey as rejected asylum seekers.

2.4 Questionable 'assurances' in the course of the EU-Turkey statement

The implementation of the EU-Turkey statement was further facilitated by undisclosed non-public policy letters, which all actors involved – EASO, Greek Asylum Service and the Appeals Committees – used as the basis to legitimate their decision to declare Turkey safe for all Syrians, who arrived in Greece after the 20 March 2016.⁴¹

On 12 April 2016, the Ambassador of the Permanent Delegation of Turkey assured in a letter addressed to the Director General of the European Commission (DG Home) that Syrians "who irregularly crossed into the Aegean Islands via Turkey as of 20 March 2016 and being taken back by Turkey as of 4 April 2016", will have access to temporary protection at their return from Greece to Turkey. In a subsequent letter, he further confirmed that Turkey is taking back non-Syrians as well.⁴² One could conclude that Turkey on its part accepted the EU-Turkey

statement retrospectively, as of 4 April 2016. To the authors' knowledge this is the only document issued by a Turkish state organ that expresses the political will of the Turkish government to implement the EU-Turkey statement return clause, thereby rendering it a deal.

The United Nations Special Rapporteur on the human rights of migrants stated: "Greece was put under considerable pressure to implement provisions from the statement well before its entry into force and to apply maximum constraints on migrants, in order to achieve the objective of returning most migrants to Turkey. Therefore, 13 out of the 202 migrants returned on 4 April 2016 may have been mistakenly returned, as their asylum claims had not been registered."⁴³

On 5 May 2016, the Director of DG Home communicated to the Greek authorities the position of the European Commission "with a view to facilitating the implementation by the Greek authorities of the EU-Turkey statement of 18 March 2016", mentioning as well that the 'safe third country' concept may be applied vis-à-vis Turkey.⁴⁴

On 29 July 2016, the Commissioner of DG Home informed the Greek Alternate Minister for Migration Policy that the "Turkish commitments" remain valid, and that the protection afforded to Syrians and non-Syrians under the scope of the EU-Turkey statement "still can be considered as sufficient protection or protection equivalent to that of the Geneva Convention", even after the failed coup d'état of 15 July 2016 and the subsequent declaration of state of emergency in Turkey.⁴⁵

It is noted that by Emergency Decree No 676, adopted on 29 October 2016, the Turkish

40 The Greek state grants international protection status to 99.6% of Syrians whose protection claims are examined on the merits. Greek Asylum Service, Asylum Service Statistical data from 07.06.2013 to 28.02.2018, 8 March 2018, available at: asylo.gov.gr/en/wp-content/uploads/2018/03/Greek_Asylum_Service_Statistical_Data_EN.pdf

41 The asylum seekers' files do not contain these letters. At a later stage, in October 2016, they were uploaded on the Greek Asylum Service's website.

42 Letters of Selim Yenel, Ambassador of the Permanent Delegation of Turkey to the EU, to Matthias Ruete, Director of DG Home, dated 12 April 2016 and 24 April 2016, published on the website of the Greek Asylum Service: asylo.gov.gr/wp-content/uploads/2016/10/scan-file-mme.pdf

43 United Nations Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Greece, A/HRC/35/25/Add.2, *ibid.*, Par 31.

44 Letter of Matthias Ruete, Director of DG Home, to Vassileios Papadopoulos, Secretary General for Population and Social Cohesion of the Greek Alternate Ministry of Migration Policy, dated 5 May 2016, published on the website of the Greek Asylum Service: asylo.gov.gr/wp-content/uploads/2016/10/scan-file-mme.pdf

45 Letter of Dimitris Avramopoulos, Commissioner of DG Home, to Ioannis Mouzalas, Greek Alternate Minister of Migration Policy, dated 29 July 2016, published on the website of the Greek Asylum Service: asylo.gov.gr/wp-content/uploads/2016/10/scan-file-mme.pdf

Government introduced derogations to the right to remain on Turkish territory for cases concerning individuals who lead, participate in or support a terrorist organisation or a benefit-oriented criminal group, pose a threat to public order or public health, or have relations with terrorist organisations defined by international institutions and organisations. Persons falling under those categories may be deported, even where they have a pending international protection procedure or benefit from international protection or temporary protection. In such cases, an appeal against a deportation order does not have suspensive effect. Consequently, the legal regime in Turkey does not provide effective protection from refoulement.⁴⁶ It seems that the EU actors involved in the *hotspot* return policy of refugees to Turkey failed to assess these significant fundamental legislative changes. To the knowledge of the authors the issue has not been addressed in any further letter.

UNHCR had also addressed non-public letters to the Greek Asylum Service on 4 May 2016, 9 June 2016 and 14 December 2016, providing partial information concerning the legal regime applied to Syrians in Turkey and admitting that the monitoring of returned Syrians has been difficult since the EU-Turkey statement. After publication of the EU-Turkey statement, UNHCR has published its legal considerations⁴⁷ but had not until now published a report on the current legal and factual situation of Syrian refugees in Turkey.⁴⁸

46 Amnesty International, *Refugees at heightened risk of refoulement under Turkey's state of emergency*, 22 September 2017, available at: www.amnesty.org/en/documents/eur44/7157/2017/en/, AIDA, *Country Report Turkey*, 30 March 2018, available at: www.asylumineurope.org/reports/country/turkey

47 UNHCR, *Legal considerations on the return of asylum-seekers and refugees 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, *ibid*

48 *Refugee Support Aegean/Pro Asyl, Legal Note, UNHCR has Failed to Stand Up for Refugee Rights During Crucial EU-Turkey Deal Judgement*, 20 October 2017, available at: rsaegean.org/legal-note-unhcr-has-failed-to-stand-up-for-refugee-rights-during-crucial-eu-turkey-deal-judgement/

3. ANALYSIS OF THE 'HOTSPOT APPROACH'

3.1 Identification and nationality assessment

New arrivals at the Aegean Islands are screened, registered and identified by the Greek Police and/or Frontex.⁴⁹ The cases studied demonstrate a total lack of transparency at this crucial stage. In particular, in none of the 40 cases examined – all Syrian nationals – a record with respect to the process of identification and nationality assessment was applied, thus impeding in practice any possibility to challenge and/or crosscheck the initial registration. Interpretation services, provision of information, legal aid and safeguards for vulnerable persons are not guaranteed at this stage, not even after capacities were reinforced by EU agencies.

In 12 out of the 40 cases examined the initial registration of personal data was incorrect. The most striking example concerns an unaccompanied minor who was wrongfully registered as an adult upon arrival. The erroneous date of birth persisted throughout all stages and procedures, including his asylum claim, which was examined and finally rejected as if he was an adult.

The relevant domestic provisions concerning correction of erroneously registered personal data⁵⁰ are not applied in the *hotspots*, as laid out in internal guidelines of EASO. These apply to “all actors involved in the asylum procedure within the context of the joint project aiming at the implementation of the EU-Turkey statement of 18 March 2016, i.e. Police staff at the disposal of the Asylum Service, Asylum Service staff, EASO experts and EASO interim staff”.⁵¹ The

said guidelines provide for the personal data of the applicant, which are recorded by the Police, to be maintained and not corrected at the stage of registration of the asylum application. EASO experts are instructed to address such issues arising during the interview only in exceptionally strictly prescribed cases; a distinction that is not provided for by law and is not likely to consolidate the applicants' rights. It rather plays to EASO's limited competence to conduct interviews only within the ultra-rapid *hotspot* procedure, as per its internal SOPs.

3.2 Return

In all the 40 cases of Syrians examined, shortly after their arrival to Greece, the police automatically issued return decisions to Turkey explicitly based on the EU-Turkey statement, without any individualised assessment of the arrivals' personal circumstances. Return decisions were issued despite the fact that all of them had already applied for asylum or had expressed their will to do so. Police authorities neither examined the general legal and factual situation in Turkey, nor the particular situation which applies to Syrians in Turkey. No hearing took place before a competent state organ, no interpretation was granted in the procedure, no legal aid was provided, and those in need of special treatment were not identified, let alone treated accordingly. In the course of the current *hotspot* return practice, return decisions are not activated until completion of the asylum procedure. Strikingly, in all cases examined that reached a final rejection (30 out of 40), upon notification of the negative decision, all Syrians concerned were immediately arrested and detained for the purpose of returning them to Turkey under the terms of the EU-Turkey statement and on the basis of the initial return decisions that had been issued before the examination of the asylum application.

49 European Commission, *Hotspot stay of play*, 18 December 2017, available at: ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf

50 Law 4375/16, Art 43.

51 EASO, *Instructions for managing asylum applications in the context of the pilot project of the Asylum Service – EASO for the implementation of the EU Turkey agreement of 18 March 2016*, versions of 7 April 2016 and 29 July 2016 and EASO, *SOPs for the implementation of the Border Asylum Procedures in the context of the EU Turkey Statement 18/03/2016*, versions of 31 March 2017 and 30 June 2017. The instructions and SOPs are not non-public and were disclosed to the authors by the European Center

for Constitutional Rights (ECCHR) that obtained access to them by EASO, pursuant to the Agency's obligation under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents. For further information see ECCHR, *Case report, EASO's involvement in Greek Hotspots exceeds the agency's competence and disregards fundamental rights*, status as of March 2018, *ibid*.

According to this practice, return decisions were considered "revived", although no further assessment had been performed.

As a result, none of the 40 Syrians included in the study sample were properly informed about the return decision and/or its legal consequences. Accordingly, in practice, they had no possibility to effectively exercise their right to appeal. In fact, they were unaware that – pursuant to the EU-Turkey statement – their exact legal status since entering the EU was that of a returnee to Turkey and not that of an international protection seeker.

Prior to the EU-Turkey statement, the police granted leave to remain in EU territory to all Syrians arriving in Greece, within the meaning of Art 3 of the European Convention on Human Rights (ECHR), prescribing protection from refoulement, parallel to asylum procedures.⁵² Subsequent to the EU-Turkey statement, Syrian asylum seekers' fate, namely return to Turkey, is sealed right from the start, thereby turning refugees falling under international protection into returnees subjected to readmission procedures. In one of the 40 cases examined, the new return policy to Turkey was applied by the police as early as 1 April 2016, despite the fact that Turkey has agreed to returns according to the EU-Turkey statement only from 4 April 2016 onwards, as stated in a non-disclosed letter from the Ambassador of the Permanent Delegation of Turkey to the EU, dated 12 April 2016.⁵³ The current *hotspot* return procedure lacks legal basis; it is exclusively described in an internal police circular.⁵⁴

Currently, readmissions of non-Turkish nationals from Greece to Turkey take place based on two

parallel procedures: a) under the Bilateral Greek-Turkish Readmission Protocol (Law 3030/2002), implemented in cooperation between the national authorities of the two countries and funded by the Greek state⁵⁵ and b) under the EU-Turkey statement, implemented with the direct participation of Frontex and funded by the EU.⁵⁶

The actual act of return under the EU-Turkey statement is enforced by joint operations coordinated by Frontex⁵⁷, not bound by or accountable to Greek law. A Frontex complaint mechanism is in place, however, it has proven to be ineffective in practice, as the following example illustrates. In one of the cases examined, a complaint was brought before Frontex with regards to an imminent risk of violation of article 3 ECHR⁵⁸ in case of readmission of a detained Syrian to Turkey. The agency decided that the complaint was inadmissible because the return had not yet been materialised in practice. Hence, concerned Syrian refugees find themselves in a paradox situation and remain, in fact, without any remedy to protect themselves against the actual act of readmission to Turkey.

3.3 Confinement

The geographical restriction envisaged in Greek law 4375/16 – an alternative to detention measures – serves the purpose of confinement of all persons at the respective entry point to the EU in order to facilitate their swift return, following a fast-track examination of asylum claims. However, the idea of an ultra-rapid *hotspot* procedure

⁵² Greek Police, Implementation of the provision of L. 4332/2015 Amendment of provisions of the Code of Greek Citizenship etc., circular 1604/15/142/3413/10.8.2015, available (in Greek) at: www.synigoros.gr/resources/docs/150907-astinomia.pdf

⁵³ Letters of Selim Yenel, Ambassador of the Permanent Delegation of Turkey to the EU, to Matthias Ruete, Director of DG Home, dated 12 April 2016 and 24 April 2016, *ibid*.

⁵⁴ Greek Police, Treatment of immigrants at the Reception and Identification Centers (RIC) – Asylum Procedures – Implementation of EU-Turkey Common Statement of the 18th March 2016 (readmissions to Turkey), circular 1604/16/1195968/18.06.2016, available (in Greek) at: www.synigoros.gr/resources/docs/egkyklios-elas-ths-18-6-2016.pdf

⁵⁵ Only 21 persons were readmitted to Turkey under the Readmission Protocol in 2017, in comparison to 683 readmissions executed in implementation of the EU-Turkey statement. Greek Police, Press Release Return of seven Syrian refugees to Turkey, 15 March 2018, available (in Greek) at: www.mopocp.gov.gr/index.php?option=ozo_content&perform=view&id=6330&Itemid=655&lang-. This serious discrepancy indicates that subsequent to the EU-Turkey statement cooperation between Greece and Turkey in the framework of the Readmission Protocol is not functioning effectively.

⁵⁶ Turkish nationals are readmitted under the framework of the EU-Turkey Readmission Agreement dated 16 December 2013.

⁵⁷ Greek Ombudsman, Returns of Migrants – Special Report 2016, p. 14, September 2017, available (in Greek) at: www.synigoros.gr/resources/eidikiekthesiepirofesal-lodapwn2016gr--2.pdf

⁵⁸ Article 3 of the European Convention on Human Rights (ECHR) prohibits torture, and "inhuman or degrading treatment or punishment".

that is designed to be concluded in a few days, clearly failed in practice. The main result of the containment measures has been the stranding of all asylum seekers in the *hotspots* for a prolonged period of time, in deplorable health and sanitary conditions and without access to basic services.⁵⁹ As a result, unjustifiable deprivation of liberty has become the standard practice in the *hotspots*.⁶⁰

In all the 40 cases examined, initial return and detention decisions and subsequent deprivation of liberty measures, i.e. decisions restricting their freedom of movement to the respective *hotspots*, were imposed on the respective persons by the Reception and Identification Centres (RIC), the Police and the Asylum Service authorities, without conducting any individual assessments. The cases reviewed further illustrate that, on average, significant time passes from the initial issuance of the return decision pursuant to the EU-Turkey statement until the enforcement of the return decision. In 5 out of the 30 cases it took approximately a year, approximately 10 months in 5 other cases, and in one case it even took 22 months.⁶¹

On 17 April 2018, the Greek Council of State by Decision no 805/2018 annulled the Asylum Service Director's Decision of 31 May 2017, which ordered – as a general measure – the restriction of movement of asylum seekers, who arrived to the islands of Lesbos, Rhodes⁶², Samos, Kos, Leros

and Chios after 20 March 2016, to the respective islands. On 20 April 2018, the Director of the Asylum Service issued a new Decision, ordering the restriction of movement of all asylum seekers arriving at the said islands for reasons of public interest, in particular for the implementation of the EU-Turkey statement and for faster and more efficient asylum procedures.⁶³

The Director of the Asylum Service has issued this decision taking into account “[t]he fact that during the course of the implementation of the EU-Turkey Joint Statement of 18-3-2016 and according to the followed practice up to today, asylum seekers who have entered Greece from Turkey and who do not stay at the Aegean islands will not be accepted by Turkey for the purpose of return in case of rejection of their application.” This official declaration reveals the diplomatic purposes and the limited territorial application of the EU-Turkey statement on the Aegean islands only and not on the Greek mainland.

3.4 Registration of asylum and examination

Applications for international protection of Syrians in the *hotspots* are recorded in a short registration form. Asylum claims of applicants belonging to other nationalities are registered in a longer registration form. Then the following asylum procedures are taking place according to *hotspot* practice.

First, asylum claims of persons fleeing Syria are examined by EASO and the Greek Asylum Service exclusively under consideration of admissibility. In concrete terms this means that only those Syrians who can prove that they were not safe in Turkey and/or are considered vulnerable persons (see Chapter 4) will be referred for eligibility examination (examination regarding the fulfilment of refugee recognition criteria). All other asylum applications from persons originating from Syria are rejected on inadmissibility grounds on the basis that Turkey is a 'safe third country' for them.

Second, asylum claims of persons originating from countries with a low asylum recognition rate

59 Amnesty International, Greece: Asylum seekers in abysmal conditions on islands, 23 October 2017, available at: www.refworld.org/docid/59edc8de4.html, Human Rights Watch, Greece: Urgent Need to Move Asylum Seekers from Islands, 21 December 2017, available at: www.hrw.org/news/2017/12/21/greece-urgent-need-move-asylum-seekers-islands, Médecins Sans Frontières, Confronting the mental health emergency on Samos and Lesbos: Why the containment of asylum seekers on the Greek islands must end, 10 October 2017, available at: www.msf.org/sites/msf.org/files/2017_10_mental_health_greece_report_final_low.pdf and Refugee Support Aegean/Pro Asyl, Humiliating reception conditions as a deterrent to prevent refugee arrivals on the Aegean islands, 7 March 2018, available at: rsaagean.org/stopthetoxicdeal-xenophobia/

60 European Council on Refugees and Exiles, The implementation of the hotspots in Italy and Greece - A study, December 2016, available at: www.refworld.org/docid/584ad1734.html

61 This numbers do not include the period from arrival to registration of the asylum claim, which in some cases amounted to another five months.

62 In Rhodes no Reception and Identification Centre has been established. It has not been chosen as a “hotspot area” for the implementation of the “hotspot” asylum and return procedures by EU and national bodies. Asylum procedures are conducted by the Greek Asylum Service.

63 Director of the Asylum Service, Decision no 8269, dated 20 April 2018 (Official Gazette B' no 1366/20.4.2018).

(such as Algerians, Pakistanis, etc.) are examined exclusively on eligibility.

Third, in the case of nationals for which the recognition rate is high (such as Iraqis, Eritreans, etc.) a merged procedure, examining both admissibility and eligibility, is carried out. As a result, not many applicants are granted asylum.

The practice of applying different asylum procedures according to the nationalities of the applicants is arbitrary, as it is neither provided by EU nor by domestic law. In addition, it violates the principle of non-discrimination as set out in Article 3 of the Geneva Convention of 28 July 1951 relating to the status of refugees. Instead, it is explicitly based on EASO's undisclosed internal guidelines, which frame the *hotspot* asylum procedures⁶⁴ in order to implement the EU-Turkey statement.

Subsequent to the EU-Turkey statement, asylum applicants arriving at the *hotspots* were arbitrarily exempted from the EU relocation program (see Chapter 2.1). Additionally, it is not verified whether they fall under the humanitarian clauses of the Dublin III Regulation⁶⁵. Out of the 40 Syrians, whose cases were examined in the present study, 28 individuals raised issues related to the Dublin III Regulation during their registration and/or first instance interview. However, in none of these cases did an effective examination of Dublin III provisions take place. In the aforementioned case of the unaccompanied minor who

was examined as an adult, this administrative practice even resulted in a breach of his right to family reunification.

3.5 EASO interviews

In implementation of operational activity 'HEL 4', EASO staff has conducted admissibility interviews with Syrians in the Greek *hotspots* since April 2016, although it was only later that the amendment of Greek domestic law 4375/2016 of 22 June 2016 granted EASO the competence to conduct asylum interviews.

In all the 40 cases examined, the interviews were conducted after 6 May 2016 and carried out by EASO staff. In the 10 most recent interviews, all conducted after 6 November 2017, the interview transcripts indicate the interviewer only by using a code, instead of the interviewer's full name as required by Greek law. Further, contrary to the law, none of the interviews were audio recorded.⁶⁶ These unlawful practices aggravate the lack of impartiality, transparency and accountability.

All interviews included in the purposive sample of the present study were conducted according to the interview/transcript templates used for admissibility interviews issued by EASO.⁶⁷ These templates were already in place on 18 March 2016, when the EU-Turkey statement became public. The interview conducted by the EASO staff constituted the only opportunity for the asylum seekers to be heard; the next stage in their asylum case was already the rejection on the ground of inadmissibility, issued by the Asylum Service. In the second instance all cases were examined without an interview as well, as envisaged in Greek law.⁶⁸

64 EASO, Instructions for managing asylum applications in the context of the pilot project of the Asylum Service – EASO for the implementation of the EU Turkey agreement of 18 March 2016, versions of 7 April 2016 and 29 July 2016; EASO, SOPs for the implementation of the Border Asylum Procedures in the context of the EU Turkey Statement 18/03/2016, versions of 31 March 2017 and 30 June 2017. The instructions and SOPs are not non-public and were disclosed to the authors by the European Center for Constitutional Rights (ECCHR) that obtained access to them by EASO, pursuant to the Agency's obligation under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents. For further information see ECCHR, Case report, EASO's involvement in Greek Hotspots exceeds the agency's competence and disregards fundamental rights, status as of: March 2018, *ibid*.

65 Regulation (EU) No 604/2013, Art 16 (humanitarian clause regarding family unity in cases of dependent children, siblings or parents) and Art 17 (regarding bringing together persons with any family relations on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible).

66 Law 4375/16; Art 52 (14). According to the provision of Art 52(15) when an audio recording is not possible, a full transcript of the interview has to be kept. In none of the examined cases failure to record is registered.

67 EASO, Interview/Transcript templates used for admissibility interviews, 18 March 2016 - 11 June 2017. These documents are not non-public and were disclosed to the authors by the ECCHR that obtained access to them by EASO, pursuant to the Agency's obligation under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.

68 For more information on second instance, read Chapter 2.3.

Upon completion of the interviews, 'concluding remarks' regarding the admissibility and/or credibility of the applicant's claims were issued – either by the EASO staff member who conducted the interview or, in some cases, by a different EASO staff member that had neither heard nor met the applicant.⁶⁹ The latter was practised despite the apparent fact that credibility and the individual's profile can, as a matter of principle, only be effectively assessed by the person who examined her/him orally.

In all the cases examined, the 'interview transcript' and the 'concluding remarks' constituted the basis for the admissibility decisions issued by the caseworkers of the Greek Asylum Service and Appeals Committees who had neither met, nor heard the asylum seeker in question. A qualitative analysis of the sample revealed a series of patterns in the way the interviews were conducted. They make very clear that the interviews were based on the EASO interview/transcript template and its predetermined questions.

On the one hand, it shows that Turkey was predetermined as the only country of interest with regard to the 'safe third country' concept. Although in some cases examined the concerned persons transited through and/or stayed in other third countries as well, there was no attempt during the interviews to examine the safety of these countries. Instead, cases were solely examined with regard to the situation in Turkey.⁷⁰

On the other hand, the EASO interviewers systematically asked Syrian asylum seekers why they refrained from applying for international protection in Turkey; a very misleading question, considering the fact that refugees from Syria are explicitly excluded from requesting international protection in Turkey, pursuant to Art 3.1(r), 91 of Turkish Law No. 6458/13 on Foreigners and International Protection (LFIP).

69 Out of the 40 cases examined, in 10 cases the expert who drafted the "concluding remarks" differed to from the expert that conducted the interview. In 8 cases the expert is indicated using a code, instead of indicating the interviewer's full name. In one case, one expert was signing on behalf of another. In three cases it could not be identified whether the expert that conducted the interview was the same person drafting the conclusion.

70 In 9 out of 40 cases examined the asylum seekers transited via Turkey and additionally one or more other countries before requesting asylum in Greece.

Instead, they are subject to a group-based, *prima facie-type* Temporary Protection Regime (TPR), as per Council of Ministers Decree no 6883/14, which grants beneficiaries the right to legal stay as well as some level of access to basic rights and services. UNHCR in Turkey does not register temporary protection beneficiaries and does not carry out refugee status determination (RSD) proceedings under its mandate. The Temporary Protection Identification Document (*Gecici Koruma Kimlik Belgesi*) issued to beneficiaries of Temporary Protection is not identified as 'residence permit' by Turkish law.⁷¹ Syrians refer to this type of documentation as '*Kimlik*'.

Even in cases in which Syrians indicated to EASO interviewers that they had received documents in Turkey, these were not properly assessed during the interviews.⁷² There are strong indications that the EASO staff is not fully aware of the Turkish legal regime regarding Syrians, as in the respective 'concluding remarks' of the cases in question, EASO experts suggested that Turkey is a 'safe third country' omitting to examine those pleas (for the mandate of EASO see Chapter 2.3).

In addition, in all the 40 cases included in the sample the examination with regard to the enjoyment of rights in Turkey is limited to questions on whether the applicants took up employment in the country or not – disregarding the fact that in Turkey, there are substantial gaps between access to employment in law and access to employment in practice.

In particular, Syrians holding temporary protection status in Turkey have the right to apply for a work permit on the basis of the Temporary Protection Identification Card, subject to regulations and directions to be provided by the Council of Ministers. According to the "Regulation on Work Permit for Foreigners under Temporary Protection", adopted on 15 January 2016, an application for a work permit may be lodged only 6 months after temporary protection status has been granted. The Turkish Ministry of Labour may cease to issue work permits with regard to provinces which have been determined by the Ministry

71 AIDA, Country Report Turkey, *ibid.*, pp. 111, 123.

72 All interviews were limited to the examination of the admissibility of their asylum applications, under the presumption that Turkey is a 'safe third country'.

of Interior to pose risks in terms of public order, public security or public health. The competent Ministry may also set a quota on temporary protection beneficiaries based on the needs of the sectors and provinces. The number of beneficiaries active in a specific workplace may not exceed 10% of the workforce, unless the employer can prove that there would not be any Turkish nationals able to fill the vacancy. If the workplace employs less than 10 people, only one temporary protection beneficiary may be recruited. In conclusion, there currently is little incentive to obtain work permits, a situation which is further hampered by a cumbersome process. As a result only about 15,000 Syrians have actually done so. These figures still represent a minimal fraction (1.2%) of the 1,733,809 registered temporary protection beneficiaries between the age of 19 and 64 in Turkey.⁷³

The cases examined demonstrate that the enjoyment of the right to work in Turkey is not assessed according to the legal framework in the country. EASO's interviews and its assessment in the concluding remarks are limited to the mere fact whether or not the individual concerned has worked in Turkey, failing to examine further whether employment was formal or informal and under which conditions it took place. Thus, the legal framework and the practical obstacles regarding access to employment in Turkey are neither explored during the interview, nor assessed in the concluding remarks by EASO experts. As a result, no proper assessment is taking place with regard to whether the protection acquired in Turkey lies in accordance with the protection envisaged in the Geneva Convention.⁷⁴

It is also striking that – although conformity with the Geneva Convention on Refugees is an important criterion for return to a third country according to EU law – in none of the 40 cases

questions regarding the set of rights envisaged in the Geneva Convention were raised by the interviewers.

In the cases examined, claims expressed by the Syrians regarding persecution, infliction of harm and/or acts of refoulement – to Syria and/or other countries – in Turkey were not sufficiently examined or followed up by proper additional questions by the interviewers.

Also, the qualitative analysis of the study's sample revealed inappropriate communication methods and unsuitable questions related to past experience of harm and/or persecution. Particularly alarming is that in cases where the asylum seekers were referring to shootings and deaths at the Turkish-Syrian border, interviewers often failed to follow up appropriately. Instead, it occurred that they focused on whether the person that had just reported about very serious traumatic experiences had documentation when crossing the border, and on how they can be sure that persons actually died from the shootings. Such lines of questioning are very insensitive and unprofessional and can potentially lead to further trauma.

The qualitative analysis revealed further inappropriate communication practices, such as: closed questions impeding a proper follow-up, no opportunity to explain the case in the applicant's own words, failure to consider factors that are likely to distort the applicant's ability to express him- or herself properly (such as mental health issues or prior trauma), lack of clarification with regard to vague or ambiguous concepts mentioned by the interviewer (such as 'international protection' or 'safe third country'), potential inconsistencies or misunderstandings regarding critical aspects of the case that could lead to confusion and/or the inability of the applicant to express him- or herself effectively, and more generally, violations of the right to be heard.⁷⁵

In conclusion, in none of the 40 cases surveyed, the requirements inherent in the 'safe third

⁷³ AIDA Report Turkey, *ibid.*, pp. 133-135, International Crisis Group (ICG), *Turkey's Syrian Refugees: Defusing Metropolitan Tensions*, 29 January 2018, pp. 10, 20, available at: www.refworld.org/docid/5a82a3424.html

⁷⁴ For example, according to Art 17 of the United Nations Convention relating to the Status of Refugees of 28 July 1951 "The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage earning employment" allowing for restrictive measures under specific conditions.

⁷⁵ ECCHR, Case report, *EASO's involvement in Greek Hotspots exceeds the agency's competence and disregards fundamental rights*, *ibid.* and HIAS, *EASO's Operation on the Greek Hotspots, An overlooked consequence of the EU-Turkey Deal*, March 2018, available at: www.hias.org/sites/default/files/hias_greece_report_easo.pdf

country' concept were examined in their entirety or analysed in sufficient depth (for 'safe third country' criteria see Chapter 2.2.b). An individualised fair and effective assessment with respect to the 'safe third country' concept – based on each person's profile, background and individual circumstances – has not been provided for any of the cases.

3.6 The EU-Turkey statement in numbers

According to publicly available information, following the EU-Turkey statement, between 1 April 2016 and 31 March 2018, 20,953 Syrians entered Greece by sea. Throughout this whole period, Syrians constituted the top arriving nationality⁷⁶ as well as the top nationality applying for asylum in Greece.⁷⁷

According to the European Commission, Frontex and EASO deployed 993 persons to Greece as of February 2018 in order to support the operational implementation of the EU-Turkey statement.⁷⁸ As of the end of 2017, taking into account all five *hotspots*, 84 members of staff of the Greek Asylum Service were supported by 176 EASO members of staff and experts deployed to Greece.⁷⁹ Until 31 March 2018, despite generous support and enforcement by the EU, only 2,383⁸⁰ negative decisions were issued in first instance based on the 'safe third country' concept by the Greek

Asylum Service.⁸¹ According to the most current information available⁸², the rate in the second instance is even lower, with only 135 decisions on inadmissibility issued by the Independent Appeals Committees until 27 August 2017. Therefore the hotspot asylum procedures cannot be considered efficient.

According to the Greek Police, as of 26 April 2018 only 275 Syrians in total were readmitted to Turkey on the basis of the EU-Turkey statement, out of the 1,601 total readmissions under the EU-Turkey statement. The vast majority of the readmitted refugees were nationals of other countries.⁸³ As per the most current official police data on the nature of returns, published on 31 March 2018, all Syrians who returned to third countries in 2016, 2017 and 2018 did so willingly.⁸⁴

As of 6 March 2018, 12,685 third country nationals remained stranded at the five *hotspot* islands – Lesbos, Samos, Chios, Kos, and Leros –, although they have the capacity to host only 7,797 persons in total.⁸⁵

To conclude, *hotspot* asylum and return procedures are neither fair nor efficient.

76 Data compiled from the following sources: UNHCR, Nationality of arrivals to Greece, Italy and Spain - Monthly - Jan to Dec 2016, 2 February 2017, available at: data2.unhcr.org/en/documents/details/53447, UNHCR, Refugee and Migrant Arrivals to Europe in 2017, 16 February 2018, available at: data2.unhcr.org/en/documents/details/62023 and UNHCR, Greece Sea arrivals dashboard - March 2018, 5 April 2018, available at: data2.unhcr.org/en/documents/download/63019

77 Greek Asylum Service, Asylum Service Statistical data from 07.06.2013 to 31.03.2018, available at: asylo.gov.gr/en/wp-content/uploads/2018/04/Greek_Asylum_Service_Statistical_Data_EN.pdf

78 European Commission, Operational implementation of the EU-Turkey statement, 28 February 2018, available at: ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_eu-turkey_en.pdf

79 Greek Asylum Service, Statistical data of The Asylum Service - AIDA REPORT ON GREECE 2017, 15 February 2018, available (in Greek) at: asylo.gov.gr/wp-content/uploads/2018/02/AIDA-Report-2018.pdf

80 This figure includes exclusively decisions on Turkey as a 'safe third country' following the implementation of the EU-Turkey statement, as this concept has not been applied before.

81 Data retrieved from Greek Asylum Service, Asylum Service Statistical data from 07.06.2013 to 31.03.2018, *ibid*.

82 European Commission, Seventh Report on the progress made in the implementation of the EU-Turkey statement, 6 September 2017, available at: ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170906_seventh_report_on_the_progress_in_the_implementation_of_the_eu-turkey_statement_en.pdf

83 Greek Police, Press Release Return of five irregular immigrants to Turkey, 26 April 2018, available (in Greek) at: www.mopocp.gov.gr/index.php?option=ozo_content&lang=&perform=view&id=6367&Itemid=656

84 Greek Police, Statistical data on illegal migration, 2016, available (in Greek) at: [www.astynomia.gr/index.php?option=ozo_content&lang=%27.%27&perform=view&id=55858&Itemid=1240&lang=](http://www.astynomia.gr/index.php?option=ozo_content&lang=%27.%27&perform=view&id=55858&Itemid=1240&lang=,), Greek Police, Statistical data on illegal migration, 2017, available (in Greek) at: www.astynomia.gr/index.php?option=ozo_content&lang=%27.%27&perform=view&id=70776&Itemid=1240&lang= and Greek Police, Statistical data on illegal migration, First Trimester 2018, available (in Greek) at: www.astynomia.gr/index.php?option=ozo_content&perform=view&id=78538&Itemid=73&lang=

85 Greek Ministry of Digital Policy, Telecommunications and Media, National situational picture regarding the islands at Eastern Aegean Sea, 6 March 2018, available at: is.gd/05032018_nationalsituation

4. IDENTIFICATION OF VULNERABLE PERSONS IN THE HOTSPOTS

Vulnerable persons are afforded special administrative treatment under Greek domestic Law 4375/2016. For example, they are excluded from the ultra-rapid exceptional borders procedure (Arts 50.2 and 60.4). They also enjoy a series of special procedural guarantees to ensure their right to a fair and effective hearing. They are, thus, considered as applicants in need of special procedural guarantees due to their individual circumstances (Arts 34, 50, 52 and 53).

In practice, Syrian asylum seekers confined in the *hotspots*, who succeed to prove their vulnerable status during the examination of their asylum application, can get the geographical restriction lifted and are subsequently transferred to the mainland.⁸⁶ They are then referred to the normal procedure and are examined on the merits, not on admissibility under the 'safe third country' concept, as explicitly provided by the EASO Standard Operating Procedures (SOPs).

Regardless of whether the examination procedure focuses on admissibility or on the merits, vulnerability identification is a critical aspect of any asylum case. By definition, it needs to be examined by means of an individualised assessment, as the risk in case of return to the country of origin or a third country can only be determined based on the individual's particular profile and circumstances. For instance, vulnerability often indicates and/or relates to past persecution; past persecution is a strong indicator for a well-founded fear of future persecution. As such, vulnerability lies at the core of status determination.

Vulnerability assessment in the Greek *hotspots* takes place during the reception and identification procedures upon arrival. It is carried out by the medical and psychosocial unit of the Reception and Identification Service (RIS), as provided by Art 9 of Law 4375/2016. Vulnerability assessment is also a part of the asylum procedures carried out by Asylum Service caseworkers or an Independent Appeals Committee. They have

the competence to determine at any stage of the procedure whether a person qualifies as 'vulnerable' based on the facts of the case or to refer them to specialised personnel for respective diagnosis (Law 4375/2016 Arts 50, 52, 53).

In practice, the EASO staff that conducts the first instance examination is also directly involved in the identification of vulnerability – a procedure which is not prescribed by Greek law, but by EASO's internal SOPs, which leave the assessment of vulnerability to the discretion of the EASO staff. No clear framework regulates this joint procedure between domestic and EASO staff; their respective roles and competences are not clearly defined.

The RIS did not identify vulnerability upon arrival in any of the 40 cases examined. No record regarding the procedure or the medical exams or sessions that took place in order to assess the concerned applicant's vulnerability was provided to any of the Syrians concerned. In some cases only a one-page 'foreigner's medical card' issued by the RIS with the word 'no' written next to a box titled 'vulnerability' was provided to them, without any medical or other document drafted by an expert to substantiate the negative assessment.

Vulnerability is not effectively assessed during the first instance interview by the EASO staff either. Instead, the analysis of the cases exposes the systematic use of general, inappropriate questions without effective clarification or follow-up, such as: "Do you suffer from any serious mental or physical disability?" Furthermore, the interview template provided by the EASO SOPs follows an approach that may lead to further trauma, as it includes repetitive questions on traumatic events without clear scope and indicative questions insisting on exact details of the mental health issue's effect on the asylum seeker's everyday life.

An EASO vulnerability assessment took place in only 7 out of the 40 cases. In 5 of those 7 cases the 'assessment' procedure was limited to the

⁸⁶ European Council on Refugees and Exiles, The concept of vulnerability in European asylum procedures.

filing of relevant annexes to the EASO SOPs⁸⁷. In these 5 cases, an annex regarding the assessment of special needs was filed by EASO staff that had never examined or even met the ‘assessed’ asylum seekers. The EASO staff declared them non-vulnerable. In the remaining 2 cases a vulnerability interview took place. In both cases the same identical forms were issued, declaring the individuals concerned non-vulnerable. In none of the cases, the expertise of the EASO staff who made the assessment is mentioned. In all the 40 cases examined, the determining asylum authority followed EASO’s findings and categorised the applicants as non-vulnerable – without hearing.

During the procedures, the 40 Syrian asylum seekers whose cases are examined in the study, were not provided with any record to determine whether, and if so under which criteria and at which point in time, vulnerability assessments were shared between the different actors carrying out those assessments – i.e. RIS and EASO – and with the decisive asylum authorities. Arbitrary practices and lack of transparency effectively hindered access to vulnerability assessment procedures and the possibility to challenge them. This led to grave violations of the right to be heard and the right to be examined fairly.

An alarming conclusion emerges from the case studies. 33 out of the 40 Syrians were proven to meet the vulnerability criterion after all. These figures include all of the cases that underwent a negative EASO vulnerability assessment.⁸⁸ In 17 cases vulnerability was identified by the RIS

itself upon completion of identification procedures. In the remaining 16 cases it was diagnosed by professional psychiatrists, psychologists and/or other specialised experts. Thus, 33 out of 40 asylum seekers were wrongfully examined with regard to their vulnerability and rejected as if they were healthy and had not undergone past persecution. They were not afforded the procedural guarantees that they were entitled to. Amongst those asylum seekers were identified victims of torture and/or serious violence and/or persons diagnosed as suffering from serious mental health disorders, some of them even amounting to disability, exacerbated – if not triggered – during their prolonged stay in the *hotspots*.

The lack of proper diagnostics and of access to proper care with regard to existing vulnerabilities of populations fleeing from violence and trauma evidently affects their health and rehabilitation. The additionally experienced continued violence and insecurity in Greece – where deplorable living conditions, a climate of insecurity and despair, and containment against their will in the *hotspots* lead to clashes amongst the asylum seekers and with the security forces, accompanied by disproportionate use of force or ill-treatment by the police – have reportedly further negatively affected the mental wellbeing of these populations, created new vulnerabilities and/or exacerbated the existing ones. According to a recent report from Médecins Sans Frontières (MSF), the situation amounts to a “dramatic mental health emergency”, documented by a significant increase in the number of patients needing psychological and psychiatric support subsequent to the EU-Turkey statement, and a deterioration of the symptoms they present.⁸⁹

The analysis of the cases illustrates that a fast-track mass examination of populations fleeing from war zones and refugee producing countries – thus, highly likely with personal histories of past harm and/or persecution and related

87 EASO, Instructions for managing asylum applications in the context of the pilot project of the Asylum Service – EASO for the implementation of the EU Turkey agreement of 18 March 2016, versions of 7 April 2016 and 29 July 2016; EASO, SOPs for the implementation of the Border Asylum Procedures in the context of the EU Turkey Statement 18/03/2016, versions of 31 March 2017 and 30 June 2017. The instructions and SOPs are not non-public and were disclosed to the authors by the European Center for Constitutional Rights (ECCHR) that obtained access to them by EASO, pursuant to the Agency’s obligation under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents. For further information see ECCHR, Case report, EASO’s involvement in Greek Hotspots exceeds the agency’s competence and disregards fundamental rights, status as of: March 2018, *ibid*.

88 The remaining 7 asylum seekers of the study, which have not yet been assessed vulnerable, claim to be vulnerable as well. They are trying to gain access to an appropriate effective procedure to assess their vulnerability and actual health condition. This constitutes a big challenge in the current reported situation at the ‘hotspots’.

89 Médecins Sans Frontières, Confronting the mental health emergency on Samos and Lesbos: Why the containment of asylum seekers on the Greek islands must end, *ibid*., Refugee Support Aegean/Pro Asyl, Humiliating reception conditions as a deterrent to prevent refugee arrivals on the Aegean islands, *ibid*.; Vulnerable refugees exposed to an inhuman “deal”, 13 March 2018, available at: rsaegean.org/stoipheticdeal-vulnerability/#victimsoftorture

vulnerabilities – trapped in *hotspots* under deplorable conditions, are not a viable solution in practice. The identification of vulnerability – and especially ‘hidden’ vulnerability, e.g. in the case of victims of trafficking or torture or in the case of persons suffering from serious and incurable mental health issues – is in principle a lengthy process to be conducted by specialised staff. It cannot effectively be managed in a fast-track ‘mode’ for persons arriving en masse, as envisaged by the ‘hotspot approach’. In the context of the Greek *hotspots*, it resulted in an

arbitrary and non-transparent flawed process. A process that is based on checklists with general categories, neither fully recorded nor accessible to the person whom it concerns, with contradictory assessments by different actors and/or at different points in time. A process that clearly violates the law and medical standards. A process that leads to a total collapse of guarantees and an unjustifiable amount of suffering for refugees and persons fleeing persecution. A process that actually inflicts serious harm and trauma, instead of diagnosing and treating it properly.

5. RIGHT TO APPEAL

5.1 Administrative appeal

Under the exceptional borders procedure an appeal against a negative first instance decision by the Asylum Service can be lodged within the short time limit of five days after the applicant had been notified of the decision. The appeal has a suspensive effect.⁹⁰ The procedure is in writing and an oral hearing takes place only in exceptional cases prescribed by law. This includes cases in which doubts related to the thoroughness of the first instance procedure, complex claims or subsequent claims that entail new serious evidence have arisen.⁹¹

Appellants are entitled to free legal assistance and representation at the stage of the appeal as guaranteed in EU law.⁹² As of the time of writing, the state-run legal aid scheme is still not operative in the Samos and Leros *hotspots*. It became operative in Chios and Kos only in September 2017 and in Lesbos in October 2017. With one lawyer appointed per *hotspot*, a total of only 117 appellants benefited from the state-run scheme in the *hotspots* until 31 December 2017.⁹³ In addition,

the *hotspots* are characterised by serious gaps in legal aid, most of which is being provided by non-governmental organizations (NGOs), and not all the needs are covered due to a lack of capacity and funding.⁹⁴ As a result, minimum standards at the stage of appeal are not met. In 28 out of the 30 purposive sample cases that were decided in second instance, the appellants received legal aid before the Appeals Committees, which was provided by an NGO. In these 28 cases the appellants raised through written memorandums circumstances rendering an oral examination necessary – as laid out in Art 3 ECHR – that had not been examined or raised in first instance. They further requested an oral hearing before the competent Appeals Committee. In 21 cases the Committees decided without further reasoning that “there is no need for an oral hearing”. In 7 cases it failed to respond to the request for an oral hearing.

In 2 out of the 30 cases the appellants neither received legal aid in second instance nor were they represented by a lawyer. In first instance,

⁹⁰ Law 4375/2016 Art 61.1 - 61.4.

⁹¹ Law 4375/2016 Art 62 as amended by Law 4399/16 Art 86.16.

⁹² APD Art 20, Law 4375/16 Art 44.3.

⁹³ Greek Asylum Service, Statistical data of The Asylum Service - AIDA REPORT ON GREECE 2017, 15 February 2018, available (in Greek) at: asylo.gov.gr/wp-content/uploads/2018/02/AIDA-Report-2018.pdf

⁹⁴ Danish Refugee Council, Fundamental Rights and the EU Hotspot Approach, October 2017, available at: drc.ngo/media/4051855/fundamental-rights_web.pdf. International Bar Association, The refugee crisis: Desperation on the Greek islands – ‘There are children everywhere’, 19 December 2017, available at: www.ibanet.org/Article/NewDetail.aspx?ArticleUid=645e83d0-7f4a-4585-b434-71d438538805. Legal Aid Actors Task Force, Legal Aid (Individual Legal Representation in Asylum/Refugee Context) for Migrants, Asylum Seekers and Refugees in Greece: Challenges and Barriers, January 2018, available at: data2.unhcr.org/es/documents/download/61989

EASO and the Asylum Service accepted their individual characteristics – membership in an ethnic and religious minority and LGBTI respectively – but found that Turkey is a ‘safe third country’ for them. In second instance, the same Appeals Committee examined both cases without an oral hearing. In the LGBTI case the Committee further examined the credibility of the appellant without an oral assessment, not believing that the applicant is an LGBTI person. Thus, all studied cases were examined without hearing the applicants and based on a flawed first instance procedure, as analysed above.

5.2 Judicial appeal

An annulment application against a final asylum decision can be filed before the competent Administrative Appeals Court of Piraeus within 60 days after the applicant has been notified of the decision. An annulment application against a return decision may also be filed within 60 days following notification. In this case, the first instance administrative courts are competent. In the case of return decisions issued by Lesbos and Chios police authorities, the competent court is based in Mytilene. In the case of decisions issued by Samos police, it is the court in Syros and in the case of decisions issued by the police of Kos and Leros, the court in Rhodes is competent.

Filing an annulment application does not have an automatic suspensive effect. In this regard, an additional suspension application and a request for interim order can be filed. If it is granted, the readmission to Turkey is suspended.

The legal and administrative fees required for filing an annulment application and a suspension application, including costs of notification to the respondent authority and fees for the appearance of a legal representative before the court and their written submissions in support of the applications, are very high. On average the whole procedure can cost between 600€ and 800€. This does not take into account the travel expenses of lawyers due to the particular geographical circumstances. Benefiting from free legal assistance in the *hotspots*, however, is close to impossible in practice, as the competent courts are located elsewhere and strict conditions are prescribed in order to prove lack of income.

The scope of the judicial review is limited to the legality of the contested decisions, taking into consideration the legal and factual situation at the time of their issuance. Thus, the domestic courts do not examine the merits of the case, nor do they assess the current risks and violations that may be impending at the actual time of readmission to Turkey. The date of the court hearing is on average scheduled several months or up to a year after the submission of the annulment application.

In conclusion, the geographical disparity between the *hotspots* and the courts, the detention or restriction of the potential appellants in the *hotspots* as well as obstacles in finding a lawyer in combination with the high costs of the procedures, render access to justice impossible in practice for the vast majority of the rejected asylum seekers in the *hotspots*. When designing the Greek *hotspots*, located on small islands where no courts are operating, practical aspects to safeguard even the physical access to justice were apparently not taken into consideration.



Location of Greek hotspots (in white) and competent courts (in black)

6. ‘SAFE THIRD COUNTRY’ ASSESSMENT

6.1 Impact of the EU-Turkey statement

The central element that is repeatedly invoked by all actors involved in the assessment of asylum applications lodged by Syrians arriving on the Aegean islands after 20 March 2016 is the EU-Turkey statement and the subsequent concomitant non-disclosable letters⁹⁵ with regard to the implementation of the EU-Turkey statement. In the case of Syrians, the EU-Turkey statement is applied automatically. Competent asylum authorities systematically reinforce the value of the EU-Turkey statement by basing their decisions on the said letters. The EU-Turkey statement and the letters are used in conjunction in order to justify the recognition of Turkey as a ‘safe third country’.

A qualitative analysis of the examined cases reveals consistent patterns with regard to how different EASO experts in the framework of very different cases, in different *hotspots* and at different points in time substantiate their assessment that the ‘safe third country’ concept applies. Repeatedly and without distinction – in 21 cases even with the exact same wording – the EASO experts justified the applicability of the ‘safe third country’ concept by simply considering the EU-Turkey statement and the letters as a ‘guarantee’ thereof. For instance, in the case of a Kurdish single male the EASO expert in charge concluded that “the concept of safe third country may be applied” and that the conditions of Art 38.1 of the Asylum Procedure Directive (APD) are met, as it is “underlined by the guarantees given by the Turkish authorities in conjunction with the EU-Turkey Agreement entered into force on the 20th of March 2016”. The same applies to cases concerning single Arab males, Kurdish families with under-age children or a single Arab female. A similar line of reasoning is followed in all EASO concluding remarks examined.

In all the 40 first instance decisions examined, the EU-Turkey statement and the letters are systematically invoked. The Asylum Service cites the EU-Turkey statement and states in

its reasoning that “it can be assumed by the 18.3.2016 Common Statement of EU and Turkey that the applicant will be accepted anew in this country [Turkey]”.

For the Asylum Service the EU-Turkey statement unquestionably serves as a return clause. All the letters are also systematically mentioned as elements that are taken into consideration in the course of the examination of admissibility. In 18 cases, the Asylum Service explicitly refers to the letters in order to substantiate the decision that Syrians are granted ‘effective temporary protection’ in Turkey.

In the second and final instance, the EU-Turkey statement is as well invoked in all the 30 cases examined, with its full text systematically cited word for word. In 11 cases, the Appeals Committees consider the EU-Turkey statement as a legally binding international agreement. In 4 cases the statement is considered as “an agreement with political commitment”. In 10 cases the EU-Turkey statement is considered as a return measure. In 5 cases no assessment is made in this regard, even though the EU-Turkey statement is mentioned as an element of the file taken into consideration. Irrespective of the reasoning endorsed by each Committee, it is evident that the statement plays an important role in the asylum decisions.

In all the cases examined the Committees took into consideration the aforementioned non-disclosable policy letters in order to conclude that Turkey is a ‘safe third country’. They were considered of “advanced probative value” in 25 out of the 30 cases examined. In some cases the letters of the Turkish Ambassador were even rated as “diplomatic assurances” in the framework of the implementation of the EU-Turkey statement, and/or “assurances” for the criteria of the ‘safe third country’ concept to be met, including the principle of non-refoulement. It has to be noted that by assessing if a third country is safe for a particular asylum seeker, any diplomatic assurances provided by the receiving third country would need to be assessed with a view to determining whether they would constitute a suitable and reliable tool to eliminate a risk of persecution and/or

⁹⁵ This concerns the letters that have been addressed in detail in Chapter 2.4 “Questionable ‘assurances’ in the course of the EU-Turkey statement”.

any other form of harm facing the asylum-seeker upon removal and that he or she has access to an asylum procedure.⁹⁶ Diplomatic assurances should not be used as a loophole to undermine the principle of non-refoulement.⁹⁷

The importance that the Committees attribute to the letters is startling, taking into consideration that these letters are outdated and do not address the applicable legal regime. They rather express a political will of a general nature, which was not even exchanged between the responsible official Greek and Turkish counterparts. Further, none of the 40 applicants was notified or informed about the existence and/or the content of the letters and their link to her/his particular case, during the initial and only interview with EASO experts. Neither were they provided with an opportunity to comment on those. In all the cases, the examination and decision-making bodies involved (EASO, Greek Asylum Service, Appeal Committees) failed to assess and verify whether the content of the letters is reliable and/or up-to-date.

In the vast majority of the cases, in the Committees' decisions special reference is made to the EU-Turkey negotiations and the response to the Syrian crisis (Joint Action Plan). Furthermore, they often refer to the fact that the current return measures from Greece to Turkey are funded by the EU. Critical elements regarding the applicants' individual circumstances and the legal regime in Turkey are not effectively examined. The alarming underlying premise is that since the EU is funding the returns of Syrian refugees to Turkey, the Greek authorities are strongly encouraged to conduct the asylum examinations according to a predetermined outcome, on the basis of political rather than legal considerations. "Political commitment" is explicitly cited as the main goal in the post EU-Turkey statement asylum case law. To conclude, the *hotspot* asylum model does not serve the rule of law, but the success of a controversial asylum experiment.

96 UNHCR, UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006, available at: www.refworld.org/docid/44dc81164.html

97 Committee against Torture (CAT) adopted its revised General Comment (GC) (now No.4) on the implementation of Article 3 of the Convention against Torture in the context of Article 22, p. 20, available at: www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf

6.2 Turkey as a 'safe third country'

The 'safe third country' assessment with regard to Turkey carried out by the examination and decision-making bodies involved (EASO, Greek Asylum Service, Appeal Committees) is largely limited to the mere repetition of the applicable legal provisions of the APD and Greek law. It lacks proper assessment of the individual circumstances of the applicants concerned as well as of the legal and factual situation of Syrians in Turkey. This pattern permeates all the stages of the procedure. It shows in the wording of the concluding remarks of EASO, in first instance decisions of the Asylum Service⁹⁸ and in second instance decisions of the Committees.⁹⁹ The decisions are often and at many points identical and repetitive. These inadequate assessments lead to a clear breach of the Greek authorities' obligation under Art 3 ECHR, according to which the returning state is responsible to ensure respect of the principle of non-refoulement. An aspect of this responsibility is the positive obligation to carry out an appropriate examination of individual asylum applications. This includes consideration of the information and facts that were known or that ought to have been known by the authorities to exist at the time of the decision. According to the United Nations Special Rapporteur on the human rights of migrants, "admissibility decisions issued are consistently short, qualify Turkey as a safe third country and reject the application as inadmissible: this makes them practically unreviewable."¹⁰⁰

98 The Greek Council for Refugees has published in English an indicative example of a first instance inadmissibility decision issued in November 2017 against a Syrian national in the Samos hotspot available at: www.asylumineurope.org/reports/country/greece/annex-ii-template-safe-third-country-decision

99 The Committees' negative decisions on admissibility and applicability of the 'safe third country' concept were ruled by majority in 26 of the studied cases, and were unanimous in 4 cases. In total 98.2% of decisions issued by the Independent Appeals Committees in 2017 have upheld the first instance inadmissibility decisions on the basis of the 'safe third country' concept. Greek Council for Refugees, AIDA Greece report, *ibid*.

100 United Nations Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants on his mission to Greece, A/HRC/35/25/Add.2, *ibid*, Par 81.

The examination of the case studies further illustrates that Turkey is considered a 'safe third country' without examination of all the cumulative preconditions for the application of the 'safe third country' concept under the APD and Greek law. In particular, EASO experts in their concluding remarks failed to examine all the preconditions in 33 out of the 40 cases examined. The Greek Asylum Service failed to do so in 8 cases, the Appeals Committees in 14 out of the 30 cases examined.

The current legal framework applicable in Turkey is not examined effectively. Neither of the EASO 'concluding remarks' nor the decisions issued by the Greek authorities take into consideration the Turkish Executive Decree 676/2016, issued under the state of emergency, that strips off protection from refoulement and abolishes the right to an effective appeal. The legal status of Syrians in Turkey is overrated and misunderstood; EASO and the Asylum Service systematically confuse the temporary protection granted to Syrians in Turkey with international protection. In addition, the right to work under Turkish law is erroneously mentioned and assessed in the relevant decisions. In 28 out of the 30 cases for which a second instance decision was issued, despite long analysis and citing of the Turkish general legal framework, which in principle grants the right to work, the actual preconditions laid down by Turkish law are totally omitted and not assessed by the Committees. In the remaining 2 cases no assessment on the issue is conducted at all.

The current factual situation is not properly assessed either. In 18 cases, EASO did not cite any source to substantiate the assumption that Turkey is a 'safe third country'. In the other cases, references are made mainly to outdated provisions of Turkish law and Turkish governmental sources or to other sources that are not analysed properly. The Asylum Service's decisions follow a common standard approach. In all the cases the same 15 general endnotes – without being properly assessed in the actual text – are added to the rejection decision. They are mostly referring to governmental sources, all of which are outdated.

The most current cited source is of January 2017, however, it is in fact irrelevant to the issue as it concerns ECHO's activities in Turkey. Also, no specific research on the situation of persons

with the applicant's individual characteristics, e.g. ethnicity, religion, etc., was carried out. The Committees' decisions are as well largely based on governmental and outdated sources or on sources that are irrelevant to the case examined. Some reliable sources are cited, but are erroneously assessed, leading to conclusions on the situation in Turkey that run contrary to the substance of the cited sources. The most illustrative example is the misinterpretation of the findings of the report of the Special Representative of the Secretary General on Migration and Refugees following a fact finding mission to Turkey in May-June 2016. In some cases the Committees refer to the report to conclude that Syrian returnees are not detained in Turkey, despite the fact that said report specifically refers to a practice of "de facto detention" of Syrians returned to Turkey from Greece (p. 18). In other cases, said report is cited to conclude that there is no risk of violation of the principle of non-refoulement, despite the fact that the Special Representative explicitly raises concerns with regards to the breaching of said principle on behalf of the Turkish authorities (p. 19-20).¹⁰¹

Asylum authorities with decision-making power deliberately fail to examine the actual and legal situation concerning conditions of detention and reception in Turkey. In none of the studied cases did such an examination take place: not in the course of the interviews, not in the decision recommended to the Asylum Service by EASO experts and not in the first instance decisions either. In the second instance, in 7 cases studied, the Committees rejected the claims of the applicants concerning detention and reception conditions in Turkey, arguing that it is outside the scope of their examination, limiting it only to grounds related to persecution. In 20 cases the Committees failed to examine claims of violation of Art 3 ECHR regarding reception conditions in Turkey; in 3 cases such allegations were rejected on vague grounds. Regarding allegations of human rights violations related to detention conditions in Turkey, in 20 cases the Committees rejected the claims relying on insufficient reasoning to substantiate their decisions, while in

101 Council of Europe, Report of the fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, 30 May - 4 June 2016, SG/Inf(2016)29, 10 August 2016, available at: www.refworld.org/docid/58de48524.html

3 cases they omitted to examine such pleadings whatsoever.

A systematic failure to properly assess and examine the individual circumstances of the cases emerges as a finding of the study as well. The 'safe third country' assessment conducted by the Asylum Service and the Appeals Authorities follows a first instance interview, which was carried out incompletely and did not cover all critical aspects of the case. No hearing takes place before the Asylum Service or the Committees; instead their judgment is based on EASO's 'transcript' and 'concluding remarks'. The asylum seeker's claims, as raised during the interview, are selectively and fragmentally passed on and examined from instance to instance by persons who never heard her/him personally. In the vast majority of the cases the asylum seekers' critical individual characteristics – e.g. ethnicity, religion, past persecution by the Turkish authorities – are openly and arbitrarily disregarded at all stages of the procedure.

The connection required by the 'safe third country' rule between the applicants concerned and Turkey, on the basis of which it would be reasonable for them to return to Turkey, is not efficiently examined on an individualised basis either. EASO systematically fails to even assess the connection precondition; it was omitted in 33 out of the 40 'concluding remarks' studied. The Asylum Service establishes a connection *inter alia* on the "possibility to apply for international protection in Turkey" in the vast majority of the cases examined (32 out of 40). In 18 out of these, this factor alone was considered enough to establish a connection, thereby rendering an assessment of further connection criteria unnecessary. Other factors considered to establish a sufficient connection by the Asylum Service include the presence of family members or friends in Turkey, the period of previous stays and the "ethnic and/or cultural bonds" to Turkey – without further justification or even mentioning the applicant's ethnicity.

In the case of the Appeals Committees, it seems that the factor that determines connection is the "large number of persons of the same ethnicity" – again without further analysis and indistinctly used for all ethnic groups. It has been invoked in 24 out of 30 cases. The "free will and choice" of the applicants to leave Turkey and

"not organize their lives in Turkey" is also considered as a factor establishing a link in 13 cases. Other factors taken into consideration by the Committees include the same mere reference, as indicated by the Asylum Service, to "ethnic and/or cultural bonds" without further specification, the proximity of Turkey to Syria, and the presence of relatives or friends in Turkey without effective examination of their status and situation there.

All actors follow a pattern of rejecting the applications on the basis that the asylum seekers failed to prove harm and fear of individual future risk, without examining either the existing available and objective information on the situation in Turkey or the asylum seekers themselves.

Homogenous, policy-driven decisions rather than an individualised assessment of the cases, and a reasoning directed by the assumption that Turkey constitutes a 'safe third country' unless the opposite is proven by the asylum seekers, shifts the burden of proof to their detriment.

Requests before the Appeals Committees to submit preliminary questions to the Court of Justice of the EU (CJEU) regarding the application of Art 38 APD in relation to the protection afforded to Syrians in Turkey were submitted in 28 out of the 30 cases examined. They were all rejected. In 17 out of the 28 cases the requests were rejected with the vague reasoning that it would cause delay in the procedures without "compelling reason". In 2 cases the applicable provision was considered so obvious as to leave no scope for any reasonable doubt. In 9 cases the request was not at all examined by the Committee. In sum, asylum case law in the *hotspot* procedure reveals multi-layered ambiguity to the clear detriment of the fundamental rights of asylum seekers and refugees.

6.3 Domestic case law

On 22 September 2017, the Plenary of the Greek Council of State delivered two judgments (2347/2017 and 2348/2017) upholding, by majority, the rejection of the asylum applications of two Syrian nationals as inadmissible by the Regional Asylum Office of Lesbos on the basis that Turkey was a 'safe third country' in their case, relying on the aforementioned letters. Furthermore, the highest administrative court concluded that the ultra-rapid *hotspot* procedures are lawful, although no prior ministerial decision

or EU Council Decision was adopted to determine the existence of a 'mass influx', which might have justified fast-track procedures.

A majority of 13 to 12 judges found that there is no reasonable doubt as regards the meaning of Art 38 APD and therefore found no reason to submit a request for a preliminary ruling to the CJEU, as requested by the applicants. The 12 dissenting judges highlighted the existence of reasonable doubt on a number of issues, including the requirement of ratification of the Geneva Convention by Turkey without geographical limitation, the compliance of Turkish temporary protection with the requirement of being "in accordance with the Geneva Convention", and the necessary degree of connection between the applicant and Turkey as a 'safe third country'.

The Court rejected the applicants' claims of being at risk of a violation of Art 3 ECHR on account of detention and living conditions in Turkey as inadmissible on jurisdictional grounds. It stressed that the competent procedure for such protection would lie in immigration and not asylum law with the respective administrative proceedings before police and competent courts. However, first instance administrative courts – while examining appeals against readmission decisions issued by the police – have also declared themselves incompetent to examine violations of Art 3 ECHR (Administrative Court of Mytilene, in Council, decisions No. 12/2017, 13/2017, 14/2017, 15/2017, 17/2017, 23/2017). In another line of reasoning, in the case of the first Syrian whose asylum application was rejected as inadmissible under the newly established Committees of Law 4375/2016, the Administrative Court of Mytilene rejected his appeal to suspend readmission procedures to Turkey on public interest grounds without any further justification.

By deciding with a marginal majority of 13 against 12 that the provision of Art 38 APD is clear and free from doubt – despite the fact that the mere existence of a minority of 12 judges clearly indicates that this interpretation was by no means obvious and beyond any reasonable doubt¹⁰² – the highest administrative court of

Greece failed to submit a pressing and critical European issue of general interest to the CJEU for an authentic legal interpretation. Thereby it allows space for arbitrary practices implemented by policy makers and national authorities beyond any control of legality. Simultaneously, Greek courts so far have failed to examine Art 3 ECHR claims regarding detention and reception conditions in Turkey by passing on responsibility from one to another, depriving rejected asylum seekers of their right to an effective remedy.

102 Group of Lawyers for the Rights of Migrants and Refugees, *Jura novit curiae?* A critical review of the judgments 2347/2017 and 2348/2017 by the plenary of the

Council of State, 25 October 2017, available at: omadadikigorwnenglish.blogspot.gr/2017/10/jura-novit-curiae.html#more

7. CONCLUSION

The EU has failed to form its response to the large number of arrivals of protection seekers according to the principles of solidarity and ‘burden sharing’. Likewise, relocation decisions have not been effectively implemented due to lack of political will. Instead, the EU-Turkey statement, a soft law pilot project, serves as the basis for an atypical readmission agreement between the EU and Turkey, set beyond democratic decision-making and control and without the involvement of the European Parliament. *Hotspot* asylum procedures after the EU-Turkey statement furthermore serve as a blueprint for controversial CEAS amendments regarding admissibility rules and the concepts of ‘safe third country’ and ‘first country of asylum’.

After the EU-Turkey statement, hastily passed Greek legislation, unofficial instructions and SOPs of EU agencies led to the emergence of the exceptional ultra-rapid asylum and return procedures in the “*hotspot* areas”. Joint operations between EU and national actors in return and asylum procedures are taking place, without a regulatory framework applicable to all actors involved. This unofficial practice results in lack of transparency and accountability and the bending of democratic principles.

The five Greek islands of Lesbos, Chios, Samos, Kos and Leros have unofficially been chosen as the ‘*hotspots* areas’ where the procedures for the implementation of the EU-Turkey statement are taking place. All newly arrived migrants, asylum seekers and refugees are confined in the *hotspots* with a dual aim: First, to contain them in the *hotspots* in deplorable and life threatening conditions with deterring impact. Second, to return Syrian refugees and non-Syrian rejected asylum seekers to Turkey, following return and asylum procedures which fail to respect core standards of fairness.

In the *hotspots*, initial screening and registration procedures are conducted by Greek authorities and Frontex with a total lack of transparency. Vulnerable persons are neither identified nor supported properly and individual protection needs are not duly assessed by the national and EU actors involved. As a result, vulnerable persons are deprived of the procedural safeguards afforded to them by EU and domestic law. The Greek Police issues – automatically, without individual assessment and even in cases of registered asylum seekers – return decisions to Turkey against third country nationals who arrive in the Greek territory via the Aegean Sea. The return decisions are activated at a later stage, after the completion of the asylum procedures and without any further assessment. Immediately afterwards, return operations are conducted by Frontex beyond any regulatory regime. Due to lack of procedural safeguards, even refugees such as Syrians are not aware that, upon arrival to the EU, their status is that of a returnee to Turkey rather than that of a protection seeker.

During the asylum procedures, different forms and methods of examination are applied – depending on the applicant’s nationality – on the basis of EASO’s SOPs, contrary to fundamental legal standards. Since 20 March 2016, Turkey is predetermined as a ‘safe third country’ for Syrian refugees on the basis of the EU-Turkey statement and subsequent correspondence between the European Commission and Turkish officials. EASO personnel conduct asylum interviews and provide their opinion on the respective case on the basis of SOPs and internal instructions. Subsequently, a decision is issued by the Greek Asylum Service – without hearing the applicant. In second and final instance, the administrative appeal granted to rejected asylum applicants is examined – without hearing the applicant either. Recourse to justice does not suspend the contested return to Turkey. In practice, it is also limited due to geographical and financial barriers.

These findings are substantiated by the analysis of a purposive sample of 40 cases of asylum seekers originating from Syria whose applications for asylum were examined in the five *hotspots* after the EU-Turkey statement was released.

Due to lack of effective individual assessment, the *hotspot* return and asylum procedures violate the principle of non-refoulement, fundamental human rights and the obligation to respect and promote human dignity. Moreover, they constitute an externalisation mechanism of protection obligations under the EU acquis to Turkey, a non-EU country, where the acquis is not applicable. Instead of ‘burden sharing’, *hotspot* procedures result in ‘burden dumping’ on Member States at the external EU borders, such as Greece, and third countries neighbouring the EU, such as Turkey.

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