



LEGAL POLICY BRIEF

Athens, 18 June 2021

REFUGEES IN LEGAL LIMBO

ANOTHER OVERLOOKED CASUALTY OF EXTERNALISING ASYLUM AT ANY COST

Thousands of Syrian nationals are trapped between the EU and Turkey. Their asylum applications in Greece are rejected, not because they do not qualify for asylum but because they are expected to seek asylum in Turkey instead. However, after the crisis at the Greek-Turkish borders in Evros in early March 2020, Turkey has not allowed the readmission of any applicants from Greece. As a result of the EU's externalization policy, these refugees remain in Greece in a situation of limbo, even though they qualify for asylum. They are often imprisoned in immigration detention centres for prolonged periods, homeless, without access to the reception system and without any prospects of seeing their situation improving. Following a new Ministerial Decision published on 7 June, the same fate now awaits asylum seekers from Afghanistan, Somalia, Pakistan and Bangladesh.

Starting Point: EU-Turkey Statement

On 18 March 2016, the EU-Turkey Statement was adopted, which essentially “externalizes” European responsibility for migration management to Turkey. The Statement foresees, among other things, the readmission to Turkey of migrants who have arrived to Greece irregularly by sea and do not apply for asylum or have their asylum application rejected. As the majority of people arriving to Greece via Turkey do in fact qualify for asylum, Greece began to also reject persons for whom the Asylum Service considered that Turkey was a “safe third country” and who could, therefore, seek asylum there instead.

Until last week, Greece applied the safe third country concept regarding Turkey only to Syrian nationals. In particular, when interviewing applicants from Syria, the Greek Asylum Service and the European Asylum Support Office (“EASO”) only ask questions to determine whether Turkey can be considered a safe country for them to ask for asylum. They are not asked any questions about why they fled their country of origin and whether they can be returned there. The fact that the procedure for determining whether Turkey is a safe third country does not meet the standards of the rule of law and European, International and Human Rights Law has been widely documented.¹

Additionally, because the aim of the EU-Turkey Statement is the rapid readmission of asylum seekers to Turkey, the processing of asylum applications was adjusted to ensure refugees would be kept in the immediate vicinity of the border. Indeed, immediately after the declaration came into force, all asylum seekers arriving to the Greek “hotspot” islands (Lesvos, Kos, Chios, Samos and Leros) were detained. Subsequently, generalized detention was replaced by the infamous measure of geographical restriction, according to which asylum seekers are not allowed to leave the respective island. On Kos, however, blanket detention continues to take place alongside the measure of geographical restriction.

No Readmissions to Turkey

Since March 2020,² there has not been a single readmission to Turkey. Nevertheless, the Greek Asylum Service, together with EASO, continue to summarily reject refugees on the basis that Turkey is a safe third country. This creates a situation that is contrary to the fundamental tenets of international protection and human rights: People are caught between two States, neither of which take responsibility for them. People eligible for international protection have, thus, become what the EU calls “refugees in orbit”, i.e. “refugee[s] who, although not returned directly to a country where they may be persecuted, [are] denied asylum or unable to find a State willing to examine their request, and are shuttled from one country to another in a constant search for asylum”.³

Situation contrary to the basic tenets of refugee and human rights law

International and European asylum and human rights law obliges States to examine whether people need protection and prohibits turning them back to a country where there is a real risk they will be subject to persecution, torture, inhuman or degrading treatment.⁴ In principle, the State of arrival is responsible for

¹ Cf. Massouridou/Kyprioti, The EU Turkey Statement and the Greek Hotspots – A Failed European Pilot Project, 2018, available at: <https://bit.ly/3w7fYMO>.

² Answer to written question by Commissioner Johansson, available at: <https://bit.ly/3g0cFRD>.

³ Cf. Definitions of the Department of Migration and Home Affairs, Refugee in Orbit, available at: <https://bit.ly/3w72gJF>.

⁴ Art. 38 Directive 2013/32/EU.

determining whether this need for protection exists – if it does, then certain rights must be granted (such as labour rights, social security, healthcare, education, freedom of movement, travel documents). If a State decides to employ the “safe third country” concept, - in itself a very controversial notion with no legal basis in the 1951 Geneva Refugee Convention - it can only do so on the premise that the third country assumes its obligations under the Convention. The fundamental idea remains the assumption of responsibility for those seeking protection. However, the Greek authorities continue to apply the “safe third country” concept, although no one takes responsibility. Neither Turkey, nor Greece.

Solution from European law

Greek asylum law 4363/2019 implements European Directive 2013/32/EU. Both provide, in Art. 86(5) and in Art. 38(4), respectively, that if the third country refuses to take the person back, the State must examine the asylum application as to its substance. The wording from the Greek provision additionally clearly indicates that such a new examination must be done on the own motion of the administration, namely: *ex officio*. Since Turkey has not readmitted any person from Greece for more than a year, there is no doubt that Greece is obliged to examine the merits of applications rejected on the basis that Turkey is a safe third country without requiring those applicants to file a separate application to this end. Greece becomes responsible for examining their asylum application and must conduct an asylum interview and assess if they are entitled to international protection. For Syrians, for example, this means, Greece needs to examine why these persons had to flee Syria and if it is safe for them to return there.

The Greek practice instead

But instead of assuming responsibility and examining the merits of the asylum applications of these persons, Greece has opted for either summarily detaining them for readmission or for granting them a deadline up to 30 days to leave the country (“voluntary departure” decision). Nevertheless, no readmissions have taken place since March 2020 and, therefore, their detention “in view of readmission” lacks legal basis. On the other hand, these persons have nowhere to go. Turkey is not taking them back and no other country is admitting them to its territory. At the same time, they cannot return – and, of course, must not be returned – to Syria, because the country is at war and they often also risk individualized persecution. Still, this month, 15 Syrian nationals who had received a “voluntary departure” decision were reportedly only allowed to depart from the island of Lesbos after providing a one-way flight ticket to Damascus as requested by the authorities.

Additionally, the Greek Asylum Service either refuses to register new (“subsequent”) asylum applications from these persons, exactly because this would trigger the country’s obligation to examine them in substance, or rejects them in a cursory fashion, without at all addressing their arguments under Art. 86 (4) Greek Asylum Law 4363/2019 (Art. 38 (4) Asylum Procedures Directive). Some persons have already applied for international protection three times and their application has been found inadmissible all three of them, although Turkey has never readmitted them to date.

Therefore, Syrians who have arrived at the Greek hotspots, despite their undoubtable need for international protection, have found themselves either arbitrarily detained or in a situation of legal limbo and destitution, as they are excluded from the reception system, they have no right to cash assistance and no right to work either. Some of them have been stranded on the Greek islands for almost 2 years, in a situation of prolonged uncertainty-consequence of the EU’s ill-conceived attachment to externalising migration at any cost.

Human suffering as a consequence of inaction and perpetuation of failed externalisation policies

Whereas on paper it seems like a dogmatic question, in practice this policy leads to human suffering and severe hardships. C.F., a victim of torture, A.F., his wife, and R.F. their child who suffers from mental disability, Syrian nationals of Kurdish ethnicity, had their asylum application rejected as inadmissible, on the basis that Turkey was a safe third country for them. They were placed in detention in view of readmission and were detained for 5 months. Although it has already been more than a year that Turkey has not readmitted the family to its territory, the Greek Asylum Service has been refusing to examine the merits of their application to date, as mandated by Art. 38(4) of the Asylum Procedures Directive. The family has no access to cash assistance, has no right to work and has been rendered destitute. At the same time, they have no access to the necessary medical treatment, which, especially in the case of their daughter, is particularly urgent. The same applies for A.S., a Syrian asylum seeker suffering severe mental illnesses who got detained upon arrival on Kos. His asylum application got rejected on the basis that Turkey is a safe third country. He filed a so-called subsequent application – and was again rejected on the same basis. He was held in detention for more than 18 months. Thousands share their fate; thousands are left in limbo.⁵

New Ministerial Decision: extending the sinister practice to four more nationalities

Despite the ongoing suspension of readmissions to Turkey, the Greek Ministry for Migration and Asylum and the Ministry of Foreign Affairs published Joint Ministerial Decision No. 42799 on 7 June, which “designates” Turkey as a safe third country not only for Syrians, but also for Afghanis, Somalis, Pakistanis and Bangladeshis.⁶ Aside from serious concerns regarding the legality of the designation of Turkey as a safe third country, the decision means that the fate of the Syrians refugees described above is now expected to affect approximately 70% of all asylum seekers in Greece.⁷ Their asylum applications will be rejected on the basis that Turkey is safe for them and they can seek asylum there, even though in fact they cannot. The number of people left in legal limbo is expected to multiply exponentially.

EU’s silence on the matter

A priority parliamentary question on the applicability of Art. 38(4) of the so-called Asylum Procedures Directive in Greece was addressed to the European Commission in February 2021.⁸ The Commission has three weeks to answer priority questions. For non-priority questions, the deadline is six weeks.⁹ Despite the urgency of the matter, the Commission only answered on 1 June 2021,¹⁰ pointing out the applicability of Art. 38(4) and the need to ensure appropriate reception conditions for the applicants in the meantime. However, EASO, an EU Agency, continues to conduct admissibility interviews and issue “Opinions” recommending the rejection of the applicants on the basis that Turkey is a safe third country for them.

⁵ Cf. the Statistics of the Greek Ministry for Migration, available at: <https://bit.ly/3gf57VC>.

⁶ Ministry for Migration and Asylum, Greek legislation designates Turkey as a safe third country, for the first time. This decision is for asylum seekers from Syria, Afghanistan, Pakistan, Bangladesh and Somalia, 07/06/2021, available at: <https://bit.ly/3wg22jH>.

⁷ Cf. Efsyn.gr, Πολιτικά παιχνίδια Μηταράκη με την «ασφαλή» χώρα Τουρκία, 07/06/2020, available at: <https://www.efsyn.gr/node/297421>.

⁸ The question tabled by MEP Erik Marquardt is available at: <https://bit.ly/3w8jB4Y>.

⁹ Cf. European Parliament, At a Glance – Parliamentary Questions, December 2014, available at: <https://bit.ly/3w2B2nn>.

¹⁰ The answer by Commissioner Johansson is available at: <https://bit.ly/3g0cFRD>.