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PRO ASYL**



LEGAL NOTE

**UNHCR has Failed to Stand Up for Refugee Rights During Crucial EU-Turkey Deal
Judgement**

October 20th 2017

On 22 September 2017, the Council of State (Greece's highest administrative court) ruled against applications by two Syrian male asylum-seekers challenging the negative decisions by one of Greece's Asylum Appeals Committees that considered Turkey a 'safe third country' for them.¹ Refugee Support Aegean (RSA) represented Afaaz*², one of the two asylum-seekers before the hearing by the Council of State.³ Afaaz*, is a married Syrian man who suffers from post-traumatic stress disorder (PTSD). He managed to transit through Turkey and enter Greece where he asked for asylum on 4 August 2016.

The rulings by the Council of State in these two cases open the door to forcible returns of Syrian asylum seekers to Turkey under provisions of the EU-Turkey deal. The case was initially heard by the Council of State's Fourth Chamber but was finally referred to the Plenary given the importance of the case⁴.

Correspondence produced by UN Refugee Agency (UNHCR) was of particular importance on the outcome of the two cases at all stages of the asylum procedure. RSA and PRO ASYL highlight that both the Greek Asylum Service and the Appeals Committees have systematically based their findings that Turkey is a 'safe third country' on two letters by UNHCR when issuing inadmissibility decisions in cases of Syrian refugees. The other basic piece of evidence routinely cited in the decisions are: the Turkish "diplomatic assurances" provided by the Permanent Representative of Turkey to the Director-General for DG Migration and Home Affairs of the European Commission dated 12 April 2016 (where the former assured that Syrians returning to Turkey from Greece will have access to temporary protection); and a letter addressed to the Greek authorities from Director-General of DG Migration and Home Affairs of the European Commission, Matthias Ruete dated 5 May 2016 (*"in view to facilitating the implementation of the statement of 18 March 2016"*).

The first critical UNHCR letter dated 4 May 2016 (addressed to the Director of the Greek Asylum Service as response to her request for information)⁵ states that temporal protection legislation provides for "*a set of rights and measures of assistance*" and that those returned under EU-Turkey statement – in light of the legislation and the Turkish diplomatic assurances - "*should be able to obtain the temporal status*". Although it does not literally adopt a position regarding Turkey as a 'safe third country', the letter obviously allows for an interpretation in favor of considering Turkey a 'safe third country' and goes as far as mentioning the diplomatic assurances provided by Turkey as a positive indication. The letter avoids to stress major deficiencies of the Temporary

1 Decision 2347/2017 Council of State Plenary; and Decision 2348/2017 Council of State Plenary

2 Not the applicant's real name.

3 Decision 2348/2017. Council of State Plenary, 22 September 2017.

4 Decision 446/2017 Council of State Fourth Chamber (referral to Plenary)

5 See GREAT/HCR/310.

Protection Status (TPS) legislation concerning duration, termination/suspension or exclusion of the status, lack of special legal remedies, lack of guarantees in accessing international protection in case of its termination and restrictions in rights and integration. Furthermore, the letter avoids to mention that the granting of temporary protection status under TPS legislation is discretionary and to assess the “credibility” of the given diplomatic assurances.

On 9 June 2016, a second letter followed as a response to the Greek Asylum Service request for information in relation to the first 12 Syrians who were returned voluntarily to Turkey under the EU-Turkey deal.⁶ In this second letter, UNHCR admitted that it could not confirm if returnees, who had been pre-registered by the Turkish authorities, had obtained temporary protection status. However, UNHCR again evaded providing more specific information regarding the situation of Syrian refugees in Turkey⁷, its monitoring ability or taking a clear stance in favor or against characterizing Turkey as a safe third country.

In the asylum case of Afaaz*, the final second instance inadmissibility decision issued on 16 September 2016 by the Third Appeals Committee stated that the principle of *non-refoulement* is guaranteed in Turkey and that the temporary protection status fulfills the criteria of protection in accordance to 1951 Geneva Convention standards. The competent Appeals Committee based its reasoning on what it called “credible” diplomatic assurances offered by the Turkish authorities to the European Commission as “confirmed” by the first two letters from UNHCR. The Appeal Committee’s reasoning was also based on the aforementioned letter from Director-General of DG Migration and Home Affairs and a letter from the Commissioner for Migration to the Greek Minister for Migration Policy dated 29 July 2016. In his July 2016 letter, the Commissioner for Migration stated that despite the attempted coup d’état of 15 July 2016, the Turkish assurances remain valid.

On 29 November 2016, the Council of State, Fourth Chamber heard the petitions of the two Syrians against the negative second instance decisions on their asylum claims. During the proceedings, legal representatives of the Greek state specifically mentioned the UNHCR correspondence as key evidence showing that Turkey fulfilled criteria of a safe third country. On 15 February 2017, the Fourth Chamber decided to refer the cases of two Syrians to the Council of State Plenary given the importance of the case.

6 GREAT/HCR/442.

7 RSA and PRO ASYL would like to stress that the phase of preregistration of temporal status has been criticized as opaque and that access to social rights is not guaranteed.

On 14 December 2016, UNHCR addressed an updated letter to the Greek Asylum Service.⁸ The letter contains a clear admittance that UNHCR does not have proper access to asylum-seekers returned to Turkey under the deal and cannot verify or monitor their status and treatment by Turkish authorities in the majority of concerned cases.⁹ This letter compromises all conclusions possibly drawn by the first two letters and was later submitted by the applicants' lawyers before the Council of State Plenary which held a public hearing on the two cases on 10 March 2017.

In its 22 September 2017 final ruling on the two Syrians' cases, the Council of State upheld the Appeals Committee's findings that Turkey is a 'safe third country' and in particular that its temporary protection regime is in accordance with the 1951 Geneva Convention and the *non-refoulement* principle is guaranteed in Turkey. In addition, the Council of State's ruling based its findings essentially on the diplomatic assurances, the UNHCR letters of May 2016 and June 2016 as well as the letters from Director-General of DG Migration and Home Affairs and the Commissioner for Migration. The ruling makes no reference to the updated third UNHCR letter presented by the applicants' lawyers.

Another major issue considered by the Plenary was whether the Council of State would make a preliminary reference to the Court of Justice of the European Union (CJEU). The applicants' lawyers argued that such reference was required in order to clarify the notion of "protection in accordance to 1951 Geneva Convention/New York protocol 1967" of Article 38 (1)(e) of the Asylum Procedures Directive (APD) which is crucial for the concept of Turkey as a safe third country. The decision taken by judges was not to refer the case to CJEU by a marginal 13 to 12, as found that "*there to be no reasonable doubt as regards the meaning of Article 38 of the Directive*".

Considering that evidence presented in UNHCR's initial letters has been used to pave the way for forcible returns of asylum-seekers to Turkey under the deal, the Agency's delays in providing updated information proved detrimental. Moreover, UNHCR has never

8 On 23 December 2016, UNHCR sent a letter to an RSA lawyer upon her information request (GREAT HCR/973/23.12.2016). The letter included information similar to the letter sent in early December 2016 to the Greek Asylum Service.

9 See relevant extract: "*UNHCR does not benefit at this stage from unhindered and predictable access to pre-removal centers in Turkey and to the Duzici reception center (...). Second UNHCR needs to seek authorization to visit the center at least 5 days in advance, which in practice does not allow for timely monitoring of some individual cases. Third, UNHCR does not systematically receive information on the legal status and location of (...) and is not always able to track their location and monitor their situation once they have left the reception center(...). Out of 82 Syrian nationals readmitted from Greece UNHCR is in the position to confirm (...) that 12 of them (re) acquired temporary protection. (...)...*"

reacted publicly to the use of its letters by the Greek authorities as key evidence supporting that Turkey can be considered a ‘safe third country’.

Questions are also raised in relation to UNHCR’s failure to communicate to the competent authorities its incapability of effectively monitoring readmissions of Syrians refugees given that it has never enjoyed unrestricted access to detained refugees in Turkey.¹⁰

UNHCR also failed to advocate efficiently before the Greek authorities for the need of ratification of the 1951 Geneva Convention (without reservations) while applying ‘safe third country’ concept (Article 38(1)(e) APD) and for the need of a request for a preliminary ruling to the CJEU by the Council of State for the notion of Article 38(1)(e) in absence of a common interpretation among Member States.¹¹

UNHCR’s approach raises serious questions given the fact that in March 2016, it produced its own analysis on the procedural safeguards that need to be met by Greece when applying the –‘safe third country concept’ as well as the preliminary request issue. The paper was produced prior to any of the letters addressed to the Greek Asylum Service.¹²

In the March 2016 paper, UNHCR expresses the position that Greece cannot apply the ‘safe third country’ concept as long as no specific rules are laid in the national law concerning the methodology by which the competent authorities satisfy themselves that the ‘safe third country’ concept can be applied to a particular country or an applicant.¹³ It is well known that so far such methodology has never been produced by the Greek authorities before applying the ‘safe third country’ concept. Additionally, UNHCR held the opinion that the provision of Article 38(1)(e) APD “means that access to refugee

10 During a fact-finding mission between 30 May 2016 and 4 June 2016, the Special Representative of the Secretary General on migration and refugees of the Council of Europe has highlighted the restrictions that UNHCR faced in accessing detainees in need of international protection in Turkey available in: Report of 10 August 2016, available at:

https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680699e93. Furthermore, on 28 September 2016 UNHCR’s Europe Director stated that access to Duzici center was blocked to UNHCR since the failed military coup and that until that say none of the returned Syrians have got temporary protection, available in :<http://euobserver.com/migration/135279>.

11 UNHCR addressed a letter to the Council of State that referred to the March 2016 paper and the need of preliminary ruling regarding the meaning of Article 38(1)(e) APD only after the Council of State hearing of March 2017.

12 See UNHCR’s “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”, available at <http://www.unhcr.org/56f3ec5a9.pdf>

13 See UNHCR, Legal considerations, note above, at p. 6.

status and to the rights of the 1951 Convention must be ensured in law, including ratification of the 1951 Convention and/or the 1967 Protocol, and in practice”. Moreover it takes a clear position on the issue of preliminary reference by stating that “...*of the meaning of Article 38(1)(e) APD among Member States, the appropriate course of action would be for a national court (potentially from Greece) to submit a request for a preliminary ruling to the CJEU on the interpretation of this Article*”.

Furthermore, UNHCR has avoided until now to publish all its information regarding the real situation of Syrians refugees in Turkey and to criticize publicly the insufficient protection that refugees including Syrians enjoy in Turkey in law and in practice. Scandalously, the Agency has even failed to denounce publicly the amendment of the Turkish law (LFIP) in October 2016 following the attempted coup d'état. Serious concerns exist since the amended legislation increases directly to the high risk of refoulement of asylum seekers including Syrians beneficiaries of temporary protection as the suspensive effect of appeals against deportation has been removed¹⁴.

Given the aforementioned facts, it is clear that UNHCR has avoided any public position or intervention that could compromise the political dynamic or tribunal proceedings around the recognition of Turkey as a safe third country.

RSA and PRO ASYL are deeply concerned about UNHCR's decision to stay silent about the violations of basic refugee rights in the name of EU-Turkey deal, especially given the present regime in Turkey. The dissenting Opinion in the Council of State's ruling in the Afaaz* case, when referring to post-coup Turkey makes UNHCR's silence even more deafening: “...*fundamental rights and liberties are openly violated, judicial independence has been dismantled, where freedom of speech and press are not applied and guarantees of rule of law are not applied to those opposing the regime*”.¹⁵

14 Executive Degree 676/2016 dated 29.10.2016.

15 Dissenting opinion of the Council of State ruling of 22 September 2017.

Refugee Support Aegean (RSA) is a Greek non-profit organization focusing on strategic litigations in support of refugees, monitoring human rights violations, as well as the provision of legal, social and humanitarian support in individual cases. Members of the organization are based on the islands and on the mainland and visit different parts of Greece in order to document the situation there. RSA is the implementing partner of the [PRO ASYL](#) Foundation project RSPA - Refugee Support Program Aegean in Greece. PRO ASYL acts as an independent voice for human rights and refugee protection in Germany and Europe.

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