

First Section
European Court of Human Rights
Council of Europe
67075 Strasbourg-Cedex

Paris, 20 September 2017

Subject: Third-party intervention in case J.B. v. Greece, application n°54796/16

To the President of the First Section of the European Court of Human Rights,

Pursuant to the letter of 31 August 2017 granting Gisti and the International Federation For Human Rights (“FIDH”) leave to make written submissions, we are immensely honoured to file a third-party intervention in the case JB v. Greece (Application n°54796/16).

The case at stake raises difficult questions regarding **access to and the effectiveness of rights** that migrants enjoy pursuant to articles 3 and 13 of the Convention in the context of the migration policies in Europe, particularly following the creation of “hotspots” to manage migration flows, as well the conclusion of the EU-Turkey “statement”, that deems Turkey a safe country of return for persons seeking international protection. From the very outset, this statement came under attack from both reputable NGOs and international and European bodies,¹ that have collectively expressed fears about Greek hotspots quickly being transformed into mere holding centres, thus clearing the way for *en masse* returns at the expense of migrants’ fundamental rights. In parallel, the worrying evolution in the political situation in Turkey casts doubt on the notion that this country should be considered safe for returned asylum-seekers.

By filing a third-party intervention in this case, Gisti and FIDH intend to deal with matters regarding Turkey being considered a safe-third country for asylum-seekers returned from the Greek hotspots as concerns a violation of article 3 alone, (**part 1**), as well as on the absence of adequate procedural guarantees for migrants on the Greek island of Lesbos, as concerns a violation of article 3 alone and article 3 read in conjunction with article 13. (**part 2**)

*

1. Turkey as a safe third country for readmitted asylum-seekers and migrants?

As a preliminary observation, it is important to point out that, in the current context, international organisations, national and international refugee and human rights NGOs and other monitoring bodies have extremely limited access to asylum-seekers in Turkey following their readmission from Greece. While limited monitoring could be conducted immediately following the conclusion of the EU-Turkey statement, very little has been published since early 2016.²

¹ See, for example: United Nations High Commissioner for Refugees (“UNHCR”), 24 March 2016, *UN rights chief expresses serious concerns over EU-Turkey agreement*; The Guardian, *Refugee crisis: key aid agencies refuse any role in 'mass expulsion'*, 23 March 2016.

² For instance, Mülteci-Der’s last observations on the refugee situation in Turkey, which note concerns on forced voluntary returns and deportations from Turkey to Syria, the arbitrary detention of Syrian refugees and the absence of guarantees for Syrian nationals to access temporary protection following readmission, date back to April 2016. The last official publication from Refugee Rights pre-dates the EU-Turkey statement.

Specifically in relation to Syrian nationals, UNHCR has publicly acknowledged that it “*does not benefit at this stage from unhindered and predictable access to pre-removal centres in Turkey and to the Düzici reception centre*”.³ Following readmission, Syrian nationals are held in this reception centre, one of several facilities in Turkey funded by the European Union, located in Osmaniye province, 200 kilometres from Aleppo. An increasingly challenging national context for human rights defenders and refugee rights organisations following the July 2016 failed *coup* attempt has only exacerbated these difficulties.⁴ The cumulative result is that “*nobody knows what exactly happens*”, with civil society organisations “*running against walls*” trying to get information from the Turkish authorities and admitting that they “*neither know who exactly is detained, on what exact legal ground, for how long nor ... the conditions they are facing. Nobody knows what is going on*”.⁵

However, from the limited information on the situation of asylum-seekers readmitted from Greece to Turkey that our organisations have been able to gather, it is possible to identify a systemic and real risk of *refoulement* in the Turkish legal framework for international protection (1.1); as well as a risk of exposure to reception and detention conditions that may amount to inhuman or degrading treatment (1.2).

1.1 Legal framework for international protection in Turkey: systemic risk of *refoulement*

It is well known that Turkey applies a geographical limitation to the 1951 Refugee Convention, restricting its protection to European nationals. In April 2014, Turkey’s Law on Foreigners and International Protection (“LFIP”) came into force, which created the Directorate General for Migration Management (“Directorate General”) charged with managing asylum and migration in Turkey and, for the first time, established a dual protection system for non-European nationals.⁶

Refugees from Syria are provided with “temporary protection” as a group (with applicable procedures and principles set out in the accompanying Temporary Protection Regulation), whereas asylum-seekers from other countries may be granted one of three “individual protection” statuses (as either a refugee, conditional refugee or a recipient of subsidiary protection).⁷ The implementation of this new system has been criticised by human rights groups, and there is a concerning information gap, particularly in relation to non-Syrian applicants for individual protection.⁸

The principle of *non-refoulement*, in line with international standards, is enshrined in LFIP, article 4. Section 4 of the Law envisages the removal of foreign nationals through “removal decisions” taken by the Directorate General, or the governorate with which the relevant application for protection was filed. A person subject to a removal decision may be removed to their country of origin, a transit country or a third country. Categories of persons against whom such a decision can be issued are set out in LFIP, article 54(1)(a) to (j), and includes members of a terrorist or criminal organisation, persons who have falsified documents, who have entered Turkey or are in the country irregularly, and who pose a threat to public order, to public health or to national security. Certain persons – such as those who face a risk of torture or inhuman treatment, who face serious health risks, or victims of trafficking or physical, psychological and sexual violence) are exempt from refusal decisions under LFIP, article 55. It is possible to appeal a

³ UNHCR, Representation in Greece, *Response to query related to UNHCR’s observations of Syrians readmitted to Turkey*, GREAT/HCR/973, 23 December 2016.

⁴ There has been a nationwide crackdown on journalists, civil society and members of the political opposition. For example, in July 2017, nine leading human rights defenders were arrested on baseless charges (see BBC News, *Turkey police hold rights activists including Amnesty chief*: <http://www.bbc.com/news/world-europe-40517184>). Recently, several press articles targeting NGOs working in favour of migrants’ rights have also been published (see, for example (in Turkish), <http://www.hur24.com/almanvakiflari-turkiyede-sinsi-faaliyetler-yurutuyor-33986h.htm>).

⁵ ProAsyl, ‘*Nobody knows what exactly happens*’ – the situations of refugees sent back to Turkey, 6 June 2016, available at: <https://www.proasyl.de/en/news/nobody-knows-what-exactly-happens-the-situation-of-refugees-sent-back-to-turkey/>.

⁶ Republic of Turkey, *Law No. 6458 on Foreigners and International Protection* (“LFIP”), 4 April 2013, available at: http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf.

⁷ *Ibid.* articles 91 and 61-63; and *Temporary Protection Regulation*, 22 October 2014, available at http://www.goc.gov.tr/files/_dokuman28.pdf.

⁸ Amnesty International, *No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey*, June 2016, available at <https://www.amnesty.org/en/documents/eur44/3825/2016/en/>.

removal decision to the administrative courts under LFIP, article 53. Removals are suspended during the appeal (which should be decided within 15 days) and an appeal decision is definitive. Under the Temporary Protection Regulation (“TPR”), protection can be refused or cancelled (if already granted) in accordance with the provisions of article 8, which in some respects reflects LFIP, article 54, though it is framed more broadly.

Furthermore, under TPR, article 12(1), temporary protection is terminated on an individual basis when the person concerned leaves Turkey of their own free will, If such a person later returns to Turkey, in accordance with the provisions of article 13, the Directorate General has discretion to decide whether to reinstate temporary protection. For Syrian nationals readmitted from Greece after 20 March 2016, a temporary clause was added to the TPR according to which temporary protection *may* be granted, regardless of their previous status in Turkey.⁹ However, as noted by the Turkish NGO, Mülteci-Der, this amendment does not guarantee any automatic access (or re-access) to temporary protection for Syrian nationals, and there is no clarification as to what happens if protection is not granted, generating a concern for that returned Syrians would be forced to live in a camp against their wishes, or intimidated into asking for a “voluntary” return to Syria.¹⁰ Accessing temporary protection for returned non-Syrians is an even greater challenge. **Thus, temporary protection, even when granted, is a very fragile protection, particularly in cases of re-entry into Turkey.**

Since the entry into force of both the LFIP and the TPR, and notably following the failed *coup* attempt in July 2016, the situation in Turkey has evolved considerably. Shortly after the attempted *coup*, the Turkish Government declared a state of emergency throughout the country for a period of 90 days, that has been consecutively extended for three-month periods in October 2016, January 2017, April 2017 and July 2017, and allows the government to enact “emergency decree laws” subject only to limited *ex post* parliamentary scrutiny.¹¹

Certain of these decrees have made significant inroads into the Turkish system of protection for asylum-seekers in general, and specifically concerning protection from *refoulement*.

Executive Decree 676, enacted on 29 October 2016,¹² amends the LFIP provisions on removal decisions. Article 35 *Cancels* the suspensory effect of any appeal for persons falling under LFIP, article 54(1)(b): leaders, members or supporters of a terrorist organisation or a benefit oriented criminal organisation); (d): persons who pose a public order or public security or public health threat; and those deemed to be “affiliated” with organisations determined to be terrorist organisations by international organisations or associations (an *addition* to the LFIP categories of persons who may be subject to a removal decision as article 54(1)(k)). The scope of this additional category is not further defined, which creates a risk that it may be applied arbitrarily. Furthermore, Article 36 allows for the issuance of a removal decision *at any stage* of the status determination procedure, including in relation to *existing* beneficiaries of international protection. In addition, under the terms of Executive Decree 688, enacted on 29 March 2017,¹³ no court order can suspend administrative decisions taken under emergency decrees issued during the state of emergency (including, removal decisions).

The combined effect of these provisions significantly reduces (if not extinguishes) the availability of effective remedies as regards removal decisions based on LFIP, article 54(1)(b), (d) or (k) (as amended). This represents a significant inroad to the principle enshrined in LFIP, article 4, and generates a serious systemic risk of *refoulement*. This risk is heightened in relation to ethnic or religious minorities, who

⁹ Council of Ministers, Decision no. 2016/8722, 5 April 2016. *See*, Mülteci-Der observations, April 2016, note 2 *supra*, p.6.

¹⁰ Mülteci-Der observations, April 2016, note 2 *supra*, p.6.

¹¹ Venice Commission, *Opinion on emergency decree laws nos. 667-676 adopted following the failed coup of 15 July 2016*, December 2016, available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)037-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e).

¹² Available at: <http://www.resmigazete.gov.tr/eskiler/2016/10/20161029-5.htm> (in Turkish).

¹³ Available at: <http://www.resmigazete.gov.tr/eskiler/2017/03/20170329M1-1.htm> (in Turkish).

suffer from widespread human rights violations across Turkey,¹⁴ as well as persons subject to a particular vulnerability, for whom there is no specific protection framework.

Despite the constraints on monitoring and documentation work referred to above, there is consistent and compelling evidence of the very real risk of direct *refoulement* facing Syrian nationals who receive, or are seeking to receive, temporary protection in Turkey.¹⁵ Between January and April 2016, Amnesty International recorded the large-scale forced return of nearly 100 Syrian men, women and children to Syria from Hatay province in southern Turkey on a nearly daily basis. Among those deported were unaccompanied children, pregnant women and elderly people in need of urgent medical care, as well as those who were returned while attempting to register for temporary protection.¹⁶ Amnesty has also documented *refoulement* cases involving Afghan and Iraqi nationals, revealing the systematic nature of this practice by the Turkish authorities.¹⁷

As a result, non-European nationals seeking international protection in Turkey do not benefit from effective guarantees to protect them from exposure to a real risk of being subjected to inhuman or degrading treatment. In *Ilias and Ahmed v. Hungary* (ECtHR, 14 March 2017, Application no. 47287/15), the Court considered that this situation amounted to a violation of Article 3 of the Convention.

1.2 Reception and detention conditions in Turkey: risk of inhuman or degrading treatment

From the limited information available, it is understood that Syrian nationals returned to Turkey are transferred to Adana, where they are held in the Düziçi camp. Officially, the detention of Syrians is only for registration purposes, but returnees have been detained without being informed of the reason for and length of their detention, and without access to lawyers and to adequate medical treatment.¹⁸ The arbitrary detention of 12 Syrians (including four children) for three weeks following their arrival in Turkey has been documented.¹⁹

Little is known about the living conditions in Düziçi. According to one documented case, the conditions were so bad that a Syrian woman with four children asked to be returned to Syria rather than stay on in the camp.²⁰ To our knowledge, there is no provision for specialised care for vulnerable returnees, including returnees who suffer from psychological conditions. Nor are any specific protections provided for ethnic and religious minorities. There is evidence that Syrian refugees (including children) who voluntarily return to Turkey from Greece have been subject to human rights violations in Turkey, including arbitrary detention and denial of access to legal representation as well as specialised medical care, which may amount to violations of article 3 as well as other rights enshrined in the Convention.²¹

These and other serious deficiencies in the Turkish system of international protection have led asylum and human rights organisations to unanimously denounce Turkey as a country that should not be considered either as a safe first country of asylum nor a safe third country, and certainly not without a

¹⁴ See, for example, US Department of State, Turkey Human Rights Report, 2016, available at: <https://www.state.gov/documents/organization/265694.pdf>.

¹⁵ See, publications by Amnesty International including: *Europe's Gatekeeper: Unlawful Detention and Deportations of Refugees from Turkey*, December 2015, available at: www.amnesty.org/en/documents/eur44/3022/2015/en/; *Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey Deal*, April 2016, available at: <https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>; and *No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey*, June 2016.

¹⁶ Amnesty International, *Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey Deal*, April 2016.

¹⁷ Amnesty International, *Europe's Gatekeeper: Unlawful Detention and Deportations of Refugees from Turkey*, December 2015.

¹⁸ Tunaboylu and Alpes, *The EU-Turkey Deal: what happens to people who return to Turkey?* Forced Migration Review (54), February 2017, p. 84.

¹⁹ Amnesty International, *Syrians returned from Greece, arbitrarily detained*, 19 May 2016, available at <https://www.amnesty.org/en/documents/eur44/4071/2016/en/>.

²⁰ Tunaboylu and Alpes, note 18 *supra*, p. 86.

²¹ Amnesty International, *Syrians returned from Greece, arbitrarily detained*, 19 May 2016; The Guardian, *Syrians returned to Turkey under EU Turkey Deal 'have had no access to lawyers'*, 16 May 2016, available at: <https://www.theguardian.com/world/2016/may/16/syrians-returned-to-turkey-after-eu-deal-complain-of-treatment>.

detailed, individualised assessment of each asylum-seeker's case.²² At various intervals, several European courts have also determined that Turkey is not a safe country for asylum-seekers.²³ However, as discussed in part (2) the application procedures in place in the Greek hotspots fall well short of the standards required by article 3 of the Convention, as well as article 3 read in conjunction with article 13.

*

2. Migrants' procedural rights under article 3, and article 3 in conjunction with article 13

In light of recent reports by reputable NGOs and international organisations, Gisti and FIDH will stress that the current legal framework in Greece and the situation in the Greek hotspots might give rise to systematic violations of the procedural rights of migrants detained in the hotspots, and readmitted to Turkey. Such a situation is at odds with the Court's well-established case-law on article 3 (2.1) and article 3 read in conjunction with article 13 (2.2).

2.1 Systemic violations of procedural guarantees under article 3 in the Greek hotspots

A) The obligation to conduct *proprio motu* assessment of the risks under article 3

In light of the Court's well-established case law on the matter, it is in principle for the person seeking international protection in a contracting State to submit, as soon as possible, his claim for asylum with the reasons in support of their claim, and to adduce evidence that there are substantial grounds for believing that deportation to a third country would entail a real and concrete risk of treatment in breach of Article 3 (ECHR, 5th chamber, *FG v. Sweden*, 12 January 2014, Application no. 43611/11, §125). However, the Court has recognized that anyone subject to a removal measure with potentially irreversible consequences has the right to obtain sufficient information in order to facilitate the task of substantiating their claim. **In this respect, the Court has constantly recalled that in expulsion cases where a claim under article 3 is based on a well-known general risk and information about such a risk, article 3 of the Convention requires States to carry out a risk assessment of their own initiative, including the risk of chain-refoulement. (ECtHR, Gr. Chamber, 21 January 2011, *M.S.S. v. Belgium*, Application no. 30696/09, §115). Furthermore, the Court has found that there is a positive duty on national authorities, when necessary in light of the circumstances, to go beyond the evidence provided by the applicant and use diverse sources of current information in order to gain a clearer understanding of the situation in the receiving country.**²⁴

In conducting such a *proprio motu* assessment, **diplomatic assurances** are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment, and the weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time. Thus, States should always pay great attention to materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations (*see* for example: ECtHR, 11 January 2007, *Salah Sheekh*, Application no. 1948/04, §136; ECtHR, 7 June 2007; *Garabayev v. Russia*, Application no. 38411/02, §74).

This obligation to carry out a risk assessment *proprio motu* is all the more important in cases where persons are detained while seeking asylum and in a situation of vulnerability that requires more thorough care and attention, given the difficulty they may face in substantiating their claim. The length of the

²² FIDH and IHD joint press release, *Is Turkey A Safe Country?*, 31 October 2016, available at <http://en.ihd.org.tr/index.php/2016/10/31/turkey-a-safe-country/>; Ulusoy, *Turkey as a Safe Third Country?*, 29 March 2016, available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-thir>; Tunaboynu and Alpes, note 18 *supra*, p. 84.

²³ *See*, for instance, High Court of England and Wales, *The Queen on the application of Mr Husain Ibrahim, Mr Mohamed Abasi v The Secretary of State for the Home Department*, 5 August 2016, available at: <http://www.asylumlawdatabase.eu/en/case-law/uk-queen-application-mr-husain-ibrahimi-mr-mohamed-abasi-v-secretary-state-home-department>; and French Council of State, case n° 336034, 23 July 2017, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000022513066>.

²⁴ *See* for example: ECtHR, 31 May 2001, *Fatgan Katani and Others v. Germany*, Application no. 67679/01.

applicant's detention period is a key factor to be taken into account in determining vulnerability (ECtHR, 15 July 2002, *Kalashnikov v. Russia*, Application no. 47095/99, §102; ECtHR, 18 January 2005, *Kehayov v. Bulgaria*, Application no. 41035/98, §64; ECtHR, 8 November 2005, *Alver v. Estonia*, Application no. 64812/01, §50; ECtHR, 8 November 2005, *Ananyev and Others v. Russia*, Application nos. 42525/07 and 60800/08, §142). Moreover, an asylum-seeker can be very vulnerable because of their experience during their migration and the traumas they are likely to have endured previously (ECtHR, 6 March 2001, *Dougoz v. Greece*, Application no. 40907/98; ECtHR, 10 April 2001, *Peers v. Greece*, Application no. 28524/95; ECtHR, 1 June 2009, *S.D. v. Greece*, application no. 53541/07). It is thus frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof (see, among other landmark cases: ECtHR, 20 July 2010, *N. v Sweden*, Application no. 25035/09; ECtHR, 27 March 2008, *Hakizimana v. Sweden*, Application no. 37913/05; ECtHR, 8 March 2007; *Collins and Akaziebie v. Sweden*, Application no. 23944/05).

B) Readmission to a “safe third country”: the pressing need for a proprio motu risk assessment

In cases where asylum-seekers are returned to a third country on the sole basis that it can be deemed “safe”, the *proprio motu* risk assessment should be even more thorough, as recently set out by the Court in the recent Ilias and Ahmed case (ECtHR, 14 March 2017, *Ilias & Ahmed v. Hungary*, Application no. 47287/15). The Court found that Hungary had violated article 3 in returning applicants to Serbia on the sole basis that it was considered a safe third country by domestic law. Crucially, the Court stressed that Hungary's failure to conduct any risk assessment under article 3 involved a reversal of the burden of proof to the detriment of applicants, including the burden to prove the real risk of inhuman and degrading treatment in a chain-refoulement from Serbia to the Yugoslav Republic of Macedonia and, finally, Greece. In short, **the cumulative effect of both applicants in the case being detained for a long period and returned on the sole basis that the returning country is deemed safe, reverses the burden of proof and nullifies the protection provided by article 3 of the Convention. The reversed burden of proof upon them turns article 3 into a theoretical right that could never, in practice, benefit asylum-seekers, in view of the impossibility of substantiating their claims.** Further, an increasing influx of migrants cannot absolve a State of its obligations under article 3 (ECtHR, Gr. Chamber, 21 January 2011, *M.S.S. v. Belgium*, Application no. 30696/09, §223; ECtHR, Gr. Chamber, 23 February 2012, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, §122).

C) Procedures in the Greek hotspots and Turkey as a “Safe Third Country”: a reversal of the burden of proof to the applicants' detriment

Reports from reputable NGOs and international organisations reveal the insufficient assessment of asylum claims in the Lesbos hotspots under article 3, both at the material time of the present case and at present. The role of the European Asylum Support Office (“EASO”) in the assessment process also merits consideration.

A number of reports from European Union bodies as well as reputable NGOs have shown a systemic, long standing failure to provide migrants with an assessment of their claims that would meet the requirements under the Convention and of the Court's case law on the matter. The prominent role played by EASO interviews in the procedure, which are subsequently implemented by the Greek Asylum Service, is critical here, especially since these interviews apparently **fail to provide a critical evaluation** as to whether Turkey qualifies as a safe third country for a particular individual.

Of particular concern is the fact that a significant number of decisions to return asylum-seekers to Turkey are standardised, taken on the sole basis that Turkey should be considered a Safe Third Country, **without** any thorough and concrete investigations on the risks that a particular asylum-seeker may face once returned. In March 2016, just after the EU-Turkey statement was agreed, UNHCR expressed concerns about the respect of the procedural safeguards under Article 38(2) of the Procedures Directive II

in Greece, especially as concerns the lack of an individual examination procedure.²⁵ Recent reports show that the situation has not changed since the enactment of the new Greek Law 4375/2016 in April 2016. According to a report by the Italian NGO, ASGI, the Greek Appeals Committees now tend to grant most of the appeals concerning the inadmissibility of asylum applications based on the consideration that Turkey should be considered a safe third country or country of first asylum.²⁶ Also, it has been well documented that the border procedure, which provide very few possibilities for migrants to substantiate their claims, seems to be applied to all asylum applications submitted on the Aegean islands²⁷.

Similarly, in a report published one year after the implementation of the “hotspots” approach in Greece, the European Court of Auditors pointed out a number of significant shortcomings in the procedures applied, especially with regards to EASO’s on-site work. The report pointed out that coordination at the individual hotspot level was “*still fragmented*” and that “*although it has been established that the central authorities in the Member States are responsible for the overall management of the hotspots, at least in Greece, they have yet to take on this responsibility in full*”.²⁸ Moreover, the Court recalled the Commission’s September and November 2016 progress reports on the hotspots,²⁹ in which the commission called on Member States to step up their support for EASO in providing experts “*as the number of experts being deployed in Greece remains insufficient to cope with the increased number of asylum applications which need to be processed*”.³⁰ At the time of the September 2016 report, it was estimated that 100 asylum case workers (i.e. interviewers) were needed at the hotspots, yet only 41 had actually been deployed by EASO at the end of September 2016.³¹ In a manner similar to the European Commission and the European Court of Auditors, the European Parliament also expressed criticism over the lack of a clear legal framework concerning interviews conducted in the hotspots, and emphasised the great confusion over the **blurred sharing of responsibilities** between stakeholders onsite.³²

The effects of the lack of both human resources and legal clarity have recently been documented by the NGO, the European Center for Constitutional and Human Rights (ECCHR)³³ in a case-study across the Greek hotspots published in April 2017 in the context of a complaint before the European Ombudsman.³⁴ In this case report, ECCHR revealed that EASO officers conduct interviews and recommend a decision to the Greek Asylum Service (that is nearly always followed). EASO’s concluding remarks specify whether the safe third country concept may be applied in the particular case, and thereby provide the ground on which the application can be rejected as inadmissible. According to ECCHR, it is regular practice for the Greek Asylum Service to rely on EASO’s interview record without posing any direct questions to the applicant. However, the interviews conducted do not permit a fair assessment of individual cases, thus not allowing for a thorough investigation of vulnerabilities and, importantly, failing to provide a critical evaluation as to whether Turkey qualifies as a safe third country for the person concerned.

²⁵ UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, 23 March 2016, available at: <http://www.unhcr.org/56f3ec5a9.pdf>

²⁶ Associazione per gli studi giuridici sull’immigrazione (“ASGI”), *Europe’s laboratory. An idea for Europe*, September 2017, p.23, available at: <http://www.statewatch.org/news/2017/aug/greece-an-idea-for-europe.pdf>.

²⁷ *Ibid*, p.12

²⁸ European Court of Auditors, *EU response to the refugee crisis: the ‘hotspot’ approach*, April 2017, pp. 8 and 36, available at: http://www.eca.europa.eu/Lists/ECADocuments/SR17_6/SR_MIGRATION_HOTSPOTS_EN.pdf

²⁹ European Commission, Greece – State of Play Report, COM(2016) 85 ANNEX 2, 10 February 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_annex_02_en.pdf and European Commission, Progress Report on the Implementation of the hotspots in Greece, COM(2016) 141, 4 March 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_20160304_progress_report_on_the_implementation_of_the_hotspots_in_greece_en.pdf.

³⁰ European Court of Auditors, note 28 *supra*, April 2017, p.36.

³¹ *Ibid*, p.36.

³² European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *On the Frontline: The hotspot Approach to Managing Migration*, May 2016, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU%282016%29556942_EN.pdf.

³³ The NGO ECCHR has been granted leave to produce a third-party intervention before the 5th Section of the Court in the case “*El Haski v. Belgium*” (ECtHR, 25 September 2012, *El Haski v. Belgium*, Application no. 649/08, §76-79).

³⁴ ECCHR, *EASO’s influence on inadmissibility decisions exceeds the agency’s competence and disregards fundamental rights*, April 2017, available at: <http://www.statewatch.org/news/2017/may/eu-ecchr-case-report-greece-EASO.pdf>.

Recently, in a report published in July 2017, Amnesty International expressed concerns over the assessments in relation to Turkey as a safe third country, including in relation to the involvement of the European Asylum Support Office (EASO) in determining admissibility and interpreting an applicant's connection with Turkey.³⁵ In May 2017, Amnesty International met non-governmental organisations and lawyers working on the Greek islands to assist asylum seekers with their applications. According to Amnesty, all stakeholders raised concerns over the supposedly individualised nature of inadmissibility assessments drafted by EASO case workers; interviewed legal aid providers stated that the analysis often lacked any assessment of the specific characteristics of each case. Also, according to the report, EASO opinions fail to consider applicants' individual circumstances, even when these covered in detail during the interviews, and find the vast majority of applications inadmissible, regardless of the nationality of the applicant. This demonstrates, according to Amnesty, the pressure Greece is under to accept Turkey as a safe third country for Syrians and non-Syrians alike,³⁶ consistent with ECCHR's abovementioned report.

*

In addition to the practical impossibility of rebutting the presumption that Turkey is a safe third country the speed of the procedure and the lack of basic procedural guarantees provided to migrants amount to systemic violations of the procedural rights that migrants enjoy under article 3 read in conjunction with article 13.

2.2. Systemic violations of procedural guarantees for migrants under article 3 read in conjunction with article 13

The Greek asylum system is characterised by systemic shortcomings concerning procedural guarantees provided to asylum seekers. These shortcomings concern not only legislation and its gaps, but also its very implementation. As a result, the rights of asylum seekers are arguably neither real nor effective, with regard to article 3 read in conjunction with article 13 as construed in the Court's long-standing case-law on the matter. The Court has underlined that, when a fast-track procedure (accelerated procedure or border procedure) is applied to the initial application, and not to its re-examination, the effectiveness of the remedy provided may be called into question, given that the merits of the asylum application may never be assessed (ECtHR, *I.M. v. France*, Application No. 9152/09, 2 February 2012, §143). Indeed, speed should not be given priority at the expense of the effectiveness of procedural guarantees designed to protect the persons concerned from arbitrary refoulement (ECtHR, *I.M. v. France*, , §150); ECtHR, 3rd section, 24 April 2014, *A.C. and Others v. Spain*, Application no 6528/11, §§85-86; ECtHR, 2nd section, 21 October 2014, *Sharifi and others*, application no 16643/09, §§167-69).

Moreover, when language assistance is not being provided either during the preparation of the asylum claim or while the proceedings are ongoing, the Court has considered that the remedy provided to the applicant should not in principle be viewed as effective within the meaning of article 13, as it is not accessible. (ECtHR, *I.M. v. France*, §§145, 151, 155). The Court has also stressed the importance of providing applicants – not only vulnerable persons – affected by a removal measure the right to receive enough information about the content and nature of the proceedings, as well as information on how to reach organisations offering legal advice (ECtHR, Gr. Chamber, 21 January 2011, *M.S.S. v. Belgium*, Application no. 30696/09, §§304-309; ECtHR, Gr. Chamber, 23 February 2012, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, § 204). Finally, where a complaint concerns allegations that the person's expulsion would expose him to a real risk of suffering treatment contrary to Article 3 of the Convention, effectiveness of that right requires that the person concerned should have access to a remedy with automatic suspensive effect (ECtHR, Gr. Chamber, 23 February 2012, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, §200).

In short, since an applicant must be able to effectively participate in judicial proceedings, the cumulative effect of the speed of the procedure, the lack of effective access to language assistance and to

³⁵ Amnesty International, *Greece: Lives on Hold Update on the Situation of Refugees and Migrants on the Greek Islands*, 14 July 2017, pp. 4-5, available at: <https://www.amnesty.org/fr/documents/eur25/6745/2017/en/>.

³⁶ *Ibid.*, pp. 4-5.

legal advice, and a remedy without automatic suspensive effect, is to rebut the presumption that the applicant has been provided with an effective remedy within the meaning of article 3 read in light of article 13. The Greek border procedure, which is implemented pursuant article 60 of the Greek law on asylum, applies to *all* asylum applications lodged in Lesbos, and more broadly, on the Aegean islands.

As a peculiarity of the procedure, asylum seekers are held in detention while the procedure is in progress. In cases where a negative decision is notified, applicants have a tight timeframe (5 days) to challenge that decision before the Appeals Committee, which is located in Athens. Access to an independent jurisdiction (namely, the Greek Administrative Courts) is delayed until a determination is made by the Appeals Committee. As outlined by a recent report, both the admissibility assessment procedure and the conduct of deportations are subject to significant shortcomings. From the very outset, access to information over asylum procedures and to legal counsel are usually lacking or inadequate, while the Greek Asylum Service decisions are frequently notified without any language assistance, and thus, without regard to the applicant's ability to understand it (A). At the appeal stage, the effectiveness of the right of appeal is also questionable since no free legal aid is available, while proceedings before Administrative Courts have no suspensive effect, meaning that people can be deported during the trial (B).

A) Lack of *effective access* to information over the asylum procedure and the content of Greek Asylum Service decisions

Located in a former military base, the Moria camp is surrounded with high-screened fences topped with barbed-wire. It is a closed camp, access to which is monitored by the police. According to ASGI, since 15 May 2016, a very summary information sheet has been distributed to those held in the camp. Asylum seekers are nevertheless still struggling to find relevant information. No list of Greek lawyers or NGOs is given to them. Also, as no lawyer is allowed to enter the camp unless he or she has already been appointed to represent an asylum seeker, access to information, lawyers and legal counsel is almost non-existent.³⁷ Moreover, since the border procedure is complex and "*convoluted*",³⁸ it is doubtful that an asylum seeker acting alone could understand it and effectively take steps to safeguard his or her rights, given the lack of access to information, and the practical impossibility of building and following-up on a litigation strategy. ASGI has also documented the systemic lack of interpreters in the process.³⁹ Similar to ASGI's findings, Amnesty International has documented how the whole asylum process is conducted in restricted time limits that render the first instance and appeals procedures, and, consequently the exercise of an effective remedy, extremely difficult, given especially that legal aid is scarce and free legal assistance at first instance is not guaranteed in Greece.⁴⁰

B) Lack of *effective remedies* against Greek Asylum Service decisions before the Appeals Committees

It is possible, as a matter of law, to challenge a first-instance decision before the Appeals Committee, which is solely located in Athens. The composition of Appeals Committee was reformed in July 2016, in order to incorporate new members. According to ASGI, this change was introduced because previously the Appeals Committees very rarely dismissed applicants' claims on the basis that Turkey was a safe country for them, whereas the Appeals Committees now tend to accept most of the appeal decisions on the inadmissibility of asylum applications based on the consideration that Turkey should be considered a safe third country or country of first asylum.⁴¹ However, as ASGI stressed in its report:

*"this procedure is the one which presents the greatest risks of ineffectiveness, since neither widespread and simple access to legal aid paid for by the State, nor the automatic suspension or availability of the contested decision of the Appeals Committee, is guaranteed".*⁴²

UNHCR is aware that asylum seekers whose applications have been rejected or declared inadmissible by

³⁷ Gisti, *Accord UE-Turquie, la grande imposture*, 2016, pp. 14 and 23-24, available at: https://www.gisti.org/IMG/pdf/2016-10_rapport-ue-turquie_light.pdf.

³⁸ ASGI has mapped the procedure scheme in its report: ASGI, note 26 *supra*, p. 38.

³⁹ *Ibid.*, p. 13.

⁴⁰ Amnesty International, note 35 *supra*, p.6

⁴¹ ASGI, note 26 *supra*, p.23.

⁴² *Ibid.*

the Appeals Committee do not have access to legal counsel.⁴³ In practice, decisions made by the Appeals Committee are notified at the police station, where people are being kept in custody, without access to any legal information.

There is a severe deficiency in the provision of legal aid. As of 2017, the administrative regulation that was supposed to implement access to free legal aid for asylum seekers before the Appeals Committee remained unpublished. In any case, it will not apply to the proceedings before the Administrative Courts. A separate UNHCR funded program to provide legal aid to applicants is limited in scope, covering only a few cases.⁴⁴

Appeals Committee Decisions are immediately enforceable. Hence, an appeal to the Administrative Court does not suspend its execution, so that it cannot be considered to be an effective remedy with respect to article 13. The applicant may be deported at any time, without having the merits of their asylum claim thoroughly examined.

In light of the foregoing, the interveners submit that Turkey being considered a safe-third country for asylum-seekers returned from the Greek hotspots exposes the latter to a systemic and real risk of *refoulement*, as well as to a risk of exposure to reception and detention conditions that may amount to inhuman or degrading treatment, contrary to article 3 of the Convention. The absence of adequate procedural guarantees for migrants on the Greek island of Lesbos infringes article 3 alone and article 3 read in conjunction with article 13.

On behalf of Gisti
Vanina Rocchiccoli
President



On behalf of FIDH
Dimitris Christopoulos
President



⁴³ ASGI, note 26 *supra*, p. 25.

⁴⁴ *Ibid*, p. 24.