

# The Concept of “Safe Third Country” Legal Standards & Implementation in the Greek Asylum System

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## Executive Summary

The concept of “safe third country” is gaining renewed prominence in European asylum systems as governments across the continent seek ways to shift their responsibility for processing refugee claims to other states. The concept, entailing a ground for inadmissibility of asylum claims without an assessment on the merits, is at the forefront of the recently agreed reform of the Common European Asylum System (CEAS) at EU level and of domestic policy implementation or exploration from Greece to the United Kingdom and Germany. These safe third country policies regularly come to a direct clash with human rights and the rule of law, hence their extensive litigation before national jurisdictions and European courts.

The present study recalls the main European legislative and jurisprudential standards underlying the safe third country concept and analyses their implementation in the Greek asylum system. It focuses particularly on the case law of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and Greek courts and tribunals, i.e. the Independent Appeals Committees (IAC) responsible for hearing asylum appeals.

States applying the safe third country concept must abide by a range of procedural and substantive requirements enshrined in particular in the EU Asylum Procedures Directive (APD) and human rights law and elaborated through jurisprudence. The main legal standards applicable to the safe third country concept may be summed up in ten core points:

1. States must enact methodology rules to set out the way the safe third country concept is to be applied in each case (Article 38(2)(b) APD; CJEU, C-564/18, C-924/19 PPU, C-821/19). Such methodology should involve a thorough assessment of the adequacy of the country’s asylum system based on available authoritative evidence (ECtHR, *Ilias and Ahmed v. Hungary* [GC]).
2. Evidence on the asylum and human rights situation in the third country must be precise and up-to-date (Article 10(3)(b) and Recital 48 APD; CJEU, C-756/21).
3. Evidence from authoritative sources e.g. UNHCR, Council of Europe, EU bodies on the situation in the third country is presumed to be known to Member States (Recital 48 APD, ECtHR, *Ilias and Ahmed v. Hungary*). The views of UNHCR carry particular weight in light of its supervisory responsibility under the Refugee Convention (CJEU, C-621/21).
4. Diplomatic assurances offered by the third country are no conclusive evidence that refugees will receive adequate treatment. Assurances must meet quality and reliability standards, assessed based on criteria including specific nature, length and strength of bilateral relations, verification through monitoring mechanisms and effectiveness of protection against torture in the third country (ECtHR, *Othman v. United Kingdom*).
5. Evidence on the situation in the third country relied upon by asylum authorities must be made available to the applicant (Articles 12(1)(d) and 38(2)(c) APD).
6. Scrutiny of compliance with the safety criteria set out in points (a) to (e) of Article 38(1) APD in the third country involves a forward-looking assessment (ECtHR, *Paposhvili v. Belgium*). Past exposure to harm is an indicator of but not a necessary condition of future risk (Article 4(4) QD).
7. The level of protection against *refoulement* in the third country must meet the test of “real risk” of being subjected to persecution or torture, inhuman or degrading treatment (CJEU, C-71/11, C-163/17; ECtHR, *Ilias and Ahmed v. Hungary*).
8. The criterion of connection with the third country requires an individualised assessment of the applicant’s circumstances, discrete from scrutiny of safety criteria in the third country. Transit

alone is not sufficient evidence of a connection with the third country (CJEU, C-564/18, C-924/19 PPU, C-821/19).

9. The absence of prospects of readmission of an applicant to the third country in the meaning of Article 38(4) APD may stem from different factual or legal situations, owed to general or individual circumstances. These include unilateral suspension of readmission agreements and tacit rejection of readmission requests.
10. Applicants must have their claims heard on the merits where there are no prospects of readmission to the third country. Member States may not apply the safe third country concept in such a case (Recital 44 APD). If the claim has already been dismissed, the onus is on the Member State to allow access to the procedure.

Findings drawn from the analysis point to serious deficiencies in the way Greece designates safe third countries and applies the concept to individual asylum applications. Ten instances where Greek practice departs from established standards include:

1. Failure of the Greek legislature to thoroughly engage with authoritative country information ahead of designation of safe third countries, including EU institutions' reports.
2. Gross misapplication of human rights standards on evidence assessment by IAC, which incorrectly consider that a third country may be designated as safe in the face of contrary evidence from authoritative sources.
3. Failure of the Greek Asylum Service and IAC to consider authoritative country information when deciding on asylum claims. Systematic use of outdated, standardised country information by the Greek Asylum Service and IAC in decisions on asylum claims.
4. Gross misinterpretation of human rights standards on diplomatic assurances by IAC and reliance on outdated, unreliable assurances at first and second instance.
5. Standardised refusal of the Greek Asylum Service to disclose country documentation to applicants whose cases are processed on safe third country grounds.
6. Misapplication of the forward-looking assessment rule under international refugee and human rights law, resulting in arbitrary dismissal of claims where applicants have not proven past exposure to ill-treatment in the third country.
7. Misapplication of the established "real risk" standard of proof and conflation with stricter standards applicable to transfers between EU countries, resulting in arbitrary requirements on applicants to prove "systemic deficiencies" in the third country's asylum system or "mass *refoulements*" creating a risk for "every person returned" thereto.
8. Inconsistent interpretation of the safety criteria at first and second instance. Incorrect use of the connection criterion by IAC as a forum for safety considerations, including risks to particular groups e.g. women, ethnic minorities, and inability to access asylum procedures and socio-economic rights.
9. Standardised determinations on connection with the third country without an individualised assessment. Inconsistent reading of factors determining the existence of a connection with the third country, including length of stay and best interests of the child.
10. Failure to assess manifest lack of prospects of readmission to the third country even where expressly raised by applicants. Lack of access to an asylum procedure for reasons of a lack of readmission prospects to the third country, including arbitrary dismissal of subsequent applications for want of "new elements".

## Introduction

The concept of “safe third country” has long been invoked by states as a ground to dismiss a claim for protection without examining it on the merits, based on the presumption that the asylum seeker would have the possibility to seek protection elsewhere.<sup>1</sup> European Union (EU) law expressly sets it out as a ground for inadmissibility in asylum procedures.<sup>2</sup>

Safe third country has gained renewed prominence in European asylum systems as governments across the continent seek ways to shift their responsibility for processing refugee claims to other states beyond the continent. It has become a centrepiece in the tortuous European Union (EU) reform of its Common European Asylum System (CEAS), where governments represented in the Council have pushed a multidimensional expansion of the definition and a lowering of standards for its use in the forthcoming Asylum Procedures Regulation – and appear to have succeeded. At the end of 2023,<sup>3</sup> co-legislators reached a political agreement on the Regulation and the remaining legislative files of the CEAS reform which endorses the version of the text put forward by the Council, subject to very few exceptions. These texts, to be formally adopted before the June 2024 European elections and to enter into force in the next two years, bring about a significant regression of EU legal standards on asylum liable to severely restrict the right to asylum throughout the continent.

The safe third country concept is also a vessel for increasingly radical domestic debates on refugee protection, from Hungary and Greece to the United Kingdom and Germany.<sup>4</sup> Safe third country policies, whether in the form of proposals or already at the stage of implementation, come to a direct and regular clash with human rights and the rule of law, and create potent risks of *refoulement* and of “refugees in orbit” phenomena where people in need of protection are denied a place to seek and obtain it. Litigation before national jurisdictions and European courts has been both inevitable and necessary to curtail policies that breach well-established standards on refugee protection and human rights.

### Safe third country in the Greek context

Greece has entrusted competence for deciding on asylum applications to the Asylum Service established under its Ministry of Migration and Asylum. The Asylum Service has several branch offices throughout the Greek territory, divided into Regional Asylum Offices (*Περιφερειακά Γραφεία Ασύλου*, RAO) and Autonomous Asylum Units (*Αυτοτελή Κλιμάκια Ασύλου*, AAU). Appeals against decisions of the Greek Asylum Service are examined by Independent Appeals

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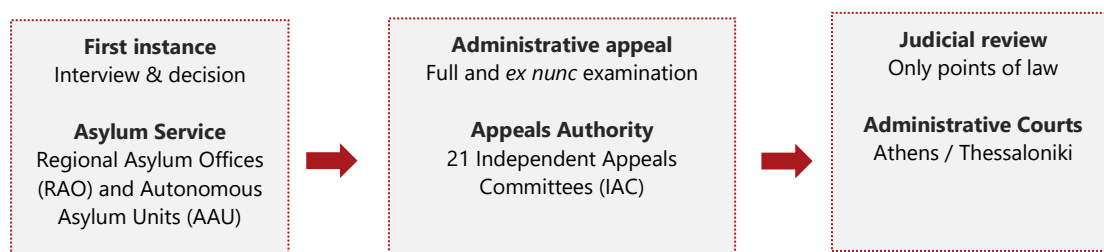
<sup>1</sup> For a recent assessment, Minos Mouzourakis & Cathryn Costello, ‘Human Rights Violations to Deflect Refugees: The EU Council Agreement on Asylum Reform as an Intensification of Policies Tried and Failed’ (*Verfassungsblog*, 25 June 2023), available [here](#).

<sup>2</sup> Article 33(2)(c) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (“Asylum Procedures Directive”).

<sup>3</sup> European Commission, STATEMENT/23/6708, 20 December 2023, available [here](#).

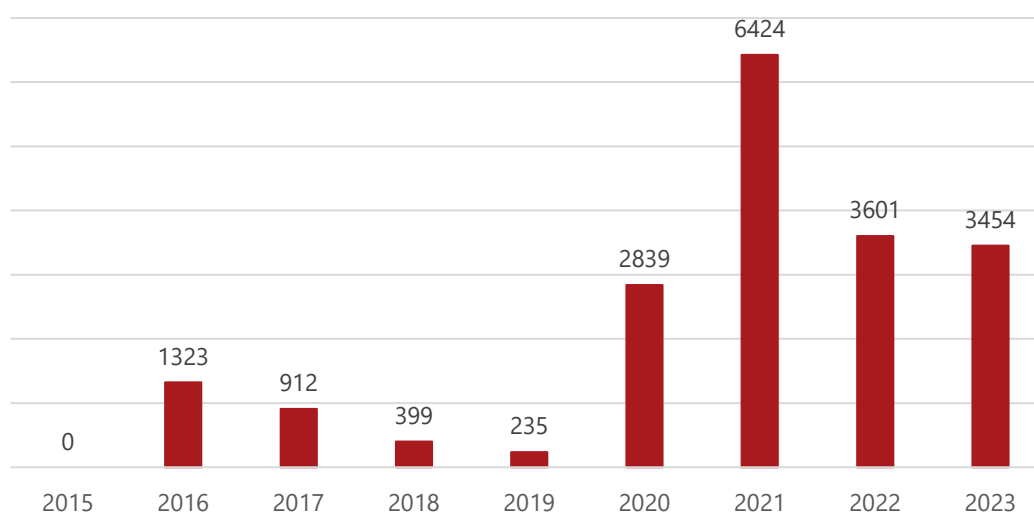
<sup>4</sup> Namely, Tagesspiegel, ‘CDU-Grundsatzprogramm: Unions-Parlamentsgeschäftsführer Frei pocht auf Auslagerung von Asylverfahren’, 7 December 2023, available [here](#); The Guardian, ‘Sunak’s Rwanda treaty ‘unlikely to satisfy supreme court’, say legal experts’, 13 January 2024, available [here](#).

Committees (*Ανεξάρτητες Επιτροπές Προσφυγών*, IAC), three-judge panels sitting as administrative committees under the Appeals Authority of the same Ministry.<sup>5</sup> Decisions of the IAC are judicially reviewable before the administrative courts (*διοικητικά πρωτοδικεία*) on points of law, though in contrast to IAC speed, courts take several years to deliver judgments in such proceedings.<sup>6</sup>



Greece started applying the safe third country concept as a ground for dismissing asylum applications as inadmissible shortly after the launch of the EU-Turkey Statement of 18 March 2016. The initial implementation of the concept was limited to Syrian refugees present on the Eastern Aegean islands of Lesbos, Chios, Samos, Leros and Kos.<sup>7</sup> The scope of the policy, however, has grown exponentially since 2020, not least due to the country-wide application of the concept to nationals of more countries following the enactment of a national list of safe third countries in mid-2021 (see [Safety Criteria: Procedural Standards](#)):

Greek Asylum Service safe third country decisions



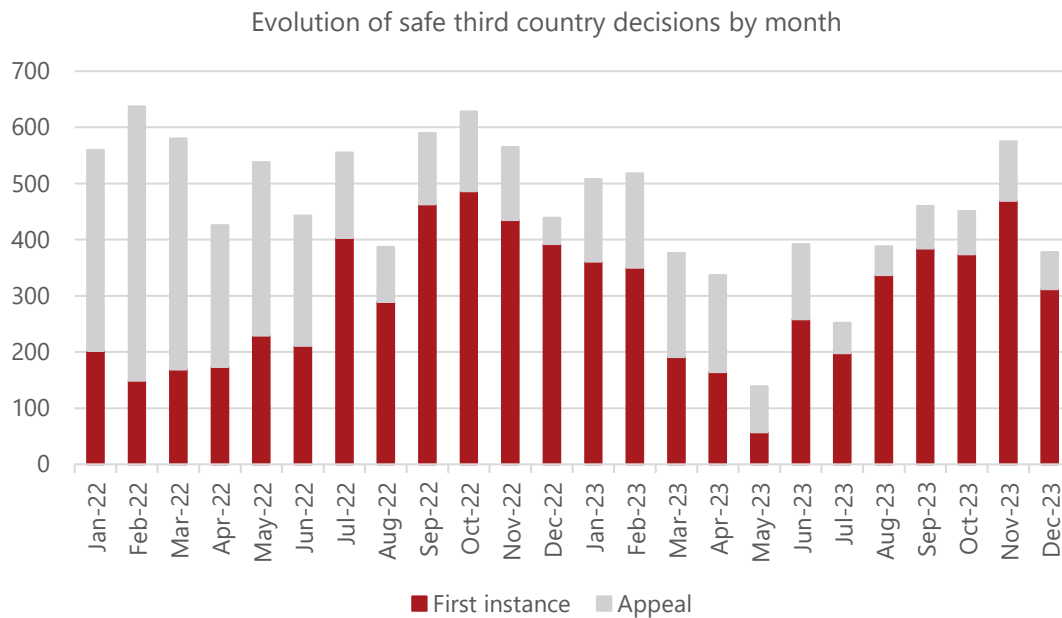
Source: Greek Asylum Service; Greek Ministry of Migration and Asylum; Hellenic Parliament

<sup>5</sup> According to the Greek Council of State, the IAC are not “courts” but satisfy the requirements of a “tribunal” for the purposes of Article 46 of the Asylum Procedures Directive: **Greek Council of State**, 1580/2021 [Plenary], 8 October 2021, para 14; 1694/2018 [Plenary], 21 August 2018, para 16; 2347/2017 [Plenary], 22 September 2017, para 24.

<sup>6</sup> Minos Mouzourakis, ‘Adjudication of Procedural Safeguards for Vulnerable Asylum Seekers in Greece: Case Law and Systemic Non-Compliance’ (2023) 35:2 *International Journal of Refugee Law* 213.

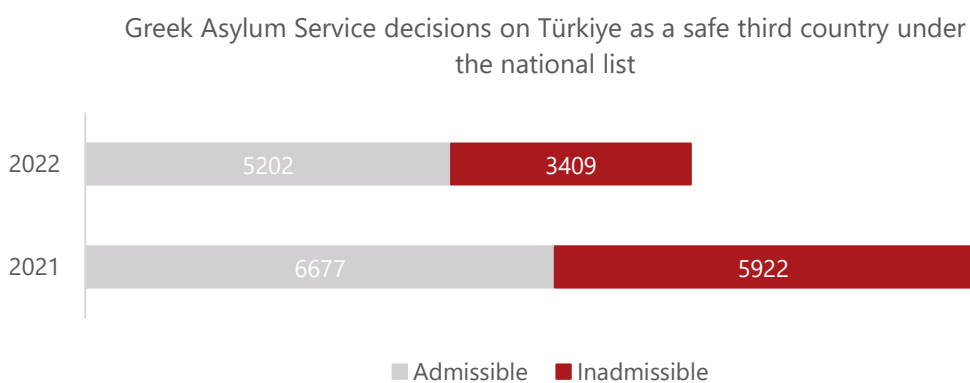
<sup>7</sup> RSA & PRO ASYL, *EU-Turkey deal: 5 Years of Shame – Rule of law capture by a Statement*, March 2021, available [here](#). For an analysis of case law, Yiota Massouridou, *Legal Opinion on the case law of the Greek Appeals Committees and Administrative Courts with regard to the application of the »safe third country« concept*, October 2019, available [here](#).

Since the entry into force of the national list, Greek asylum authorities have maintained steady course on several hundreds of cases dismissed every month on safe third country grounds. Available official figures for the years 2022 and 2023 show the following evolution in first instance and appeal decisions:



Source: Greek Ministry of Migration and Asylum

Over 10,000 asylum claims have been dismissed by the Greek Asylum Service since the entry into force of the national list, based on the designation of Türkiye as a safe third country for applicants from Syria, Afghanistan, Somalia, Pakistan and Bangladesh. That said, available data show that most cases processed by the Greek Asylum Service are declared admissible on the ground that Türkiye does not qualify as a safe third country for the applicants concerned:



Source: Hellenic Parliament

## Purpose, methods and structure of the study

The present study aims to track the main European legislative and jurisprudential standards underlying the safe third country concept and to assess their recent implementation in the Greek asylum system.

It mainly draws on case law analysis of relevant jurisprudence of the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR), in addition to a sample of over 160 decisions delivered by Greek administrative courts on judicial review of asylum cases and by the Independent Appeals Committees (IAC) of the Appeals Authority of the Greek Ministry of Migration and Asylum on asylum appeals from 2020 to present, collected from Refugee Support Aegean (RSA) casework and from cases published in the Greek Asylum Case Law Reports managed by RSA, the Greek Council for Refugees and HIAS Greece.<sup>8</sup>

The study examines safe third country standards under three main categories: (1) safety of the country, involving both procedural rules and substantive requirements; (2) connection with a particular applicant; and (3) prospects of readmission.

## The safety criteria

### Procedural standards: methodology and evidence assessment

The “designation” of a safe third country in general differs from and normally precedes its “determination” as a safe third country for a particular applicant. Current and prospective EU law, however, does not view designation as a necessary step in the process.

Article 38(2)(b) of the Asylum Procedures Directive requires states to lay down national law “rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe”.

In this respect, though EU law leaves the definition of safe third country methodology rules at the discretion of Member States,<sup>9</sup> it demands the establishment of domestic law provisions clarifying how the concept should be applied “on a case-by-case basis, in relation to the individual circumstances of the applicant”.<sup>10</sup> To comply with the principle of *non-refoulement*, such a methodology should involve a “thorough assessment” of the adequacy of the country’s

<sup>8</sup> RSA et al., *Greek Asylum Case Law Report*, available [here](#).

<sup>9</sup> Minos Mouzourakis, ‘Litigating STC in Europe: The Greek Case before the EU Court of Justice’ in Sharry Aiken & Alex Neve (eds), *Refugee "Responsibility Sharing" - Challenging the Status Quo: A Special Issue of the PKI Global Justice Journal* (Queen’s University 2023), available [here](#).

<sup>10</sup> **CJEU**, C-821/19 *Commission v Hungary (incrimination de l’aide aux demandeurs d’asile)*, 16 November 2021, para 39; C-924/19 PPU *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, 14 May 2020, para 158; C-564/18 *Bevándorlási és Menekültügyi Hivatal (Tompa)*, 19 March 2020, para 48.



asylum system and of the safeguards it offers to refugees based on available authoritative evidence.<sup>11</sup>

Member States are expected to gain even broader discretion vis-à-vis safe third country methodology under the forthcoming Asylum Procedures Regulation. Under the political agreement reached in December 2023, states would be able to apply the concept to countries designated at EU level,<sup>12</sup> to countries they may freely designate at domestic level,<sup>13</sup> and to countries that have not been designated at all.<sup>14</sup> The Regulation is expected to expressly permit EU or national designation of countries as safe third countries subject to exceptions in territorial or personal scope.<sup>15</sup>

The Greek Asylum Code currently provides that the safe third country criteria “shall be separately examined for each applicant on a case-by-case basis, except where the third country has been designated as generally safe and is included in the national list of safe third countries”.<sup>16</sup> In such a case, the applicant shall have the right to challenge the application of the concept in their particular circumstances.

The designation of safe third countries by way of a national list takes the form secondary legislation, specifically a Joint Ministerial Decision (*Κοινή Υπουργική Απόφαση*, JMD) by the Ministries of Foreign Affairs and Migration and Asylum based on an opinion of the Director of the Asylum Service.<sup>17</sup> Such a list shall take into consideration up-to-date information from authoritative sources on the countries’ legal framework, bilateral or multilateral agreements, and implementation.<sup>18</sup> The list shall be reviewed every year in November and may be immediately re-examined upon a substantial change in the human rights situation in a designated safe third country.<sup>19</sup>

Greece’s first national list of safe third countries published in June 2021 designates Türkiye as a safe third country for “applicants originating from” Syria, Afghanistan, Somalia, Pakistan and Bangladesh.<sup>20</sup> Upon review in December 2021, an addendum to the list inserted Albania and North Macedonia as safe third countries “for applicants for international protection who has irregularly entered the Greek territory from its borders” with the two countries.<sup>21</sup> The list has since remained intact.

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<sup>11</sup> **ECtHR**, *Ilias and Ahmed v. Hungary* App No 47287/15 [GC], 21 November 2019, paras 141, 152, 154.

<sup>12</sup> Article 46(1) draft Asylum Procedures Regulation.

<sup>13</sup> Article 50(1) draft Asylum Procedures Regulation.

<sup>14</sup> Article 45(2) draft Asylum Procedures Regulation.

<sup>15</sup> Article 45(1a) draft Asylum Procedures Regulation.

<sup>16</sup> Article 91(2) Law no. 4939/2022 on the ratification of a Code of Legislation on reception, international protection of third-country nationals and stateless persons and temporary protection in cases of mass influx of displaced persons, Gov. Gazette A’ 111/10.06.2022 (“Greek Asylum Code”).

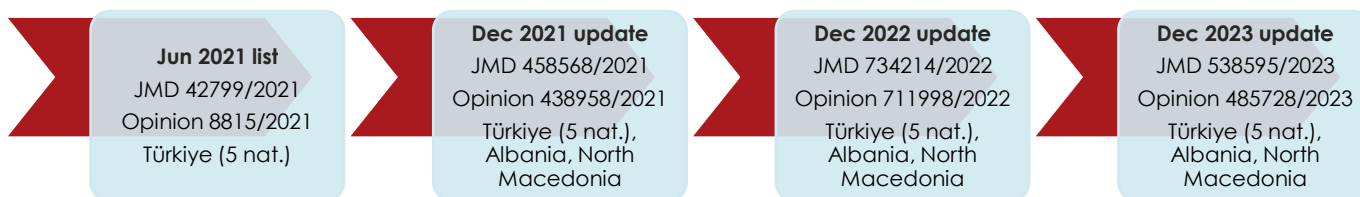
<sup>17</sup> Article 91(3) Greek Asylum Code.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Article 1(A) JMD 42799/2021, Gov. Gazette B’ 2425/07.06.2021.

<sup>21</sup> Article 1(B) and (C) JMD 42799/2021, inserted by JMD 458568/2021, Gov. Gazette B’ 5949/16.12.2021.



The legality of the safe third country list has been challenged by RSA and the Greek Council for Refugees (GCR) before the highest court of the land.<sup>22</sup> Among other arguments, the organisations submitted that Greece had not introduced proper methodology rules on the way in which its asylum authorities should apply the safe third country concept. The Greek Council of State, however, held in its 177/2023 ruling that Greek legislation complies with the methodology requirements set by Article 38(2)(b) of the Asylum Procedures Directive insofar as it cites the elements and sources based on which the national list of safe third countries should be drawn up.<sup>23</sup> In a more obscure passage of the judgment, the Court held that “the legislative provisions on elements and sources to be considered for the purpose of designation of a country as generally safe are also applicable to the designation of a country not included in said national list as safe for a particular applicant”.<sup>24</sup> This implies permission to the Greek asylum authorities to exceed the scope of the national list and to apply the safe third country concept to other third countries through a *mutatis mutandis* application of the methodology rules.

Furthermore, whereas the aforementioned legislative provisions on safe third country methodology did not enter into force until 2020, Greece had already started applying the safe third country concept since 2016. The Greek Council of State has yet to deliver its judgment on a 2018 action brought by RSA regarding the legality of safe third country decisions in the absence of enacted methodology rules during that period.<sup>25</sup>

### Up-to-date evidence

The Asylum Procedures Directive imposes an unequivocal duty on Member States to rely on “precise and up-to-date” evidence on the general situation prevailing in the third country,<sup>26</sup> echoed by jurisprudence.<sup>27</sup> This obligation is consistently flouted in Greek practice. Whereas the unpublished background documentation prepared by the Asylum Service for the purpose of its annual opinion on the designation of safe third countries provides a collation of recent sources

<sup>22</sup> RSA, ‘Key points of the Greek Council of State ruling on the “safe third country” concept’, 17 February 2023, available [here](#); ‘Decision declaring Turkey a “safe third country” brought before Greek Council of State’, 8 October 2021, available [here](#).

<sup>23</sup> **Greek Council of State**, 177/2023 [Plenary], 3 February 2023, para 34.

<sup>24</sup> *Ibid.*

<sup>25</sup> Council of State, E1686/2018 lodged on 13 June 2018, heard on 27 September 2022 and pending at the time of writing.

<sup>26</sup> Article 10(3)(b) and Recital 48 Asylum Procedures Directive.

<sup>27</sup> **CJEU**, C-756/21 *International Protection Appeals Tribunal and Others (Attentat au Pakistan)*, 29 June 2023, para 60; **Administrative Court of Athens**, 1260/2023, 15 September 2023, para 20.

of information,<sup>28</sup> decision-making at the Asylum Service and IAC continues to rely on severely outdated information on Türkiye in what largely appear to be standardised footnotes in first and second instance safe third country decisions. For instance, sources cited in decisions delivered by different IAC in the course of 2023 refer *inter alia* to the 2019 and 2020 updates of the Asylum Information Database (AIDA) country report on Türkiye, to other reports published in 2017 and 2018, and to two letters sent by the Permanent Delegation of Türkiye to the EU to the European Commission in April 2016 in the context of the EU-Turkey Statement.<sup>29</sup> The particular content and evidentiary value of diplomatic assurances contained in the two letters are analysed further below.

### Reliable evidence

Sources consulted by states for the purposes of designating a safe third country should include “in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations” according to the Asylum Procedures Directive.<sup>30</sup> Strasbourg case law stresses that “authoritative reports, notably of the UNHCR, Council of Europe and EU bodies are in principle considered to have been known” by national authorities.<sup>31</sup> The standard was recalled by the Court in its 2019 Grand Chamber ruling in *Ilias and Ahmed v. Hungary*, where it found that Hungary’s designation of Serbia as a safe third country and summary dismissal of asylum claims on that basis contravened the prohibition on *refoulement* guaranteed by Article 3 of the European Convention on Human Rights (ECHR). Therefore, under a correct reading of EU Member States’ legal obligations, safe third country methodology should extend to consideration of reports and texts of other EU institutions e.g. European Commission, European Parliament, EU Delegations, case law of the ECtHR and other jurisdictions, as well as reports of relevant civil society organisations on the human rights situation of the third country.

Significant weight should be attached to the views and positions expressed by UNHCR on the interpretation of the safe third country concept and on the situation in a particular third country, given that the UN Refugee Agency is entrusted with the responsibility to supervise the application of the 1951 Refugee Convention.<sup>32</sup> Such an obligation is explicitly affirmed in CJEU

<sup>28</sup> Asylum Service, *Ασφαλείς τρίτες χώρες – Πληροφορίες αξιολόγησης επιλεγμένων χωρών – Τουρκία*, 29 October 2023, Annex to the Opinion of the Director of the Asylum Service on a national list of safe third countries, 485728/2023, 31 October 2023.

<sup>29</sup> For example, **2<sup>nd</sup> IAC**, IP/142459/2023, 25 September 2023; **4<sup>th</sup> IAC**, 79499/2023, 8 February 2023; **5<sup>th</sup> IAC**, 39744/2023, 20 January 2023; **6<sup>th</sup> IAC**, IP/312088/2023, 28 November 2023; IP/291367/2023, 21 November 2023; **8<sup>th</sup> IAC**, 103648/2023, 20 February 2023; **11<sup>th</sup> IAC**, IP/578/2023, 28 June 2023; **12<sup>th</sup> IAC**, 168365/2023, 22 March 2023; **13<sup>th</sup> IAC**, IP/113682/2023, 13 September 2023; 22148/2023, 13 January 2023; **14<sup>th</sup> IAC**, IP/335367/2023, 6 December 2023; 250567/2023, 3 May 2023; 211179/2023, 11 April 2023; **15<sup>th</sup> IAC**, 300763/2023, 12 June 2023; **16<sup>th</sup> IAC**, 85916/2023, 10 February 2023; **17<sup>th</sup> IAC**, 297832/2023, 9 June 2023; **20<sup>th</sup> IAC**, 91410/2023, 14 February 2023; **21<sup>st</sup> IAC**, 87590/2023, 13 February 2023.

<sup>30</sup> Recital 48 Asylum Procedures Directive. See also Article 91(3) Greek Asylum Code.

<sup>31</sup> **ECtHR**, *Ilias and Ahmed v. Hungary* App No 47287/15 [GC], 21 November 2019, para 141; *M.S.S. v. Belgium and Greece* App No 30696/09, 21 January 2011, paras 346-350; **UK Supreme Court**, *R (AAA) v Secretary of State for the Home Department* [2023] UKSC 42, 15 November 2023, paras 78-87.

<sup>32</sup> Article 35 Refugee Convention.

case law,<sup>33</sup> contrary to earlier positions taken by Greek courts in the context of the safe third country concept.<sup>34</sup>

In the particular case of the Greek list of safe third countries, the designation of Türkiye, Albania and North Macedonia as safe third countries is based on an unpublished opinion of the Director of the Asylum Service, as mentioned above. This succinct opinion is based *inter alia* on unpublished country information notes of the Procedures and Training Department of the Asylum Service (“annexes”), as well as other unpublished correspondence.<sup>35</sup> The annexes to this opinion, however, are limited to a collation of extracts from various sources on the asylum systems of the third countries concerned. The opinion of the Asylum Service does not weigh these sources of information in any manner that would amount to the “thorough assessment” of evidence required by *Ilias and Ahmed v. Hungary* so as to come to an informed conclusion on those countries’ compliance with the criteria of Article 38(1) of the Asylum Procedures Directive. In fact, several of the sources cited in the annex on Türkiye, for instance, provide authoritative evidence of systemic non-compliance on the part of that country with the *non-refoulement* principle, including condemnation thereof by the ECtHR in *Akkad v. Türkiye*,<sup>36</sup> lack of access to international and temporary protection procedures, and general rule of law backsliding.<sup>37</sup> These deficiencies are documented *inter alia* in publicly available documents of the European Commission and the European Parliament that are presumed to be known to the Greek authorities.<sup>38</sup>

In its 177/2023 judgment on the legality of the Greek safe third country list, the Greek Council of State regrettably refrained from addressing the applicants’ submission that the designation of Türkiye as a safe third country ran counter to the very evidence contained in the annex to the opinion of the Director of the Asylum Service. “The Court seems to have paid undue deference to the Greek government and to have refrained from assessing whether the designation of Turkey as a STC had in fact been preceded by a “thorough assessment” of its compliance with protection standards based on available evidence.”<sup>39</sup>

<sup>33</sup> CJEU, C-621/21 *Intervyuirasht organ na DAB pri MS (Femmes victimes de violences domestiques)*, 16 January 2024, para 38; C-280/21 *Migracijos departamentas (Reasons for persecution on the ground of political opinion)*, 12 January 2023, para 27.

<sup>34</sup> **Greek Council of State**, 2347/2017 [Plenary], 22 September 2017, para 55.

<sup>35</sup> Opinion 485728/2023 of 31 October 2023 cites, among others, “document no. 2193 of 11/10/2023 of the Embassy of Greece in Ankara”, “document no. 56747 of 20/10/2023 of C4 Directorate of Justice, Home Affairs, Migration & SCHENGEN” and “document no. 3160/AΣ 1346 of 16/10/2023 of the Permanent Representation of Greece to the UN”. The contents of these documents remain unknown to date.

<sup>36</sup> App No 1557/19, 21 June 2022. No measures have been taken to date for the execution of the judgment: Council of Europe, *Communication from Türkiye: Action Plan – Akkad v. Türkiye*, DH-DD(2023)494, 18 April 2023, available [here](#).

<sup>37</sup> RSA et al., ‘European Commission dispels Greece’s designation of Türkiye as a “safe third country” for refugees – Repeal the national list of safe third countries’, 1 November 2022, available [here](#).

<sup>38</sup> Namely, European Commission, *2022 Türkiye Report*, SWD(2022) 333, 12 October 2022; *2023 Türkiye Report*, SWD(2023) 696, 8 November 2023; European Parliament, *Report on the 2022 Commission Report on Türkiye*, A9-0247/2023, 13 September 2023.

<sup>39</sup> Minos Mouzourakis, ‘Litigating STC in Europe: The Greek Case before the EU Court of Justice’ in Sharry Aiken & Alex Neve (eds), *Refugee “Responsibility Sharing” - Challenging the Status Quo: A Special Issue of the PKI Global Justice Journal* (Queen’s University 2023).

At the level of adjudication of individual asylum claims, Greek authorities make even more problematic a reading of standards on evidence assessment in the safe third country context. IAC decisions severely misinterpret the case law of the ECtHR by grossly misquoting its *Mohammadi v. Austria*<sup>40</sup> ruling as a CJEU judgment (cited as “CJEU *Mohammadi v Austria*, C-71932/12, 3.7.2014”) and erroneously attributing thereto the following *ratio*: “It has been held that the designation of a country as safe may be maintained even despite the applicant’s invoking of contrary conclusions of reports by international organisations.”<sup>41</sup> Yet, not only does the aforementioned Strasbourg – not Luxembourg – ruling concern transfers of asylum seekers *within* the EU under the Dublin Regulation and not *beyond* the EU under the safe third country concept,<sup>42</sup> but in no way does such a reasoning stem from the *Mohammadi v. Austria* judgment or other case law of the ECtHR and CJEU for that matter. Gross misreading of methodology rules is liable to substantially impact the way in which Greek authorities engage with available evidence on the human rights situation in third countries and thereby on the legality of safe third country decision-making. Similar errors of law mar the Greek authorities’ interpretation of substantive safety standards (see [Safety Criteria: Substantive Standards: Protection from Refoulement](#)).

Furthermore, none of the Asylum Service and IAC decisions seen in 2023 refer to authoritative evidence on the current state and deficiencies of the Turkish asylum system, including a “20% rule” on registration of international and temporary protection claims in all provinces with a significant population of non-nationals, and removal of tens of thousands to countries such as Afghanistan and Syria. These issues have been thoroughly documented, not least in the European Commission’s *Türkiye Report* and in the *Akkad v. Türkiye* judgment of the ECtHR condemning the country for unlawful removal of refugees to their country of origin in the form of “voluntary returns”. Only in a few exceptions have IAC cited Türkiye’s practice of coercion of refugees into signing “voluntary return” forms.<sup>43</sup> Almost none refer to the country’s “20% rule” on access to asylum procedures.<sup>44</sup>

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<sup>40</sup> App No 71932/12, 3 July 2014.

<sup>41</sup> **2<sup>nd</sup> IAC**, 171515/2023, 23 March 2023, p. 7; **8<sup>th</sup> IAC**, 583703/2022, 5 October 2022, p. 12; 511455/2022, 5 September 2022, p. 19; 237130/2022, 29 April 2022, p. 16; 161054/2022, 21 March 2022, p. 13; 142176/2022, 11 March 2022, para 9; 458313/2021, 15 December 2021, para 9; **11<sup>th</sup> IAC**, 71895/2022, 8 February 2022, para 13; 67923/2022, 7 February 2022, para 9; 384227/2021, 15 November 2021, para 9; 2075/2021, 26 February 2021, para 11; 2727/2020, 9 April 2020, para 10; **13<sup>th</sup> IAC**, IP/113682/2023, 13 September 2023, para 11; 22148/2023, 13 January 2023, para 8; 734754/2022, 7 December 2022, para 9; **14<sup>th</sup> IAC**, IP/335367/2023, 6 December 2023, p. 18; 250567/2023, 3 May 2023, p. 24; 211179/2023, 11 April 2023, p. 24; **16<sup>th</sup> IAC**, 85916/2023, 10 February 2023, para IV.4; 394674/2022, 7 July 2022, p. 7; **21<sup>st</sup> IAC**, 710801/2022, 28 November 2022, pp. 9-10; 690292/2022, 18 November 2022, p. 8; 467020/2021, 20 December 2021, p. 10.

<sup>42</sup> Only intra-EU transfers are subject to the principle of mutual trust between Member States and a stricter threshold for suspension of transfers: **CJEU**, C-8/20 *LR*, 20 May 2021, para 47.

<sup>43</sup> **10<sup>th</sup> IAC**, 22083/2020, 28 April 2021, para 2; 12540/2020, para 4; **17<sup>th</sup> IAC**, 292768/2023, 8 June 2023, para 3; **21<sup>st</sup> IAC**, 398486/2021, 19 November 2021, p. 20.

<sup>44</sup> Exceptions include **4<sup>th</sup> IAC**, 204504/2023, 7 April 2023, pp. 14 and 17; **12<sup>th</sup> IAC**, 168365/2023, 22 March 2023, pp. 11 and 14; **15<sup>th</sup> IAC**, IP/20208/2024, 10 January 2024, para 16.

### *The case of diplomatic assurances*

Human rights law imposes significant constraints on states' ability to rely on diplomatic assurances by another country regarding the treatment to be afforded to persons transferred or returned thereto, for the purposes of applying the safe third country concept. According to Strasbourg Court jurisprudence,

[A]ssurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment.<sup>45</sup>

These human rights requirements necessarily inform any reading of secondary EU legislation, including the forthcoming Asylum Procedures Regulation where co-legislators have agreed on a legally dubious presumption of third countries as compliant with the safety criteria on the sole basis of existence of readmission agreements between them and the EU to the effect that "migrants admitted under this agreement will be protected in accordance with the relevant international standards".<sup>46</sup> Such a legislative presumption would *a fortiori* contravene procedural obligations imposed by the principle of *non-refoulement* if it were to be interpreted as permitting the application of the safe third country concept without considering evidence on the state of the third country's asylum system.

The test established by the ECtHR in *Othman v. United Kingdom*, a case of extradition from the UK to Jordan ruled contrary to the *non-refoulement* principle, for the purposes of assessing the quality and reliability of diplomatic assurances elaborates eleven indicative criteria, including: (i) "whether the assurances are specific or are general and vague"; (ii) "who has given the assurances and whether that person can bind the receiving State"; (iii) "the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances"; (iv) "whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms"; (v) "whether there is an effective system of protection against torture in the receiving State".<sup>47</sup> In its earlier ruling in *M.S.S. v. Belgium and Greece* regarding the compatibility of transfers of asylum seekers to Greece with Article 3 ECHR, the Court found that "assurances given by the Greek government were inadequate and should not have been relied upon" since they were rebutted by credible sources on the situation of the Greek asylum system.<sup>48</sup>

The *Othman* test was recently applied by a national court in the safe third country context in *R (AAA) v Secretary of State for the Home Department* vis-à-vis assurances provided to the UK by

<sup>45</sup> ECtHR, *Othman (Abu Qatada) v. United Kingdom* App No 8139/09, 17 January 2012, para 187.

<sup>46</sup> Article 45(3) draft Asylum Procedures Regulation, referring to agreements concluded on the basis of Article 218 Treaty on the Functioning of the European Union (TFEU). For discussion, Minos Mouzourakis & Cathryn Costello, 'Human Rights Violations to Deflect Refugees: The EU Council Agreement on Asylum Reform as an Intensification of Policies Tried and Failed' (*Verfassungsblog*, 25 June 2023).

<sup>47</sup> ECtHR, *Othman (Abu Qatada) v. United Kingdom* App No 8139/09, 17 January 2012, para 189.

<sup>48</sup> App No 30696/09, 21 January 2011, paras 348-353.



Rwanda in relation to the treatment of asylum seekers it would admit to its territory under a bilateral safe third country arrangement.<sup>49</sup> The UK Supreme Court emphasised that “the government is not necessarily the only or the most reliable source of evidence about matters which may affect the risk of refoulement: such as, to mention some of the factors referred to in *Othman and Zabolotnyi*, the general human rights situation in the receiving state, the receiving state’s practices, and its record in abiding by similar assurances”.<sup>50</sup>

Upon concluding on the existence of “uncontested” evidence of deficiencies of the Rwandan asylum system mainly put forward by UNHCR,<sup>51</sup> the Court recalled that diplomatic assurances must be assessed not as a declaration of political commitment but as an indication of adequacy of the country’s protection system:

The central issue in the present case is therefore not the good faith of the government of Rwanda at the political level, but its practical ability to fulfil its assurances, at least in the short term, in the light of the present deficiencies of the Rwandan asylum system, the past and continuing practice of refoulement (including in the context of an analogous arrangement with Israel), and the scale of the changes in procedure, understanding and culture which are required.<sup>52</sup>

We accept the Secretary of State’s submission that the capacity of the Rwandan system (in the sense of its ability to produce accurate and fair decisions) can and will be built up. Nevertheless, asking ourselves whether there were substantial grounds for believing that a real risk of refoulement existed at the relevant time, we have concluded that there were. The structural changes and capacity-building needed to eliminate that risk may be delivered in the future, but they were not shown to be in place at the time when the lawfulness of the policy had to be considered in these proceedings.<sup>53</sup>

Conversely, in its 2347/2017 ruling on review of safe third country decisions issued in Greece following the EU-Turkey Statement in 2016, well before the adoption of the Greek safe third country list, the Greek Council of State held by majority that neither the Asylum Procedures Directive nor domestic law precluded consideration of letters exchanged by EU institutions and Turkish diplomatic authorities in 2016 as “declaratory elements of the intention of the Government of Turkey to provide protection, among others, to Syrians returned from Greece pursuant to relevant (Turkish national) legislation and related international norms”.<sup>54</sup>

The assessment of the diplomatic guarantees provided by Türkiye in 2016 forms part of the subject matter of the *J.B. v. Greece* case pending before the ECtHR, relating to a Syrian refugee whose asylum claim was dismissed in Greece shortly after the launch of the EU-Turkey

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<sup>49</sup> **UK Supreme Court**, *R (AAA) v Secretary of State for the Home Department* [2023] UKSC 42, 15 November 2023, paras 47 et seq.

<sup>50</sup> *Ibid*, para 55.

<sup>51</sup> *Ibid*, para 87.

<sup>52</sup> *Ibid*, para 102.

<sup>53</sup> *Ibid*, para 105.

<sup>54</sup> **Greek Council of State**, 2347/2017 [Plenary], 22 September 2017, para 46.

Statement.<sup>55</sup> Several factors would already provide substantial grounds to believe that the assurances given by Türkiye in the 2016 letters relating to the EU-Turkey Statement do not meet the *Othman* test of the ECtHR:

- ❖ The diplomatic assurances were given by Türkiye solely in the context of the EU-Turkey Statement. They are therefore not applicable to asylum seekers who are not present on the Greek islands, to whom the Statement does not apply.<sup>56</sup>
- ❖ The assurances are general, do not cover a determined class of asylum applicants, and only refer to the possibility for returnees to access the Turkish asylum system. One letter sent the Head of the Permanent Representative of Türkiye to the EU to the European Commission on 12 April 2016 “assures that due to the Syrian crisis, citizens of Syrian Arab Republic 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 be granted temporary protection status”.<sup>57</sup> The second letter, dated 24 April 2016, “confirms that non-Syrians who seek international protection having 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 be able to lodge an application for international protection”.<sup>58</sup>
- ❖ Bilateral relations between Greece and Türkiye have severely deteriorated in the years following the 2016 exchange of letters, on account of “wider political differences” between the two states.<sup>59</sup> For instance, the Greek government declared in 2021 that Türkiye “insists on refusing to implement its commitments without any argument”<sup>60</sup> and engages in “instrumentalisation” tactics.<sup>61</sup> For its part, the European Commission stated in 2022 that “Turkey should unequivocally commit to the principle of good neighbourly relations... Turkey must stop all threats and actions that damage good neighbourly relations and instead respect the sovereignty of all EU Member States”.<sup>62</sup> The “Athens Declaration” signed by the Heads of State of Greece and Türkiye on 7 December 2023 commits to engagement in political dialogue and a positive agenda on “measures of common interest” without any mention of returns to Türkiye.<sup>63</sup>

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<sup>55</sup> App No 57496/16, Communicated 18 May 2017. See in this regard ECRE et al., *Written submissions in J.B. v. Greece*, 4 October 2017, available [here](#).

<sup>56</sup> On this point, **13<sup>th</sup> IAC**, 34760/2021, 31 May 2021, para 4; **15<sup>th</sup> IAC**, 415514/2021, 26 November 2021, para 4. See also Recital 10 MD 1140/2019, Gov. Gazette B’ 4736/20.12.2019: “in the context of implementation of the EU-Turkey Statement of 18.3.2016 and pursuant to current practice, applicants for international protection who have entered Greece via Turkey and who do not remain on the Aegean islands are not accepted by Turkey for return upon rejection of their application.”

<sup>57</sup> Permanent Delegation of Türkiye to EU, 2016/70946263-AVBIR DT/10779625, 12 April 2016.

<sup>58</sup> Permanent Delegation of Türkiye to EU, 2016/70946263-AVBIR DT/10830418, 24 April 2016.

<sup>59</sup> **21<sup>st</sup> IAC**, 115795/2022, 28 February 2022, p. 22; 364000/2021, 4 November 2021, p. 22.

<sup>60</sup> Ministry of Migration and Asylum, ‘Νέο αίτημα της Ελλάδας για την επιστροφή 1908 παράνομων οικονομικών μεταναστών στην Τουρκία’, 28 July 2021, available [here](#).

<sup>61</sup> Ministry of Migration and Asylum, ‘Νότης Μηταράκης: «Η προστασία των συνόρων καθιστά την Ευρώπη ισχυρή απέναντι σε εκβιαστικές απαιτήσεις»’, 30 December 2021, available [here](#).

<sup>62</sup> European Commission, Reply to written question P-5731/2021, 18 February 2022.

<sup>63</sup> Athens Declaration on Friendly Relations and Good-Neighbourliness, 7 December 2023, available [here](#).



- ❖ Türkiye's ability to comply with the assurances cannot be verified through independent monitoring mechanisms in light of wider, ongoing rule of law and human rights backsliding that has continued to attract severe concerns *inter alia* from the European Council,<sup>64</sup> the European Commission<sup>65</sup> and the European Parliament.<sup>66</sup> Türkiye has been the subject of the second-ever infringement procedure launched by the ECtHR for breach of Article 46 ECHR in the *Kavala v. Türkiye* case,<sup>67</sup> and has not complied with that judgment.<sup>68</sup>

Yet, from 2016 to present, with the exception of the dissenting judgment in the Council of State 2347/2017 ruling,<sup>69</sup> both the Greek administration and the courts have heavily and consistently relied on the diplomatic assurances given by Türkiye in the 2016 letters without assessing their adequacy and credibility in accordance with the *Othman* criteria. This includes cases of applicants who did not enter Greece via the islands and who therefore do not fall within the scope of the EU-Turkey Statement.<sup>70</sup> Certain IAC have gone as far as suggesting that "the aforementioned diplomatic assurances by Türkiye fulfil the conditions and are credible and hold special evidentiary value"<sup>71</sup> based on a grossly mistaken citation of the Strasbourg Court ruling in the *Saadi v. Italy* judgment.<sup>72</sup> Quite to the contrary, the quoted extract from *Saadi* provides that "even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time."<sup>73</sup>

### Accessible evidence

The Asylum Procedures Directive guarantees asylum seekers the right to access any information on the third country taken into consideration by the asylum authorities for the purpose of deciding on their claim.<sup>74</sup> The disclosure of such information is paramount to safeguarding the

<sup>64</sup> European Council, *Conclusions (24 and 25 June 2021)*, EUCO 7/21, para 20: "Rule of law and fundamental rights in Turkey remain a key concern".

<sup>65</sup> European Commission, *2023 Türkiye Report*, SWD(2023) 696, 8 November 2023, pp. 23-24: "Serious backsliding continued... The continued refusal to implement certain rulings of the ECtHR remains a matter of serious concern".

<sup>66</sup> European Parliament, *Report on the 2022 Commission Report on Türkiye*, A9-0247/2023, 13 September 2023, para H: "the downward spiral in terms of human rights and the rule of law has continued".

<sup>67</sup> App No 28749/18, 11 July 2022.

<sup>68</sup> European Commission, *2023 Türkiye Report*, SWD(2023) 696, 8 November 2023, p. 29.

<sup>69</sup> **Greek Council of State**, 2347/2017 [Plenary], 22 September 2017, para 60.

<sup>70</sup> For example, **2<sup>nd</sup> IAC**, IP/142459/2023, 25 September 2023, para 10; 222273/2022, 19 April 2022, para 10; **3<sup>rd</sup> IAC**, 47946/2022, 28 January 2022, para 10.

<sup>71</sup> **1<sup>st</sup> IAC**, 310227/2022, 1 June 2022, p. 19; **3<sup>rd</sup> IAC**, 17613/2020, 14 September 2020, para IV.9(c).

<sup>72</sup> App No 37201/06, 28 February 2008, paras 147-148.

<sup>73</sup> *Ibid.*

<sup>74</sup> Article 12(1)(d) Asylum Procedures Directive, in conjunction with Article 10(3)(b) and (d).

fairness of the process and the applicant's right to challenge the application of the safe third country concept in their particular case.<sup>75</sup>

Greece has failed to transpose Article 12(1)(d) of the Directive into its domestic legislation. The Greek Asylum Code does, however, state that in the case of countries covered by the national list of safe third countries "the applicant for international protection may challenge the application of the safe third country concept on the ground that the third country is not safe under their particular circumstances".<sup>76</sup>

As described earlier, the Greek list of safe third countries is annually updated on the basis of an opinion by the Director of the Asylum Service on the designation of third countries as safe. The opinion and annexes thereto neither publicly available nor disclosed to applicants by the Asylum Service even upon request. The Asylum Service systematically issues standardised rejections of requests for access to these documents, citing a lack of sufficient interest on the part of asylum seekers to obtain them.<sup>77</sup> This includes applicants who have received decisions dismissing their claim as inadmissible on the basis of the safe third country list with express reference to those documents.

The refusal of the Asylum Service to grant access to its documentation on safe third countries means that applicants are denied access to the information against which their claims for protection are examined and ultimately dismissed. This amounts to a breach of EU law as highlighted by the European Commission:

To the extent Opinion... of the Director of the Asylum Service contains information referred to in Article 10(3)(b) of Directive 2013/32/EU, and the deciding authority takes the opinion into account for the purpose of taking a decision on an application for international protection, it should be made accessible to the applicant and his/her legal advisers. Under Article 38(2)(c) of the same Directive, applicants should have the possibility to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. Notwithstanding the fact that in doing so applicants refer to their particular circumstances, the information taken into consideration by the deciding authority to consider the third country as safe is relevant for the applicant and his/her legal advisers.<sup>78</sup>

The European Commission has further raised the issue in its exchanges with the Greek authorities,<sup>79</sup> to no avail.

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<sup>75</sup> Article 38(2)(c) Asylum Procedures Directive.

<sup>76</sup> Article 91(2) Greek Asylum Code. This is arguably an insufficient transposition of Article 38(2)(c) of the Asylum Procedures Directive.

<sup>77</sup> For example, **RAO Alimos**, IP/18629/2024, 10 January 2024; **RAO Lesvos**, 518870/2023, 24 November 2023; 513288/2023, 21 November 2023; 452122/2023, 5 October 2023; **RAO Samos**, 504458/2023, 14 November 2023; **RAO Thessaloniki**, 146550/2021, 23 July 2021.

<sup>78</sup> European Commission, Reply to written question E-3532/2021, 4 October 2021.

<sup>79</sup> European Commission, *Q&A on Asylum Procedure*, Ares(2023)5742599, 16 June 2023.

## Substantive standards: required level of protection in the third country

The substantive requirements for a country to qualify as a safe third country are laid down in Article 38(1) of the Asylum Procedures Directive and Articles 43a(2) and 45(1) of the draft Asylum Procedures Regulation. The EU legislature aims to amend the safety criteria as follows:

Art 38(1) Asylum Procedures Directive	Art 45(1) draft Asylum Procedures Regulation
life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion	non-nationals' life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
there is no risk of serious harm as defined in Directive 2011/95/EU	non-nationals face no real risk of serious harm as defined in [the Qualification Regulation]
the principle of non-refoulement in accordance with the Geneva Convention is respected the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected	non-nationals are protected against refoulement and against removal, in violation of the right to protection from torture and cruel, inhuman or degrading treatment or punishment as laid down in international law;
the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention	the possibility exists to request and, if conditions are fulfilled, receive effective protection as defined in Article 43a [at a minimum (a) being allowed to remain on the territory of the third country in accordance with its national law; (b) access to means of subsistence sufficient to maintain an adequate standard of living with regard to the overall situation of the hosting third country; (c) access to healthcare and essential treatment of illnesses under the conditions provided for in that country; (d) access to education under the conditions provided for in that country; (e) effective protection remains available until a durable solution can be found.]

The reform of Article 38 of the Asylum Procedures Directive politically agreed by co-legislators amounts to a regrettable, substantial deterioration of protection standards, primarily driven by the Council's intention to extend the use of the safe third country concept to countries that currently fall short of the threshold of safety. In essence, the "non-nationals" clause in Article 45(1) of the Asylum Procedures Regulation is expected to be invoked by Member States with a view to applying the concept to third countries which may persecute their own citizens and thereby produce refugees themselves. The concept of "effective protection" represents not only a regression of mandatory standards of refugee protection but an explicit departure of EU law from the 1951 Refugee Convention system that can in no way be reconciled with the EU's Treaty obligation to develop its common asylum policy in full accordance with that Convention.<sup>80</sup>

<sup>80</sup> Article 78(1) TFEU. See also **CJEU**, C-621/21 *Intervyuirasht organ na DAB pri MS (Femmes victimes de violences domestiques)*, 16 January 2024, paras 36-37; C-319/16 *M (Revocation of refugee status)*, 14 May 2019, para 81.

For ease of reference, the safety criteria of the Directive will be grouped in three main categories: protection from *refoulement*; access to procedures and protection in accordance with the Refugee Convention; and protection from persecution and serious harm.

In assessing whether the safety criteria are fulfilled in the particular case of an individual asylum seeker, Member States are required to take into consideration “the relevant statements and documentation presented by the applicant” and their “individual position and personal circumstances... such as background, gender and age”.<sup>81</sup> Greek courts have stressed this requirement in judicial review of safe third country cases and have quashed IAC decisions for failing to assess the criteria against the specific circumstances of applicants before them e.g. single women with children,<sup>82</sup> survivors of torture.<sup>83</sup>

### Protection from *refoulement*

Article 38(1)(c) and (d) of the Asylum Procedures Directive require the third country to observe the principle of *non-refoulement* as enshrined in Article 33(1) of the Refugee Convention and in human rights law.<sup>84</sup> namely Articles 4 and 19(2) of the EU Charter of Fundamental Rights and Article 3 ECHR. This means that standards set by well-established case law on *non-refoulement* underpin the application of the safe third country concept.

On the one hand, the examination of the requisite level of protection in the third country corresponds to the established test of “real risk of being subjected to treatment” amounting to persecution or to torture, inhuman or degrading treatment.<sup>85</sup> Asylum authorities and courts may not permissibly require applicants to meet more onerous an evidentiary threshold than the “real risk” of *refoulement* for the purposes of rebutting the presumption of safety of such a country under Article 38(2)(c) of the Directive. As the UK Supreme Court has recently recalled in its *R (AAA) v Secretary of State for the Home Department* on transfers of asylum seekers to Rwanda, “it is not essential for the court to resolve conflicts in the evidence: its task is to consider whether there are substantial grounds for believing that there is a real risk of *refoulement*”.<sup>86</sup>

In light of the above, the adjudication of the safe third country concept in Greece flouts human rights standards insofar as the Asylum Service and several judges in the Appeals Committees and administrative courts consistently require asylum seekers to meet much stricter a standard

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<sup>81</sup> Article 4(3)(b) and (c) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (“Qualification Directive”).

<sup>82</sup> **Administrative Court of Athens**, 103/2023, 31 January 2023, para 9.

<sup>83</sup> **Administrative Court of Athens**, 1260/2023, 15 September 2023, para 20; 384/2023, 16 March 2023, para 17.

<sup>84</sup> In particular, Articles 4 and 19(2) Charter and Article 3 ECHR.

<sup>85</sup> **CJEU**, C-71/11 *Y and Z*, 5 September 2012, paras 79-80; C-163/17 *Jawo*, 19 March 2019, para 87; **ECtHR**, *Ilias and Ahmed v. Hungary* App No 47287/15 [GC], 21 November 2019, para 126; **UK Supreme Court**, *R (AAA) v Secretary of State for the Home Department* [2023] UKSC 42, 15 November 2023, paras 23, 38, 71, 74.

<sup>86</sup> **UK Supreme Court**, *R (AAA) v Secretary of State for the Home Department* [2023] UKSC 42, 15 November 2023, para 74.

of proof than the “real risk” test in order to rebut the presumption of compliance with the *non-refoulement* principle in Türkiye. This has resulted in arbitrary denial of protection to refugees who put forward substantiated claims of a real risk of facing unlawful removal to their countries of origin upon return to said country. Incorrect standards of proof on *non-refoulement* encountered in Greek case law include the following:<sup>87</sup>

- ❖ Requirement to demonstrate a “serious risk of systemic deficiencies in the asylum procedure and reception conditions of asylum seekers in the third country, resulting in serious and demonstrated grounds to believe that the asylum seeker transferred to the territory of that state will run a real risk of being subjected to inhuman or degrading treatment”.<sup>88</sup> This rests on an impermissible and wrong application of the stricter “systemic deficiencies” test set by the CJEU for transfers of applicants *within* the EU, which are subject to the principle of mutual trust between Member States bound by the EU *acquis* and may only be precluded in exceptional circumstances.<sup>89</sup> This reading, however, contradicts the position of the EU Court that “a third State cannot be treated in the same way as a Member State”.<sup>90</sup> EU law therefore does not permit states to extend the principle of mutual trust to third countries not bound by the CEAS, with a view to setting any standard of proof higher than the “real risk” test in their application of the safe third country concept.

<sup>87</sup> For further analysis, Minos Mouzourakis, ‘Μέτρο απόδειξης στην εφαρμογή της «ασφαλούς τρίτης χώρας» ως λόγου απαραδέκτου των αιτήσεων ασύλου’ (2022) *Εφαρμογές Δημοσίου Δικαίου* 52.

<sup>88</sup> **Administrative Court of Athens**, 384/2023, 16 March 2023, para 12; 103/2023, 31 January 2023, para 8; **1<sup>st</sup> IAC**, 310227/2022, 1 June 2022, p. 19; **2<sup>nd</sup> IAC**, IP/142459/2023, 25 September 2023, para 11; 171515/2023, 23 March 2023, p. 7; 548632/2022, 20 September 2022, para IV.11; 222273/2022, 19 April 2022, para IV.11; **3<sup>rd</sup> IAC**, 47496/2022, 28 January 2022, para 11; **5<sup>th</sup> IAC**, 39744/2023, 20 January 2023, para 11; 563011/2022, 27 September 2022, p. 16; 563008/2022, 27 September 2022, para 11; 563007/2022, 27 September 2022, para 11; 203097/2021, 25 August 2021, para 11; 202946/2021, 25 August 2021, para 11; 202789/2021, 25 August 2021, para 11; 202299/2021, 25 August 2021, para 11; **6<sup>th</sup> IAC**, IP/312088/2023, 28 November 2023, para IV.3; IP/291367/2023, 21 November 2023, para IV.3; **8<sup>th</sup> IAC**, 583703/2022, 5 October 2022, p. 11; 511455/2022, 5 September 2022, p. 18; 237130/2022, 29 April 2022, p. 15; 161054/2022, 21 March 2022, pp. 12-13; 142176/2022, 11 March 2022, para 9; 458313/2021, 15 December 2021, para 9; **11<sup>th</sup> IAC**, IP/578/2023, 28 June 2023, para 11; 67923/2022, 7 February 2022, para 8; 384227/2021, 15 November 2021, para 6, 2075/2021, 26 February 2021, para 10; **13<sup>th</sup> IAC**, IP/113682/2023, 13 September 2023, para 11; 22148/2023, 13 January 2023, para 8; 734754/2022, 7 December 2022, para 9; 6722/2020, 9 April 2020, p. 3; 2727/2020, 9 April 2020, para 9; **14<sup>th</sup> IAC**, IP/335367/2023, 6 December 2023, p. 18; 250567/2023, 3 May 2023, pp. 22-24; 211179/2023, 11 April 2023, p. 23; 485434/2022, 23 August 2022, p. 30; **16<sup>th</sup> IAC**, 85916/2023, 10 February 2023, para IV.3; 394674/2022, 7 July 2022, p. 6; **21<sup>st</sup> IAC**, 87590/2023, 13 February 2023, p. 13; 710801/2022, 28 November 2022, p. 9; 690292/2022, 18 November 2022, pp. 7-8; 467020/2021, 20 December 2021, pp. 9-10.

<sup>89</sup> Recently recalled in **CJEU**, C-228/21 *Ministero dell’Interno (Brochure commune – Refoulement indirect)*, 30 November 2023, paras 130-131; C-297/17 *Ibrahim*, 19 March 2019, para 84; C-163/17 *Jawo*, 19 March 2019, paras 83-85.

<sup>90</sup> **CJEU**, C-8/20 *LR*, 20 May 2021, para 47.

- ❖ Requirement to establish the existence of a practice amounting to a “structural problem”,<sup>91</sup> or “official confirmation of mass *refoulements*”.<sup>92</sup>
- ❖ Requirement to prove a “systematic breach of the principle of *non-refoulement* by the Turkish authorities leading to the conclusion that every person returned to that country is subjected to a risk of removal to a country where they face danger of torture or inhuman or degrading treatment”.<sup>93</sup>

On the other hand, the scrutiny of *non-refoulement* involves a forward-looking assessment of the risk of an applicant being subjected to a threat to life or liberty or to torture, inhuman or degrading treatment.<sup>94</sup> The assessment “therefore includes prediction”.<sup>95</sup> Past exposure to persecution or to torture, inhuman or degrading treatment may be “an indication of future risk” but “does not constitute a necessary condition for the existence of such a risk”.<sup>96</sup> Greek authorities, however, routinely come to the conclusion that applicants do not face a risk of *refoulement* in Türkiye on the ground that they had not already faced such treatment in the country prior to their arrival in Greece.<sup>97</sup>

These deficiencies have a bearing on the manner in which Greek asylum authorities apply points (c) and (d) of Article 38(1) of the Asylum Procedures Directive on substance. Practice at the Greek Asylum Service is inconsistent, with many first instance decisions maintain the view that applicants face no risk of *refoulement* in Türkiye, while an increasing number of first instance decisions have concluded on the existence of risk; past exposure to *refoulement* and past inability to register an asylum claim tend to be decisive factors.<sup>98</sup> On appeal, the IAC only

<sup>91</sup> **6<sup>th</sup> IAC**, 5892/2020, 27 May 2020, para 15.

<sup>92</sup> **1<sup>st</sup> IAC**, 310227/2022, 1 June 2022, p. 19; **13<sup>th</sup> IAC**, 6722/2020, 9 April 2020, p. 12; **17<sup>th</sup> IAC**, 3576/2020, 10 March 2020, para 12.

<sup>93</sup> **4<sup>th</sup> IAC**, 79499/2023, 8 February 2023, p. 14; **7<sup>th</sup> IAC**, 15939/2022, 12 January 2022, p. 13; 386010/2021, 15 November 2021, p. 15; 378505/2021, 11 November 2021, p. 21; 249386/2021, 16 September 2021, p. 7; 249361/2021, 16 September 2021, p. 8; **8<sup>th</sup> IAC**, 103648/2023, 20 February 2023, p. 8; 142176/2022, 11 March 2022, p. 17; 458313/2021, 15 December 2021, p. 8; **9<sup>th</sup> IAC**, 288224/2021, 4 October 2021, p. 11; **13<sup>th</sup> IAC**, 22148/2023, 13 January 2023, para 9; **14<sup>th</sup> IAC**, IP/335367/2023, 6 December 2023, p. 21; 250567/2023, 3 May 2023, p. 26; 211179/2023, 11 April 2023, p. 26; **17<sup>th</sup> IAC**, 297832/2023, 9 June 2023, para IV.3; 144971/2023, 10 March 2023, para IV.3; **18<sup>th</sup> IAC**, 672919/2022, 11 November 2022, p. 6; 165176/2021, 3 August 2021, p. 5; 165163/2021, 3 August 2021, p. 6; 68486/2021, 16 June 2021, p. 7; **19<sup>th</sup> IAC**, 73674/2022, 8 February 2022, p. 17; 73459/2022, 8 February 2022, p. 10.

<sup>94</sup> **ECTHR**, *Paposhvili v. Belgium* App No 41738/10, 13 December 2016, para 188; EASO, *Practical Guide: Qualification for international protection*, April 2018, p. 21, 31, 34, 38.

<sup>95</sup> **UK Supreme Court**, *R (AAA) v Secretary of State for the Home Department* [2023] UKSC 42, 15 November 2023, para 103.

<sup>96</sup> Article 4(4) Qualification Directive; **Administrative Court of Thessaloniki**, 397/2023, 25 May 2023, para 9.

<sup>97</sup> For example, **3<sup>rd</sup> IAC**, 47496/2022, 28 January 2022, para 15; **4<sup>th</sup> IAC**, 204504/2023, 7 April 2023, pp. 18-19; 79499/2023, 8 February 2023, para III.2; **6<sup>th</sup> IAC**, IP312088/2023, 28 November 2023, para IV.5; IP/291367/2023, 21 November 2023, para IV.5; **11<sup>th</sup> IAC**, IP/578/2023, 28 June 2023, pp. 24-25; **12<sup>th</sup> IAC**, 168365/2023, 7 April 2023, p. 15; **14<sup>th</sup> IAC**, IP/335367/2023, 6 December 2023, p. 21; 250567/2023, 3 May 2023, p. 26; 211179/2023, 11 April 2023, pp. 25-26.

<sup>98</sup> **RAO Lesvos**, IP/37214/2023, 28 July 2023; 185693/2023, 30 March 2023; 185687/2023, 30 March 2023; 8959/2023, 5 January 2023; 686079/2022, 16 November 2022; 583163/2022, 4 October 2022; 467386/2022, 10 August 2022; **RAO Samos**, 704629/2022, 24 November 2022; **RAO Piraeus**,



exceptionally contest the country's compliance with the *non-refoulement* principle.<sup>99</sup> No known positive second instance decisions have directly applied points (c) and (d).

### Access to procedures and protection in accordance with the Refugee Convention

According to Article 38(1)(e) of the Asylum Procedures Directive, a safe third country must guarantee "protection in accordance with the Geneva Convention". In its 2347/2017 judgment relating to safe third country decisions issued in Greece after the EU-Turkey Statement, the Greek Council of State refused to submit a preliminary reference to the CJEU on the interpretation of these terms. It instead relied on a juxtaposition of Article 38(1)(e) against the (dormant) "European safe third country" concept in Article 39(2) and held that

[F]or this criterion to be deemed fulfilled, it is not necessary for the third country to have ratified the Geneva Convention (namely without geographical restriction) or for its legislation to establish a system for protection of aliens, guaranteeing not only the principle of *non-refoulement* but all other rights foreseen in said Convention.<sup>100</sup>

The Court reaffirmed this reading in its 177/2023 ruling on the legality of the safe third country list enacted by Greece in 2021:

[A] third country that has ratified the Geneva Convention subject to a geographical restriction may be designated as safe in the meaning of article... 38 of Directive 2013/32/EU insofar as it complies with the principle of *non-refoulement* and offers sufficient protection of certain fundamental rights such as the right to access to health care and to the labour market.<sup>101</sup>

The forthcoming Asylum Procedures Regulation is expected to lower the threshold of required protection in the third country to "effective protection", as described above.<sup>102</sup> This would explicitly permit Member States to apply the safe third country concept to non-signatories to the Refugee Convention so long as certain – minimum, yet permissive – criteria of protection are met. Such criteria do not appear to include a right to a residence permit or to family reunification according to the agreed wording of Article 45(1)(e) of the Regulation.

The accessibility and adequacy of a third country's asylum procedure form an indispensable part of the criterion set out in Article 38(1)(e) of the Asylum Procedures Directive, though they

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IP/108252/2023, 11 September 2023; IP/21815/2023, 18 July 2023; 231799/2023, 25 April 2023; 181652/2023, 28 March 2023; **RAO Thessaloniki**, 23183/2021, 8 September 2021; 167772/2021, 4 August 2021; **AAU Corinth**, 589545/2022, 6 October 2022; 24886/2022, 14 January 2022; 4773/2022, 4 January 2022; **AAU Amygdaleza**, 124295/2022, 2 March 2022; 148880/2021, 26 July 2021.

<sup>99</sup> Exceptions include **10<sup>th</sup> IAC**, 22083/2020, 28 April 2021, para 4; **20<sup>th</sup> IAC**, 260375/2021, 21 September 2021, para B.5; 260356/2021, 21 September 2021, para B.5.

<sup>100</sup> **Greek Council of State**, 2347/2017 [Plenary], 22 September 2017, paras 54 and 63. For a similar position, **Dutch Council of State**, 201704433/1, 13 December 2017; 201703605/1, 13 December 2017; 201609584/1, 13 December 2017.

<sup>101</sup> **Greek Council of State**, 177/2023 [Plenary], 3 February 2023, para 36.

<sup>102</sup> Articles 45(1)(e) and 43a(2) draft Asylum Procedures Regulation.

are inevitably relevant to the third country's compliance with the principle of *non-refoulement* as well.<sup>103</sup> The terms "the possibility exists to request refugee status" in the provision should be construed as requiring at least a legal and institutional set-up of a functioning asylum system that is both formally and practically accessible and of adequate quality to carry out refugee status determination. The same must be expected of the interpretation of the terms "the possibility exists to request and, if conditions are fulfilled, receive effective protection" in Article 45(1)(e) of the Asylum Procedures Regulation.

Many decisions issued in individual cases in Greece conclude that applicants have the possibility to access asylum procedures in Türkiye without due consideration of authoritative evidence.<sup>104</sup> However, several Greek Asylum Service and IAC decisions acknowledge that refugees in Türkiye face substantial obstacles to access to international and temporary protection procedures,<sup>105</sup> including through express reference to the fact that "at that particular time, asylum service offices in some cities in Türkiye are closed and it will therefore be particularly difficult and time-consuming for them to find an office and travel there".<sup>106</sup> Others focus on unregistered applicants' obstructed access to health care.<sup>107</sup> Most positive IAC decisions are not adjudicated on Article 38(1)(e) of the Asylum Procedures Directive but on the **Connection Criterion**.<sup>108</sup>

Here too, however, IAC usually fail to carry out a forward-looking assessment into whether an applicant would face a *future* risk of denial of access to a procedure in the third country and place decisive emphasis on their past behaviour, however short their stay. IAC decisions have therefore incorrectly inferred proof of the accessibility of the Turkish asylum system for the individual applicant from the mere absence of a prior experience of refusal of registration.<sup>109</sup>

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<sup>103</sup> **ECTHR**, *Ilias and Ahmed v. Hungary* App No 47287/15 [GC], 21 November 2019, paras 134, 137, 141, 144.

<sup>104</sup> For recent examples, **6<sup>th</sup> IAC**, IP/291367/2023, 21 November 2023, para IV.5; **11<sup>th</sup> IAC**, IP/578/2023, 28 June 2023, para 9; **14<sup>th</sup> IAC**, 211179/2023, 11 April 2023, pp. 26-27.

<sup>105</sup> **15<sup>th</sup> IAC**, 300763/2023, 12 June 2023, para 39; **17<sup>th</sup> IAC**, 297832/2023, 9 June 2023, para IV.3(f); **21<sup>st</sup> IAC**, 710801/2022, 28 November 2022, pp. 13-14. See also **RAO Lesvos**, IP/37214/2023, 28 July 2023; 185693/2023, 30 March 2023; 185687/2023, 30 March 2023; 176536/2023, 24 March 2023; 119587/2023, 25 February 2023; 119585/2023, 25 February 2023; 8959/2023, 5 January 2023; 583163/2022, 4 October 2022; 523189/2022, 8 September 2022; 467386/2022, 10 August 2022; **RAO Chios**, 639721/2022, 27 October 2022; 610642/2022, 14 October 2022; **RAO Piraeus**, IP/108252/2023, 11 September 2023; **RAO Alimos**, 227066/2021, 7 September 2021; **RAO Crete**, 111720/2021, 7 July 2021.

<sup>106</sup> **17<sup>th</sup> IAC**, 144971/2023, 10 March 2023, para IV.3.

<sup>107</sup> **2<sup>nd</sup> IAC**, IP/142459/2023, 25 September 2023, p. 28; **5<sup>th</sup> IAC**, 563007/2022, 27 September 2022, para 17; 202299/2021, 25 August 2021, para 20; **10<sup>th</sup> IAC**, 431472/2022, 25 July 2022, para B.8; 25277/2020, 19 January 2021; 25173/2020, 19 January 2021; **17<sup>th</sup> IAC**, 292768/2023, 8 June 2023, para III.3; **20<sup>th</sup> IAC**, 260375/2021, 21 September 2021, para B.4; 260356/2021, 21 September 2021, para B.4; 29118/2020, 19 January 2021, para B.5; **RAO Lesvos**, 430443/2022, 22 July 2022; 430412/2022, 22 July 2022; 368575/2021, 6 November 2021; **RAO Piraeus**, 282678/2021, 30 September 2021; 269964/2021, 24 September 2021.

<sup>108</sup> Exceptions include **10<sup>th</sup> IAC**, 22083/2020, 28 April 2021, para C.4, decided on point (e) of Article 38(1).

<sup>109</sup> For instance, **6<sup>th</sup> IAC**, IP/312088/2023, 28 November 2023, pp. 24-25 and IP/291367/2023, 21 November 2023, pp. 23-24: "the fact that the appellants, while present in Türkiye, did not possess a *kimlik* so as to have access to health services, was owed to their fault since, as previously stated, they did not make any serious effort to submit an application for international protection, and not



## Protection from persecution and serious harm

Point (a) of Article 38(1) of the Asylum Procedures Directive requires Member States to be satisfied that a third country protects individuals against threats to life and liberty “account of race, religion, nationality, membership of a particular social group or political opinion”. Point (b) requires protection against forms of “serious harm” such as torture, inhuman or degrading treatment. Assessment of those criteria requires close consideration of the particular treatment a country may afford to specific groups of people defined by ethnic, religious or social characteristics, on the one hand, and of the characteristics and circumstances of the individual applicant that may place them at risk of such ill-treatment, on the other.

The pertinent standard of proof for assessing the criteria set out in points (a) and (b) is the “real risk” test described in **Safety Criteria: Substantive Standards: Protection from *Refoulement***. Here too, however, Greek authorities incorrectly set more onerous a threshold than “real risk” for the safety presumption to be rebutted. Several IAC have dismissed appeals on the ground that applicants failed to demonstrate a “real, individual and present risk” or an “individualised fear of persecution” in the third country.<sup>110</sup>

On substance, Greek Asylum Service practice on points (a) and (b) of Article 38(1) of the Asylum Procedures Directive remains inconsistent. The case of protection claims by women and girls is an illustrative example. While some recent first instance decisions identify a risk of serious harm facing single women in Türkiye on account of their gender and corollary vulnerability to harm and exploitation,<sup>111</sup> others maintain that the safe third country concept can be applied to them.

Decision-making in these cases is inconsistent at second instance as well. On the one hand, some IAC have rebutted the presumption of safety of Türkiye in cases of single women, acknowledging that “there is a risk of serious harm... in case of... readmission to Türkiye, where women and girls are vulnerable to sexual and gender-based violence and where the labour market also presents high risks of exploitation for children, given the widespread phenomenon

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to the Turkish state’s refusal to grant them a *kimlik*”; **14<sup>th</sup> IAC**, 211179/2023, 11 April 2023, p. 27: “the appellants stated that they did not lodge an asylum application”.

<sup>110</sup> **5<sup>th</sup> IAC**, IP/296129/2023, 22 November 2023, para VI; **6<sup>th</sup> IAC**, IP/291367/2023, 21 November 2023, para IV.6; 217698/2022, 18 April 2022, p. 23; **8<sup>th</sup> IAC**, 142176/2023, 11 March 2022, para 11; 458313/2021, 15 December 2021, para 11; **11<sup>th</sup> IAC**, 71895/2022, 8 February 2022, para 19; 67932/2022, 7 February 2022; 384227/2021; 2075/2021; **13<sup>th</sup> IAC**, IP/113682/2023, 13 September 2023, para 13; 22148/2023, 13 January 2023, para 10; 6722/2020, 9 April 2020; 2727/2020, 9 April 2020; **14<sup>th</sup> IAC**, 250567/2023, 3 May 2023, p. 29; 211179/2023, 11 April 2023, p. 29; **15<sup>th</sup> IAC**, IP/20208/2024, 10 January 2024, para 29.

<sup>111</sup> **RAO Lesbos**, IP/37214/2023, 28 July 2023; 119587/2023, 25 February 2023, 583163/2022, 4 October 2022; 476179/2022, 17 August 2022; 293136/2022, 24 May 2022; **RAO Chios**, 174837/2021, 6 August 2021; **RAO Samos**, 324826/2021, 19 October 2021; 319466/2021, 15 October 2021; 300151/2021, 8 October 2021; **RAO Kos**, 724351/2022, 1 December 2022; **RAO Piraeus**, 349896/2021, 29 October 2021; **RAO Alimos**, 227066/2021, 7 September 2021; **RAO Western Greece**, 279225/2021, 29 September 2021; **AAU Fylakio**, 160905/2023, 17 March 2023.

of child labour and exploitation”.<sup>112</sup> Other positive decisions have held that “phenomena of violence based on gender are frequent, while efforts to address the phenomenon are insufficient”<sup>113</sup> and that “single women, in particular those who have escaped situations of domestic violence, have few possibilities of access support services and are very likely to face societal discrimination, in particular in rural or more conservative areas”.<sup>114</sup> Rarely, however, are such cases adjudicated on Articles 38(1)(a) and (b) of the Asylum Procedures Directive – most IAC decisions rely on such evidence to conclude on the absence of a sufficient connection between the applicant and the third country (see [Connection Criterion: Forum for Adjudication of Safety Aspects](#)).<sup>115</sup> On the other hand, other IAC decisions apply the safe third country concept to single women and dismiss their asylum claims without any consideration of their exposure to acute protection risks in Türkiye.<sup>116</sup>

## The connection criterion

### Factors determining a connection

Article 38(2)(a) of the Asylum Procedures Directive requires Member States to lay down domestic rules on the requirement of a sufficient connection between the applicant and the third country based on which transfer thereto would be reasonable. The CJEU has clarified that transit cannot *per se* satisfy the requirement of such a connection,<sup>117</sup> in three judgments ruling against Hungary’s policy of systematic dismissal of asylum claims made by people entering its territory from a “safe country of transit”.

Article 45(2)(b) of the forthcoming Asylum Procedures Regulation represents a step back in terms of rule prescription on the connection requirement in the safe third country concept.<sup>118</sup> It maintains a mandatory criterion of connection but no longer requires Member States to enact domestic law rules on the way in which a connection should be deemed to be established. The Preamble to the Regulation, still under negotiation by the co-legislators, is expected to include succinct references to indicators of such a connection, including presence of family members or prior settling or “stay” in the third country. It is not yet clear whether these indicators will be clearly formulated in the Preamble.

<sup>112</sup> **4<sup>th</sup> IAC**, 270314/2022, 16 May 2022, p. 26; **5<sup>th</sup> IAC**, 39744/2023, 20 January 2023, para 16; 563007/2022, 27 September 2022, para 18; 202299/2021, 25 August 2021, para 21; **16<sup>th</sup> IAC**, 85916/2023, 10 February 2023, para V.2; **20<sup>th</sup> IAC**, 26661/2020, para 4.

<sup>113</sup> **4<sup>th</sup> IAC**, 301027/2022, 27 May 2022, p. 14; **18<sup>th</sup> IAC**, 24756/2020, 18 March 2021, pp. 9-10.

<sup>114</sup> **21<sup>st</sup> IAC**, 467020/2021, 20 December 2021, p. 12.

<sup>115</sup> Exceptions include **10<sup>th</sup> IAC**, 368450/2022, 27 June 2022, para B.6; **18<sup>th</sup> IAC**, 24756/2020, 18 March 2021, pp. 9-10, decided on points (a) and (b) of Article 38(1).

<sup>116</sup> **8<sup>th</sup> IAC**, 458313/2021, 15 December 2021; **11<sup>th</sup> IAC**, 71895/2022, 8 February 2022; **18<sup>th</sup> IAC**, 165176/2021, 3 August 2021; **19<sup>th</sup> IAC**, 73459/2022, 8 February 2022.

<sup>117</sup> **CJEU**, C-821/19 *Commission v Hungary (incrimination de l’aide aux demandeurs d’asile)*, 16 November 2021, para 38; C-924/19 PPU *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, 14 May 2020, paras 158-159; C-564/18 *Bevándorlási és Menekültügyi Hivatal (Tompá)*, 19 March 2020, paras 45-50.

<sup>118</sup> Unsurprisingly, given vehement support from certain Member States for outright deletion (Austria) or merely optional application (Greece, Ireland, Italy) of the connection criterion in the Council negotiations: Council of the European Union, *Amended proposal for [an Asylum Procedures Regulation] – compilation of replies by Member States*, 9439/23, 15 May 2023, available [here](#).

According to the Greek Asylum Code, transit in conjunction with specific additional circumstances may substantiate the existence of a connection with a safe third country.<sup>119</sup> Greek law introduces a non-exhaustive list of indicators as follows:

- (i) Duration of stay in the country
- (ii) Potential contact or objective and subjective possibility of contact with the country's authorities to access employment or lawful stay
- (iii) Prior residence, including long-stay visits or studies
- (iv) Presence of even remote relatives
- (v) Presence of social, professional or cultural ties
- (vi) Presence of property
- (vii) Connection to the broader community
- (viii) Knowledge of the language of the country
- (ix) Geographical proximity to the country of origin

The provision includes particularly broad, generalised and often ambiguous factors that are arguably liable to lead to an arbitrary application of the safe third country to an individual applicant. This is particularly the case in relation to "cultural ties", "broader community" or "geographical proximity to the country of origin" which could virtually apply indiscriminately to all refugees originating from a particular country. Any factors pointing to a connection with a country should be read under thorough consideration of the individual circumstances of the applicant. Greek courts have clarified, for instance, that such an assessment cannot be limited to mere reference to the number of refugees present in the country or the duration of the person's stay prior to arrival in Greece.<sup>120</sup>

Yet, asylum authorities at first and second instance frequently use a standard text concluding on the existence of a connection between an applicant and Türkiye, without having conducted any individualised assessment of their personal circumstances.<sup>121</sup> Other decisions adopt widely diverging and at times sweeping interpretations of factors conducive to the establishment of a sufficient connection.

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<sup>119</sup> Article 91(1)(f) Greek Asylum Code. See also **Greek Council of State**, 177/2023 [Plenary], 3 February 2023, para 34.

<sup>120</sup> **Administrative Court of Athens**, 103/2023, 31 January 2023, para 9.

<sup>121</sup> For example, **1<sup>st</sup> IAC**, 310227/2022, 1 June 2022, para 4.3; **6<sup>th</sup> IAC**, 5892/2020, 27 May 2020, p. 25; **8<sup>th</sup> IAC**, 103648/2023, 20 February 2023, pp. 8-9; 142176/2022, 11 March 2022, para 10; 458313/2021, 15 December 2021, para 10; **9<sup>th</sup> IAC**, 288224/2021, 4 October 2021, p. 11; **13<sup>th</sup> IAC**, IP/113682/2023, 13 September 2023, para 12; 22148/2023, 13 January 2023, para 9; 734754/2022, 7 December 2022, para 10; **14<sup>th</sup> IAC**, IP/335367/2023, 6 December 2023, p. 23; 250567/2023, 3 May 2023, p. 28; 211179/2023, 11 April 2023, p. 28; **18<sup>th</sup> IAC**, 672919/2022, 11 November 2022, p. 7; 165716/2021, 3 August 2021, p. 7; 165163/2021, 3 August 2021, p. 8; 68486/2021, 16 June 2021, p. 6; **19<sup>th</sup> IAC**, 73674/2022, 8 February 2022, p. 18; 73459/2022, 8 February 2022, p. 12.

## Geographical proximity and presence of co-nationals

The geographical proximity factor has not only been applied to nationals of Syria,<sup>122</sup> a country neighbouring Türkiye, but also to nationals of Afghanistan.<sup>123</sup> The Greek Asylum Service and IAC seem to have stretched this tenuous interpretation even further to cover countries geographically remote from Türkiye. In the case of Somalia, decisions invoke so-called “political proximity” between the Turkish government and Somalia as a factor pointing to a connection between Somali asylum seekers and Türkiye.<sup>124</sup>

IAC have also concluded on the existence of a connection between Somali applicants solely on the ground that Türkiye has “an important number of co-nationals”,<sup>125</sup> without citing any data on the number of Somali refugees in the country. Similar reasoning has been applied in cases of Syrian,<sup>126</sup> as well as Afghan nationals.<sup>127</sup>

## Duration of stay in the third country

Both the Greek Asylum Service and the IAC consistently construe irregular presence in the third country – including detention – as “stay” for the purposes of establishing a connection therewith. However, case law is not at all consistent on the length of stay required for a connection to be formed between an applicant and the third country:

	Insufficient length of stay	Sufficient length of stay
10 months		7 <sup>th</sup> IAC 386010/2021
8 months	8 <sup>th</sup> IAC 583703/2022	5 <sup>th</sup> IAC 203097/2021
5 months	7 <sup>th</sup> IAC 15939/2022	6 <sup>th</sup> IAC IP/291368/2023 12 <sup>th</sup> IAC 168365/2023
4 months		11 <sup>th</sup> IAC 384227/2021
3.5 months	20 <sup>th</sup> IAC 260356/2021	
3 months	8 <sup>th</sup> IAC 161054/2022; 16 <sup>th</sup> IAC 29605/2021	17 <sup>th</sup> IAC 3576/2020
2 months	5 <sup>th</sup> IAC 563011/2022; 10 <sup>th</sup> IAC 224438/2022; 10 <sup>th</sup> IAC 25173/2020; 20 <sup>th</sup> IAC 260375/2021; 21 <sup>st</sup> IAC 690292/2022	5 <sup>th</sup> IAC 202946/2021; 12 <sup>th</sup> IAC 281102/2021
1.5 month	2 <sup>nd</sup> IAC 548632/2022; 8 <sup>th</sup> IAC 511455/2022; 19 <sup>th</sup> IAC 458446/2022; 19 <sup>th</sup> IAC 56018/2022	14 <sup>th</sup> IAC 4334/2020

<sup>122</sup> **6<sup>th</sup> IAC**, 217698/2022, 18 April 2022, p. 22.

<sup>123</sup> **4<sup>th</sup> IAC**, 204504/2023, 7 April 2023, p. 20; 79499/2023, 8 February 2023, p. 23; **7<sup>th</sup> IAC**, 386010/2021, 15 November 2021, p. 19; 378505/2021, 11 November 2021, pp. 29-30; 249386/2021, 16 September 2021, p. 10; 249361/2021, 16 September 2021, p. 11; **12<sup>th</sup> IAC**, 168365/2023, 22 March 2023, p. 16.

<sup>124</sup> **11<sup>th</sup> IAC**, 71895/2022, 8 February 2022, para 18; **19<sup>th</sup> IAC**, 73459/2022, 8 February 2022, p. 12.

<sup>125</sup> **3<sup>rd</sup> IAC**, 47496/2022, 28 January 2022, para 15; **11<sup>th</sup> IAC**, 71895/2022, 8 February 2022, para 18.

<sup>126</sup> **3<sup>rd</sup> IAC**, 17613/2020, 14 September 2020, para V.7.

<sup>127</sup> **15<sup>th</sup> IAC**, IP/20208/2024, 10 January 2024, para 29; **17<sup>th</sup> IAC**, 462630/2021, 16 December 2021, para 24.

1 month	4 <sup>th</sup> IAC 3226/2020; 10 <sup>th</sup> IAC 12540/2020; 17 <sup>th</sup> IAC 144971/2023; 21 <sup>st</sup> IAC 398486/2021	5 <sup>th</sup> IAC 202789/2021; 15 <sup>th</sup> IAC IP/20208/2024; 16 <sup>th</sup> IAC 394674/2022
3 weeks	2 <sup>nd</sup> IAC 222273/2022; 4 <sup>th</sup> IAC 3441/2020; 5 <sup>th</sup> IAC 12366/2020; 12365/2020; 7 <sup>th</sup> IAC 148002/2023; 15 <sup>th</sup> IAC 293257/2021	13 <sup>th</sup> IAC 2727/2020
2 weeks	8 <sup>th</sup> IAC 237130/2022; 10 <sup>th</sup> IAC 224433/2022; 21 <sup>st</sup> IAC 29458/2020	

Several IAC decisions expressly refer to the absence of a support network in the third country and to the lack of knowledge of the country's language as factors dispelling the existence of a connection that would render it reasonable for the applicant to be returned thereto.<sup>128</sup>

### Duration of stay in Greece

The length of the applicant's stay in Greece may give rise to factors countering the existence of a connection with the third country. According to internal guidance introduced by the Greek Asylum Service in November 2021, where a period exceeding twelve months has lapsed since the applicant's entry into Greece, their connection to Türkiye is presumed *not* to be sufficient unless other factors are present.<sup>129</sup>

This factor seems to have been introduced as a means of circumventing the obligation to process claims on the merits due to the manifest lack of readmission prospects to Türkiye (see [Prospect of Readmission](#)) and has been neither codified into Article 91(1)(f) of the Greek Asylum Code nor made public. This means that the guidance is not legally binding and has in fact not been consistently followed. Certain IAC, for instance, have since applied the safe third country concept to applicants despite the lapse of two<sup>130</sup> or even three years<sup>131</sup> from their departure from Türkiye and entry into Greece. Other IAC have made reference to the applicants' duration of stay in Greece as a factor dispelling the existence of a connection with the third country.<sup>132</sup>

<sup>128</sup> **2<sup>nd</sup> IAC**, 548632/2022, 20 September 2022, para V.2; **4<sup>th</sup> IAC**, 270314/2022, 16 May 2022, p. 26; **8<sup>th</sup> IAC**, 511455/2022, 5 September 2022, p. 23; 237130/2022, 29 April 2022, p. 20; **10<sup>th</sup> IAC**, 224438/2022, 20 April 2022, para 5; 224433/2022, 20 April 2022, para 5; **15<sup>th</sup> IAC**, 300763/2023, 12 June 2023, para 39; 293257/2021, 6 October 2021, para 23; **17<sup>th</sup> IAC**, 148002/2023, 13 March 2023, para III.3; 144971/2023, 10 March 2023, para IV.3; **19<sup>th</sup> IAC**, 352303/2022, 20 June 2022, para 14; **21<sup>st</sup> IAC**, 87590/2023, 13 February 2023, p. 17; 710801/2022, 28 November 2022, p. 15; 29458/2020, 19 November 2020, pp. 13-14.

<sup>129</sup> European Commission, Email exchange with the Director of the Greek Asylum Service, Ares(2022)6496250, 5 July 2022: "since 18.11.2021 and onwards, an internal instruction of the Greek Asylum Service was put in force, acknowledging that for all those applicants who have been into Greece for more than twelve months, the concept of Turkey as safe third country is not applicable."

<sup>130</sup> **3<sup>rd</sup> IAC**, 8620/2022, 7 January 2022, para IV.4.

<sup>131</sup> **18<sup>th</sup> IAC**, 672919/2022, 11 November 2022.

<sup>132</sup> **2<sup>nd</sup> IAC**, 222273/2023, 19 April 2022, para V.1; **4<sup>th</sup> IAC**, 628380/2022, 21 October 2022, para 10; 270314/2022, 16 May 2022, p. 26; **5<sup>th</sup> IAC**, 594684/2022, 10 October 2022, p. 7; **7<sup>th</sup> IAC**, 15939/2022, 12 January 2022, p. 19; **19<sup>th</sup> IAC**, 56018/2022, 1 February 2022, para 7.

## Best interests of the child

The best interests of the child should be a primary consideration in the asylum process and therefore in the application of the safe third country concept to children, whether accompanied or not.<sup>133</sup> In light of this, several IAC rule against the existence of a connection between particular applicants and Türkiye on the ground that the best interests of children mandate a “stable and safe environment, insofar as possible” preclude their removal from Greece.<sup>134</sup> In most cases, however, Committees apply the safe third country concept and dismiss the asylum claims of families with children and unaccompanied children without carrying out any best interests assessment.<sup>135</sup>

### Wrong forum for adjudication of safety aspects

Based on an *effet utile* reading of the provisions of Article 38 of the Asylum Procedures Directive, the connection criterion consists in a self-standing assessment of the reasonableness of an applicant’s transfer to a third country, separate from scrutiny of the country’s compliance with the safety criteria. The two thus represent discrete stages in the process of application of the safe third country concept.

Greek practice, however, demonstrates a significant degree of conflation of safety and connection considerations on the part of asylum authorities. Whereas admissibility decisions at first instance may be issued on non-fulfilment of any of the safety or connection criteria, nearly all positive decisions of IAC are based on the absence of a connection between the applicant and the third country. As discussed in [Safety Criteria: Substantive Standards](#), the connection criterion seems to be used by IAC as a forum for adjudicating safety considerations in the safe third country context. This has led judges different Committees to conclude on the absence of a sufficient connection between applicants and Türkiye even where the underlying reasons directly relate to the safety criteria of Article 38(1) of the Asylum Procedures Directive. Examples in IAC case law include:

- ❖ the country’s direct involvement in conflict and displacement from the country of origin e.g. Syria;<sup>136</sup>
- ❖ ill-treatment of applicants by the authorities;<sup>137</sup>

<sup>133</sup> Article 25(6) and Recital 33 Asylum Procedures Directive.

<sup>134</sup> **2<sup>nd</sup> IAC**, 548632/2022, 20 September 2022, para V.2; **4<sup>th</sup> IAC**, 628380/2022, 21 October 2022, para 10; **5<sup>th</sup> IAC**, 39744/2023, 20 January 2023, para 16; 594684/2022, 10 October 2022, p. 7; 563007/2022, 27 September 2022, para 18; **7<sup>th</sup> IAC**, 15939/2022, 12 January 2022, p. 19; **10<sup>th</sup> IAC**, 431472/2022, 25 July 2022, para B.8; 26904/2020; 25277/2020, 19 January 2021; **15<sup>th</sup> IAC**, 300763/2023, 12 June 2023, para 39; **16<sup>th</sup> IAC**, 29605/2021, 24 February 2021; **17<sup>th</sup> IAC**, 144971/2023, 10 March 2023, para IV.3.

<sup>135</sup> For recent examples, **5<sup>th</sup> IAC**, IP/296129/2023, 22 November 2023; **6<sup>th</sup> IAC**, IP/312088/2023, 28 November 2023; **15<sup>th</sup> IAC**, IP/20208/2024, 10 January 2024.

<sup>136</sup> **4<sup>th</sup> IAC**, 3444/2020, 16 March 2020, p. 12; 3441/2020, 16 March 2020, pp. 20-21; 3226/2020, 16 March 2020, pp. 21-22; **20<sup>th</sup> IAC**, 260375/2021, 21 September 2021, para B.3; 260356/2021, 21 September 2021, para B.3; 29118/2020, 19 January 2021, para B.5; **21<sup>st</sup> IAC**, 398486/2021, 19 November 2021, pp. 19-20; 297470/2021, 7 October 2021; 28217/2020, 17 December 2020, p. 13.

<sup>137</sup> **4<sup>th</sup> IAC**, 465274/2021, 17 December 2021, p. 10; **17<sup>th</sup> IAC**, 292768/2023, 8 June 2023, para IV.3.

- ❖ risks of gender-based violence, exploitation and discrimination;<sup>138</sup>
- ❖ discrimination on sexual orientation grounds;<sup>139</sup>
- ❖ targeting of particular ethnic groups e.g. Syrian Kurds;<sup>140</sup>
- ❖ lack of access to the asylum procedure and to health care and employment.<sup>141</sup>

These elements would substantiate the admissibility of the individual asylum applications on grounds of safety and would arguably provide grounds to reconsider the legislative designation of the country as a safe third country. Adjudicating these under the connection criterion runs the risk of downplaying general deficiencies of the third country's protection system as issues linked to the circumstances of the particular case at hand and thereby to contribute to a lack of principled, consistent decision-making.

### The prospect of readmission to the third country

Article 38(4) of the Asylum Procedures Directive provides that "Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given..."

According to established CJEU case law, Member States wishing to dismiss an asylum claim as inadmissible must comply with "the cumulative conditions laid down in Article 38(1) to (4)" of the Asylum Procedures Directive.<sup>142</sup> States such as Greece, however, have contested their duty to assess the prospects of readmission prior to dismissing an asylum claim as inadmissible based on the safe third country concept.

#### Threshold of impossibility of readmission

[It] is legally irrelevant whether refusal or inability of the third country to admit the applicant on its territory within a reasonable period of time, which may be explicitly expressed or may be inferred from the circumstances, is owed to reasons related to the

<sup>138</sup> **4<sup>th</sup> IAC**, 301027/2022, 27 May 2022, p. 14; 270314/2022, 16 May 2022, p. 26; **5<sup>th</sup> IAC**, 39744/2023, 20 January 2023, para 16; 563011/2022, 27 September 2022, para 16; 563008/2022, 27 September 2022, para 16; 563007/2022, 27 September 2022, para 18; 202299/2021, 25 August 2021, para 21; 12366/2020, 14 September 2020, pp. 14-15; 12365/2020, 2 October 2020, pp. 14-15; **16<sup>th</sup> IAC**, 85916/2023, 10 February 2023, para V.2; **18<sup>th</sup> IAC**, 24756/2020, 18 March 2021, pp. 9-10; **20<sup>th</sup> IAC**, 26661/2020, para 4; **21<sup>st</sup> IAC**, 690292/2022, 18 November 2022, pp. 14-15; 467020/2021, 20 December 2021, pp. 16-17.

<sup>139</sup> **19<sup>th</sup> IAC**, 352303/2022, 20 June 2022, para 14.

<sup>140</sup> **15<sup>th</sup> IAC**, 300763/2023, 10 February 2023, para 39; **17<sup>th</sup> IAC**, 144971/2023, 10 March 2023, para IV.3; **20<sup>th</sup> IAC**, 260375/2021, 21 September 2021, para B.5; 29118/2020, 19 January 2021, para B.5.  
<sup>141</sup> **2<sup>nd</sup> IAC**, IP/142459/2023, 25 September 2023, p. 29; **5<sup>th</sup> IAC**, 563007/2022, 27 September 2022, para 18; **17<sup>th</sup> IAC**, 297832/2023, 9 June 2023, para IV.3; **20<sup>th</sup> IAC**, 29118/2020, 19 January 2021, para B.5; **21<sup>st</sup> IAC**, 87590/2023, 10 February 2023, p. 17; 710801/2022, 28 November 2022, pp. 14-15.

<sup>142</sup> **CJEU**, C-924/19 PPU *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, 14 May 2020, para 153; C-564/18 *Bevándorlási és Menekültügyi Hivatal (Tompá)*, 19 March 2020, paras 36, 40, 41.



particular applicant, to objective circumstances or finally to differences of interpretation of the terms of the readmission agreement between the parties concerned.<sup>143</sup>

The European Commission has clarified the circumstances required for the applicability of Article 38(4) of the Directive as follows:

Different factual or legal situations may result in an applicant not being permitted to enter the territory of a country designated as a safe third country in accordance with Article 38 of the Asylum Procedures Directive. Such situations include the suspension by either party of a bilateral readmission agreement, or the failure by the third country to respond within the relevant deadlines to readmission requests made by the Member State.<sup>144</sup>

The state of the Greece-Türkiye context undoubtedly gives rise to circumstances triggering Article 38(4) of the Asylum Procedures Directive, given that no returns of rejected asylum seekers have taken place since 2020 and Türkiye:<sup>145</sup>

- ❖ Has declared its intention to refrain from implementing the EU-Turkey Readmission Agreement in relation to third-country nationals;
- ❖ Has unilaterally suspended the Greece-Turkey Bilateral Readmission Protocol since 2018;
- ❖ Has stopped accepting returns under the EU-Turkey Statement since 2020.

Against that backdrop, Greek courts consistently hold that detention for the purpose of readmission to Türkiye is in breach of Article 15(4) of the Return Directive<sup>146</sup> on account of the absence of reasonable prospects of removal, both from the islands<sup>147</sup> and the mainland.<sup>148</sup>

<sup>143</sup> **19<sup>th</sup> IAC**, 761318/2022, 19 December 2022, para 5; 441361/2021, 8 December 2021, para 5.

<sup>144</sup> European Commission, Reply to written question E-1347/2022, 22 June 2022.

<sup>145</sup> European Commission, *2023 Türkiye Report*, SWD(2023) 696, 8 November 2023, p. 53. See also **Greek Council of State**, 177/2023 [Plenary], 3 February 2023, para 41.

<sup>146</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 ("Return Directive").

<sup>147</sup> **Administrative Court of Rhodes**, AP127/2022, 1 December 2022; AP116/2022, 7 October 2022; AP114/2022, 7 October 2022; AP111/2022, 20 September 2022; AP99/2022, 11 August 2022; AP96/2022, 11 August 2022; AP79/2022, 21 June 2022; AP78/2022, 21 June 2022; AP72/2022, 25 May 2022; AP46/2022, 24 March 2022; AP515/2021, 16 December 2021; AP514/2021, 16 December 2021; AP450/2021, 3 November 2021; AP449/2021, 3 November 2021; AP136/2021, 24 March 2021.

<sup>148</sup> **Administrative Court of Athens**, AP831/2022, 26 May 2022; **Administrative Court of Kavala**, AP1098/2023, 29 November 2023; AP728/2023, 24 July 2023; AP504/2023, 12 May 2023; AP835/2022, 2 August 2022; AP779/2022, 14 July 2022; **Administrative Court of Komotini**, AP309/2023, 16 June 2023; **Administrative Court of Corinth**, Π4473/2022, 6 December 2022; Π4248/2022, 15 November 2022; Π4194/2022, 9 November 2022; Π4123/2022, 31 October 2022; Π4118/2022, 27 October 2022; Π3633/2022, 17 October 2022; Π3179/2022, 21 September 2022; Π3166/2023, 19 September 2022; Π2814/2022, 20 July 2022; Π2424/2022, 24 June 2022.



Yet, the absence of readmission prospects to Türkiye has not affected the implementation of the safe third country concept whatsoever.<sup>149</sup> Greece has dismissed over 10,000 claims as inadmissible since the complete halt of returns to Türkiye and continues to do so at the time of writing. The Greek Asylum Service and majority of IAC disregard the matter altogether, even in the face of express statements and/or official Hellenic Police documentation put forward by applicants.<sup>150</sup> Only a few exceptions in IAC decisions (rightly) apply Article 38(4) of the Directive due to the unilateral suspension of readmissions by Türkiye,<sup>151</sup> while in cases of unanswered readmission requests some Committees have found that failure to respond to a request within the deadlines set by the Greece-Turkey Bilateral Readmission Protocol should be construed as tacit rejection.<sup>152</sup> Other IAC take the incorrect view that the provision requires an “explicit refusal of entry”.<sup>153</sup>

### Stage of assessment of readmission prospects

Where they do grapple with the complete absence of readmission prospects to Türkiye, IAC take the view that Article 38(4) of the Asylum Procedures Directive comes into play only at the stage of “execution” of a decision declaring the asylum application inadmissible. They therefore refuse to assess the implications of a refusal of readmission prior to the delivery of a final rejection of the asylum claim and dismiss related submissions as “premature”.<sup>154</sup>

Few Committees have held so far that the lack of readmission prospects should preclude the dismissal of the asylum application as inadmissible:

[Where] it is certain, based on practice followed by a particular country either generally or for certain groups of persons or individually for the applicant, that that country shall not admit the applicant’s entry on its territory and where a change in its position is not likely to occur in the near future, then it must be accepted that the relevant application shall not be dismissed as inadmissible on the basis that said country is a “safe third country” for that applicant, even where that country fulfils the substantive criteria set out in article 38 of Directive 2013/32/EU and [article 91 of the Greek Asylum Code].<sup>155</sup>

<sup>149</sup> RSA & PRO ASYL, *Greece arbitrarily deems Turkey a “safe third country” in flagrant violation of rights*, February 2022, available [here](#).

<sup>150</sup> RSA & HIAS, *The role of the European Commission in the implementation of the EU asylum acquis on the Greek islands*, January 2023, para 36, available [here](#); RSA et al., *The state of the border procedure on the Greek islands*, September 2022, p. 23, available [here](#).

<sup>151</sup> **10<sup>th</sup> IAC**, 151657/2023, 14 March 2023, pp. 6-8; 83008/2023, 9 February 2023, para 5; **19<sup>th</sup> IAC**, 761318/2022, 19 December 2022, para 8; 441361/2021, 8 December 2021, para 10; **20<sup>th</sup> IAC**, IP/266426/2023, 10 November 2023; IP/36908/2023, 28 July 2023, para 11; IP/21911/2023, 18 July 2023; para 5; 91410/2023, 14 February 2023, para 9; **21<sup>st</sup> IAC**, 115795/2022, 28 February 2022, pp. 22-23; 364000/2021, 4 November 2021, pp. 22-23.

<sup>152</sup> **3<sup>rd</sup> IAC**, 345521/2022, 16 June 2022, para III.5.

<sup>153</sup> **2<sup>nd</sup> IAC**, 171515/2023, 23 March 2023, p. 20.

<sup>154</sup> **6<sup>th</sup> IAC**, 217698/2022, 18 April 2022, pp. 7-8. See also **12<sup>th</sup> IAC**, 168365/2023, 22 March 2023, p. 5

<sup>155</sup> **3<sup>rd</sup> IAC**, 345521/2022, 16 June 2022, para III.5; **21<sup>st</sup> IAC**, 115795/2022, 28 February 2022, pp. 22-23; 364000/2021, 4 November 2021, pp. 22-23.

The 177/2023 judgment of the Greek Council of State on the legality of the Greek safe third country list has referred questions to the CJEU for a preliminary ruling in Case C-134/23 *Elliniko Symvoulío gia tous Prosfyges* regarding the stage at which Member States should assess a third country's prolonged and demonstrated refusal to readmit applicants. The Luxembourg Court has been requested to clarify whether under Article 38 of the Asylum Procedures Directive, read in light of Article 18 of the EU Charter on the right to asylum, such an assessment should be made upon: (i) designation of the country as generally safe; (ii) rejection of the individual asylum application; or (iii) execution of the decision and return to the third country.<sup>156</sup> The hearing of the case is set for 14 March 2024.

The majority judgment of the referring Greek court favours the first interpretation. It supports the position that a third country's protracted refusal to comply with its readmission obligations should preclude even its designation as a safe third country.<sup>157</sup> This reasoning finds support in Recital 44 of the Asylum Procedures Directive, in the overall objective of the Directive to promote rapid examination of asylum claims,<sup>158</sup> and in case law of other domestic jurisdictions.<sup>159</sup>

#### Access to the procedure upon refusal of readmission

Article 38(4) of the Asylum Procedures Directive requires Member States to ensure that "access to a procedure is given" to an applicant who cannot be admitted to the territory of a safe third country. The provision, however, stops short of prescribing how Member States are to procedurally provide such access. The ambiguity of Article 38(4) is in contrast to more prescriptive rules laid down namely in Article 28(2) of the Directive on implicit withdrawal, which instructs Member States to allow the applicant the possibility to request that the case "be reopened" or "make a new application which shall not be [considered a subsequent application]" within a nine-month deadline.<sup>160</sup>

Recalling Greek practice as described above, asylum authorities dismiss asylum applications as inadmissible without any consideration of the demonstrated lack of readmission prospects to Türkiye, subject to very few exceptions. In addition, IAC maintain the view that their safe third country decisions constitute "final decisions" and consistently refuse to withdraw their decisions under general administrative law provisions on the withdrawal of administrative acts.<sup>161</sup>

<sup>156</sup> CJEU, C-134/23 *Elliniko Symvoulío gia tous Prosfyges*, Reference 7 March 2023.

<sup>157</sup> **Greek Council of State**, 177/2023 [Plenary], 3 February 2023, para 38.

<sup>158</sup> Article 31(2) and Recital 18 Asylum Procedures Directive. See also **21<sup>st</sup> IAC**, 115795/2022, 28 February 2022, pp. 10-11; 364000/2021, 4 November 2021, pp. 10-11: the opposite view "would solely result in unnecessarily delaying the examination procedure, since following the refusal of the third country to admit the applicant on its territory their application would in any case have to be examined on the merits by the competent Decision-Making Authorities."

<sup>159</sup> **Dutch Council of State**, 201704433/1, 13 December 2017; 201703605/1, 13 December 2017; 201609584/1, 13 December 2017.

<sup>160</sup> Minos Mouzourakis, '«Ασφαλής τρίτη χώρα» χωρίς επιστροφή – Αδυναμία επανεισοχής και απόρριψη αιτήσεων ασύλου ως απαραδέκτων στην επίκαιρη νομολογία' in UNHCR (ed), *Επετηρίδα Δικαίου Προσφύγων και Αλλοδαπών 2021-2022* (Sakkoulas 2024).

<sup>161</sup> *Ibid.*

This leaves asylum seekers with no option but to make a “subsequent application” for international protection in order to gain “access to a procedure”. Yet, further legal and practical barriers severely obstruct such access:<sup>162</sup>

- ❖ The registration of asylum applications is marred by protracted delays well exceeding the deadlines set by Article 6 of the Asylum Procedures Directive;
- ❖ Subsequent applications must present “new elements” or are otherwise dismissed as inadmissible in the context of a preliminary admissibility assessment, in line with Article 40(2)-(3) of the Asylum Procedures Directive;<sup>163</sup>
- ❖ The Greek Asylum Service and IAC are instructed by a July 2021 to examine whether applicants have put forward “new elements” regarding their situation in Türkiye for the purposes of the preliminary admissibility assessment;
- ❖ The Greek Asylum Service and IAC refuse to consider the impossibility of readmission as a “new element” and dismiss such claims as inadmissible for want of new elements pursuant to Article 33(2)(d) of the Asylum Procedures Directive.<sup>164</sup> Authorities other grounds to substantiate “new elements” in subsequent claims, such as the absence of a connection due to the lapse of a twelve-month period from the applicant’s entry into Greece, as discussed in [Connection Criterion](#).

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<sup>162</sup> RSA & HIAS, *The role of the European Commission in the implementation of the EU asylum acquis on the Greek islands*, January 2023, paras 39-40; RSA et al., *The state of the border procedure on the Greek islands*, September 2022, pp. 23-24.

<sup>163</sup> The only known exception is **4<sup>th</sup> IAC**, 157571/2022, 18 March 2022, p. 7, which held that a decision applying the safe third country concept is not a “final decision” and that any claim made thereafter should not be construed as a “subsequent application”. Similar reasoning may be inferred from **19<sup>th</sup> IAC**, 761318/2022, 17 December 2022, para 8, stating that the enforceability of the applicant’s safe third country decision “is... conditioned upon acceptance by the Turkish authorities of his readmission to Türkiye and the conclusion of said procedure within a reasonable period of time in line with the readmission agreement in force”.

<sup>164</sup> Among others, **3<sup>rd</sup> IAC**, 8620/2022, 7 January 2022, para IV.3; **4<sup>th</sup> IAC**, 81259/2022, 11 February 2022, p. 5; **11<sup>th</sup> IAC**, 109901/2022, 24 February 2022, para 14. See also **4<sup>th</sup> IAC**, 157571/2022, 18 March 2022, pp. 7-8, dismissing the application as manifestly unfounded on the ground that it was lodged for the sole purpose of delaying return. For exceptions, **19<sup>th</sup> IAC**, 761318/2022, 17 December 2022, para 10; 441361/2021, 8 December 2021, para 10 on account of failure to readmit the applicant within a reasonable period of time.

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