



**UNHCR**

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

## **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**

### **1. Introduction**

This paper sets out the legal considerations, based on international and European refugee and human rights law<sup>1</sup> relevant for the return and readmission of persons in need of international protection from Greece to Turkey under the (proposed) EU-Turkey cooperation, as discussed during European Council meetings with Turkey on 7 and 17-18 March 2016.

The EU-Turkey cooperation inter alia foresees the return to Turkey of asylum-seekers and refugees who have entered Greece via Turkey. According to the European Commission (EC), such returns will be in accordance with international and European law. It is stated that the legal bases for these returns are found in the EU recast Asylum Procedures Directive (APD),<sup>2</sup> in particular in the concept of ‘first country of asylum’ and the concept of ‘safe third country’ through an admissibility procedure.

It is said that applications for international protection by ‘Syrians’<sup>3</sup> can be declared inadmissible by Greece under Article 33(1) and (2)(b) of the APD because Turkey can be considered a first country of asylum for ‘Syrians’ pursuant to Article 35(b) APD. Applications for international protection by ‘non-Syrians’ may be declared inadmissible by Greece under Article 33(1) and (2)(c) APD because Turkey can be regarded as a safe third country pursuant to Article 38 APD.

### **2. Transfer of asylum-seekers and refugees from Greece to Turkey based on applying a ‘first country of asylum’ and ‘safe third country’ concept**

#### **2.1. General considerations on applying the first country of asylum and safe third country concepts**

According to UNHCR, the ‘**first country of asylum**’ concept is to be applied in cases where a person has already, in a previous state, found international protection, that is once again accessible and effective for the individual concerned. Application of the concept requires an individual assessment of whether the refugee will be readmitted to that country and granted a right of legal stay and be accorded standards of treatment commensurate with the 1951 Convention related to the Status of Refugees, and its 1967 Protocol, and international human rights standards, including protection from *refoulement*, as well as timely access to a durable solution.<sup>4</sup> While accession to relevant international and regional instruments

---

<sup>1</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <http://www.refworld.org/docid/3be01b964.html>. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, <http://www.refworld.org/docid/3ae6b3b04.html>. European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, <http://www.refworld.org/docid/3ae6b3b70.html>. European Union: Council of the European Union, *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)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, <http://www.refworld.org/docid/51d29b224.html>.

<sup>2</sup> European Union: Council of the European Union, *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)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU (“APD”), <http://www.refworld.org/docid/51d29b224.html>.

<sup>3</sup> Syrians refers to Syrian nationals or stateless persons for whom Syria was their country of habitual residence.

<sup>4</sup> This includes at least protection from torture and other cruel, inhuman or degrading treatment or punishment; risks to his or her life, or to deprivation of liberty without due process; and other rights associated with refugee status: UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, <http://www.refworld.org/docid/3fe9981e4.html>. See also,

is a pre-requisite for providing the necessary legal basis for the availability of protection and respect for rights, the actual practice of states and their consistent compliance with their obligations is decisive for determining the availability of such protection.<sup>5</sup>

The ‘**safe third country concept**’ is to be applied in cases where a person could, in a previous state, have applied for international protection, but has not done so, or where protection was sought but status was not determined. Application of the concept requires an individual assessment of whether the previous state will readmit the person; grant the person access to a fair and efficient procedure for determination of his or her protection needs; permit the person to remain; and accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including protection from *refoulement*.<sup>6</sup> Where she or he is entitled to protection, a right of legal stay and a timely durable solution are also required.<sup>7</sup>

When a state is considering applying the ‘first country of asylum’ or ‘safe third country’ concept, the individual asylum-seeker must have an opportunity within the procedure to be heard, and to rebut the presumption that she or he will be protected and afforded the relevant standards of treatment, in a previous State based on his or her circumstances.<sup>8</sup> The APD provides that in such a procedure, a transferring state may decline to undertake a substantive assessment of the asylum claim, and declare the application inadmissible. The individual must however be able to appeal the inadmissibility decision before a court or tribunal and a right to remain pending the outcome of an appeal. Suspensive effect is automatic in case of an appeal against a decision based on the safe third country concept under Article 38, while the applicant may request a court to order suspensive effect in an appeal based on ‘first country of asylum’ under Article 35.

## **2.2. The concept of first country of asylum under EU law**

According to Article 33(1) and 33(2)(b) of the APD, Member States *may*<sup>9</sup> consider an application for international protection as inadmissible if a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35 APD. The interpretation and application of these provisions is examined below.

### ***2.2.1. The scope and quality of the assessment***

Pursuant to Article 35 APD, a country can be considered as a first country of asylum for a particular applicant, when:

- a) the applicant has been recognised in that country as a refugee and he or she will be readmitted and can still avail himself/herself of that protection; **or**

---

UNHCR, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas*, September 2009, <http://www.refworld.org/docid/4ab8e7f72.html>. See also, *Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship*, [2011] HCA 32, Australia: High Court, 31 August 2011, <http://www.refworld.org/docid/4e5f51642.html>.

<sup>5</sup> UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 10 and 11, <http://www.refworld.org/docid/3b36f2fca.html>. UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 283, <http://www.refworld.org/docid/4c63e52d2.html>.

<sup>6</sup> 1951 Convention relating to the Status of Refugees, Article 33; UNHCR Executive Committee Conclusion No. 6(XXVIII) (1977); see also UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, <http://www.refworld.org/docid/438c6d972.html>. Protection from *refoulement* also includes protection from torture and other cruel, inhuman or degrading treatment or punishment; risks to his or her life, or to deprivation of liberty without due process as developed under international human rights law.

<sup>7</sup> UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 12 to 16, <http://www.refworld.org/docid/3b36f2fca.html>.

<sup>8</sup> *Ibid.*, para. 13.

<sup>9</sup> They are not, however, obliged to do so. This remains the case notwithstanding the Commission’s recommendation in its communication of 10 February 2016 (COM(2016)85).

- b) the applicant otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*, provided that he or she will be readmitted to that country.<sup>10</sup>

The assessment of whether a third country constitutes a first country of asylum requires a careful and individualised case-by-case examination.<sup>11</sup> The assessment includes, but is not limited to, determining that the person concerned will not be returned to a risk of persecution or serious harm in breach of the principle of *non-refoulement*. To determine whether ‘sufficient protection’ is available in a particular third country, member states may, but are not obliged to, apply the criteria outlined in Article 38(1) APD.<sup>12</sup>

The APD does not define ‘sufficient protection’. However, pursuant to the EU Treaties, the directive must respect fundamental rights, including the right to asylum under Article 18 of the EU Charter of Fundamental Rights.<sup>13</sup> According to UNHCR, it therefore follows from the text, context and object and purpose of Article 35 that ‘sufficient protection’ goes beyond protection from *refoulement*. In UNHCR’s view, ‘sufficient protection’ requires that protection in the first country of asylum is effective and available in law and practice,<sup>14</sup> allowing the person who has enjoyed asylum in a previous state to re-avail him- or herself of that protection. This includes a number of critical elements:<sup>15</sup>

- no risk of persecution within the meaning of the 1951 Convention or serious harm<sup>16</sup> in the previous state;
- no risk of onward *refoulement* from the previous state;<sup>17</sup>
- compliance, in law and practice, of the previous state with relevant international refugee and human rights standards, including adequate standards of living, work rights, health care and education;

---

<sup>10</sup> See also Recital 43 of the APD.

<sup>11</sup> Absence of an individualized case-by-case examination may lead to a violation of the prohibition of collective expulsions under Article 19(1) of the Charter of Fundamental Rights of the European Union. Collective expulsions are also prohibited under Article 4 of Protocol No. 4 to the European Convention on Human Rights and Fundamental Freedoms (ECHR), however Greece has not signed or ratified the Protocol.

<sup>12</sup> Under the current Greek legislation, Article 19(2) of the PD 113/2013, Greece requires for the application of the ‘first country of asylum’ concept under Article 35 that such country meets the safeguards sets out in Article 38(1) APD, see *Greece: Presidential Decree No. 113/2013 Establishment of a single procedure for granting the status of refugee or of subsidiary protection beneficiary to aliens or to stateless individuals in conformity with Council Directive 2005/85/EC "on minimum standards on procedures in Member States for granting and withdrawing refugee status" (L 326/13.12.2005) and other provisions*, 14 June 2013, <http://www.refworld.org/docid/525e84ae4.html> (“PD 113/2013”). It is understood that under the EU-Turkey Cooperation this will be subject to legislative revision, but until such legislative revisions have come into force, the current law applies.

<sup>13</sup> Recital 60 of the APD.

<sup>14</sup> Accession to and compliance with the 1951 Convention and/or the 1967 Protocol are essential, see UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 283, <http://www.refworld.org/docid/4c63e52d2.html>. Further, according to UNHCR, the capacity of States to provide protection in practice should be taken into consideration, particularly if they are already hosting large refugee populations, see UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, p. 35, <http://www.refworld.org/docid/42492b302.html>.

<sup>15</sup> UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 290-291, <http://www.refworld.org/docid/4c63e52d2.html>.

<sup>16</sup> See Article 15 of the recast Qualification Directive.

<sup>17</sup> This assessment should also take into account relevant requirements established by the European Court of Human Rights in its case law relating to Article 3 ECHR and Article 13 ECHR. In this regard, the court repeatedly held that its primary concern under these provisions in the context of an expulsion is to determine whether effective guarantees exist in the country of return to protect the applicant against arbitrary removal directly or indirectly back to his or her country of origin, See *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 298, <http://www.refworld.org/docid/4d39bc7f2.html>.

- access to a right of legal stay;
- assistance of persons with specific needs;
- timely access to a durable solution.

In the absence of a definition of the meaning of ‘sufficient protection’ and the widely divergent approaches among Member States<sup>18</sup> on what constitutes ‘sufficient protection’ and when to apply Article 35, the appropriate course of action would be for a national (Greek) court to make a reference to the CJEU on the interpretation of Article 35(b) APD.<sup>19</sup>

### **2.1.2. Procedural and other human rights safeguards**

Pursuant to Article 35 APD, the applicant shall be allowed to challenge the application of the first country of asylum concept in his or her particular circumstances. To that end, he or she is entitled to the following procedural safeguards that will have to be secured in the (in)admissibility procedure in Greece:

- A **personal interview on admissibility** in accordance with Article 34(1) APD to allow him or her to be heard and present his or her views on the application of the first country of asylum concept to him/her;<sup>20</sup>
- The **right to an effective remedy before a court or tribunal** against the inadmissibility decision in accordance with Article 46(1)(a)(ii) or (iii) and Article 46(6)(b) APD. This includes the court or tribunal’s power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant’s request or acting *ex officio*, pending the outcome of the remedy.<sup>21</sup>
- Applicants shall be given the opportunity to consult in an effective manner a **legal adviser or other counselor** (Article 22(1) APD).<sup>22</sup> Such person must have access to the applicant for the purpose of consultation, including in closed areas such as detention facilities (Article 23(2) APD). Further, on appeal, the state must ensure free legal assistance and representation on the request of the applicant (Article 20(1) APD).

Moreover, in UNHCR’s view, **family unity** needs to be maintained, and any family links militating against return need to be respected.<sup>23</sup> In the same vein, the **best interests of the child** must be a primary consideration in any transfer process, particularly when it comes to the circumstances of unaccompanied or separated children.<sup>24</sup>

<sup>18</sup> UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 290-291, <http://www.refworld.org/docid/4c63e52d2.html>. European Commission, Report on the Application of the Directive 2005/85/EC, COM(2010)465, 8 September 2010, p. 10.

<sup>19</sup> Article 267(b) of the Treaty on the Functioning of the European Union (TFEU).

<sup>20</sup> In principle, this interview should be conducted by the ‘determining authority’, i.e. the quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance (Article 2(f) APD), or alternatively by personnel of authorities other than the determining authority provided they have received the necessary training (Article 34(2) APD).

<sup>21</sup> UNHCR recalls that the remedy against an inadmissibility decision must have automatic suspensive effect in law and in practice, where the applicant has an arguable claim of a risk of ill-treatment upon return or of arbitrary deportation from the country of return in accordance with Art. 3 and 13 ECHR, See *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 293, <http://www.refworld.org/docid/4d39bc7f2.html>.

<sup>22</sup> This opportunity should be provided at all stages of the procedure, including at first instance (Article 31(1) APD) or in border procedures (see Article 43(1) APD) when deciding on the admissibility of an application for international protection.

<sup>23</sup> Recital 60 of the APD in conjunction with Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 ECHR.

<sup>24</sup> Recital 33 of the APD. Convention on the Rights of the Child, 1577 U.N.T.S 3, entry into force 2 September 1990, Article 3; UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, <http://www.unhcr.org/refworld/docid/48480c342.html>. See also, UN Committee on the Rights of the Child (CRC), *CRC*

Finally, where applying safe country concepts, Member States should take into account relevant UNHCR guidelines<sup>25</sup> and conduct regular reviews of the situation in the country.<sup>26</sup>

In the case of Syrian asylum-seekers in Greece being returned to Turkey, clarification is needed on how Syrians can apply for or reavail themselves of temporary protection under the Temporary Protection Regulation in Turkey.<sup>27</sup> However, Syrians cannot be recognized and granted refugee status within Turkey in accordance with the 1951 Convention.<sup>28</sup> Furthermore, Article 35(b) APD implies that the individual concerned must have enjoyed protection and not merely that protection *may* be available to him or her.

## 2.2. The concept of safe third country under EU law

According to Article 33(1) and (2)(c) of the APD, Member States *may* consider an application for international protection as inadmissible if a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38 APD.

### 2.2.1. The scope and quality of the assessment

Pursuant to Article 38(1) APD, a country can be considered as a safe third country for a particular applicant where the competent authorities are satisfied that the applicant will be treated in the third country in accordance with the following principles:

- a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b) there is no risk of serious harm as defined in Directive 2011/95/EU;<sup>29</sup>
- c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;<sup>30</sup>
- d) 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;<sup>31</sup> **and**
- e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

---

*General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

<sup>25</sup> Recital 46 of the APD.

<sup>26</sup> Recital 48 of the APD.

<sup>27</sup> Turkey: *Temporary Protection Regulation*, 22 October 2014, <http://www.refworld.org/docid/56572fd74.html>, issued pursuant to Article 91 of the Law on Foreigners and International Protection, Turkey: *Law No. 6458 on 2013 of Foreigners and International Protection* [Turkey], 4 April 2013, *Official Gazette*, No. 28615, (LFIP) <http://www.refworld.org/docid/5167fbb20.html>.

<sup>28</sup> The Law on Foreigners and International Protection (LFIP) in Turkey limits refugee status to ‘a person who as a result of events occurring in European countries’ has a well-founded fear of being persecuted, Article 61(1) LFIP. Article 7(3) of the Temporary Protection Regulation explicitly stipulates that ‘[p]ersons benefiting from temporary protection shall not be deemed as having been directly acquired one of international protection statuses as defined in the Law’, i.e. in Article 61 (refugees), 62 (conditional refugees) and 63 (subsidiary protection) of the LFIP [unofficial translations].

<sup>29</sup> European Union: Council of the European Union, *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)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html>

<sup>30</sup> Article 33 of the 1951 Convention.

<sup>31</sup> This includes the prohibition of *refoulement* as contained in and developed under Article 19(2) of the Charter of Fundamental Rights of the European Union and Article 3 ECHR.

For **Greece** to be able to apply the safe third country concept, specific rules have to be laid down in its national laws, as per Article 38(2) APD, namely:

- Rules requiring a **connection between the applicant and the third country concerned** on the basis of which it would be reasonable to go to that country. The applicant shall be allowed to challenge the existence of a connection between him or her and the third country.
- 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;<sup>32</sup>
- Rules in accordance with international law, allowing **an individual examination of whether the third country concerned is safe for a particular applicant** which, as a minimum, shall permit the applicant 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.

As long as the aforementioned rules are not in place, Greece cannot apply the safe third country concept pursuant to Article 38 APD.<sup>33</sup>

Application of the ‘safe third country’ concept requires a careful and individualised case-by-case examination of whether the aforementioned principles a) to e) are ensured and whether there exists a connection between the individual and the third country. Recital 44 of the APD introduces the requirement of a ‘sufficient’ connection to the third country. In UNHCR’s view, transit alone is not a ‘sufficient’ connection or meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards. Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection. Neither does a simple entitlement to entry without actual presence constitute a meaningful link.<sup>34</sup>

Of crucial importance in the current context is that the person will be (re-)admitted to the third country,<sup>35</sup> will be allowed to request refugee status and, if found to be a refugee, will receive protection in accordance with the 1951 Convention, as ‘amended’ by the 1967 Protocol<sup>36</sup> (Article 38(1)(e) APD). UNHCR understands this provision to mean that access to refugee status and to the rights of the 1951 Convention must be ensured in law, including ratification of the 1951 Convention and/or the 1967 Protocol, and in practice.<sup>37</sup> Therefore, Turkey must allow, in accordance with rules laid down in national law, non-European nationals or stateless persons who had their place of habitual residence outside Europe to request refugee status and to have access to all rights conferred by the 1951 Convention.

---

<sup>32</sup> Greece has no official national list of safe third countries but is introducing this in its draft law transposing the recast Asylum Procedures Directive.

<sup>33</sup> Current Greek law, PD 113/2013, does not include rules required under Article 38(2) APD.

<sup>34</sup> UNHCR, *UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, p. 34, <http://www.refworld.org/docid/4c63ebd32.html>.

<sup>35</sup> Recital 44 of the APD and Article 38(4) APD.

<sup>36</sup> According to Article 2(a) APD ‘Geneva Convention’ means ‘the Convention of 28 July 1951 Relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967’.

<sup>37</sup> UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, p. 36, <http://www.refworld.org/docid/42492b302.html>.

In the absence of a clear understanding of the meaning of Article 38(1)(e) APD among Member States,<sup>38</sup> the appropriate course of action would be for a national court (potentially from Greece) to submit a request for a preliminary ruling to the CJEU on the interpretation of this Article.<sup>39</sup>

### 2.2.2. Procedural and other human rights safeguards

Specific procedural safeguards in the (in)admissibility procedure need to be met in Greece when applying the ‘safe third country’ concept. This includes:

- A **personal interview on admissibility** in accordance with Article 34(1) APD to allow the applicant to present his or her views on the existence of a connection between him or her and the third country and on the ‘safety’ of the third country in his or her particular circumstances;
- **Informing the applicant** of the decision to apply the ‘safe third country’ concept and provide him or her with a document informing the authorities of the third country, *in casu* Turkey, in the language of that country, that the asylum application has not been examined in substance (Article 38(3) APD);
- The right to an **effective remedy before a court or tribunal** against the inadmissibility decision pursuant to Article 46 (1)(a)(ii) APD, with automatic suspensive effect (Article 46(5) APD).
- Applicants shall be given the opportunity to consult in an effective manner a **legal adviser or other counselor** (Article 22(1) APD).<sup>40</sup> Advisers/counsellors must have access to the applicant for the purpose of consultation, including in closed areas such as detention facilities (Article 23(2) APD). On appeal, the state must ensure free legal assistance and representation on the request of the applicant (Article 20(1) APD).

Moreover, in UNHCR’s view, family unity needs to be maintained, and any family links militating against return need to be respected.<sup>41</sup> In the same vein, the best interests of the child must be a primary consideration in any transfer process, particularly for unaccompanied or separated children.<sup>42</sup>

Finally, where applying safe country concepts, member states should take into account relevant UNHCR guidelines<sup>43</sup> and conduct regular reviews of the situation in the concerned country.<sup>44</sup>

## 2.3. Application of the Dublin Regulation

---

<sup>38</sup> UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 305-206, <http://www.refworld.org/docid/4c63e52d2.html>. European Commission, Report on the Application of the Directive 2005/85/EC, COM(2010)465, 8 September 2010, p. 11.

<sup>39</sup> Article 267(b) TFEU.

<sup>40</sup> This opportunity should be provided at all stages of the procedure, including at first instance (Article 31(1) APD) or in border procedures (see Article 43(1) APD) when deciding on the admissibility of an application for international protection.

<sup>41</sup> Recital 60 of the APD in conjunction with Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 ECHR. Further, the Dublin Regulation 604/2013 prescribes that family unity precludes any return to a first country of asylum under Article 35 APD or safe third country under Article 38 APD in accordance with the criteria for determining the member state responsible, see Article 3 of the Dublin Regulation in conjunction with Article 8, 9 and 10 of the Dublin Regulation.

<sup>42</sup> Recital 33 of the APD. Convention on the Rights of the Child, 1577 U.N.T.S 3, entry into force 2 September 1990, Article 3; UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, <http://www.unhcr.org/refworld/docid/48480c342.html>. See also, UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

<sup>43</sup> Recital 46 of the APD.

<sup>44</sup> Recital 48 of the APD.

Preceding the determination of the applicability of Article 35 or 38 of the APD, Greece should, under the Dublin Regulation,<sup>45</sup> determine which member state is responsible for examining the asylum application, in particular in light of the right to family unity and the best interests of the child.<sup>46</sup> Therefore, where the applicant has a family member residing as a beneficiary of international protection in a member state or where that family member is awaiting a first decision on their asylum application, the member state where the family member resides is responsible.<sup>47</sup> Also, where the applicant is an unaccompanied child, the member state responsible shall be that where a family member, sibling or relative is legally present, provided it is in the child's best interests.<sup>48</sup>

Further, specific procedural safeguards need to be met in Greece, including:

- informing the applicant of the application of the Dublin Regulation and allowing the applicant to submit information regarding the presence of family members, relatives and other family relations in other member states,<sup>49</sup> including through a personal interview,<sup>50</sup> and,
- in the case of unaccompanied children,
  - ensuring that a qualified representative represents and/or assists the unaccompanied child;<sup>51</sup>
  - taking appropriate action to identify the family members, siblings or relatives of the unaccompanied child on the territory of a member state.<sup>52</sup>

Further, notwithstanding the criteria for determining the member state responsible, any member state should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives and other family relations.<sup>53</sup>

## 2.4. Conclusion

International refugee law and European asylum legislation foresee the possibility of returning persons seeking and/or in need of international protection to a safe third country on the basis of the 'first country of asylum' or 'safe third country' concept. Strict substantive criteria and procedural safeguards, which are set out in the EU recast Asylum Procedures Directive, regulate the application of these concepts. Further, under the EU Dublin Regulation another member state may be responsible for examining the asylum application in particular on the basis of family unity and the best interests of the child, precluding return to a safe third country.

**UNHCR**  
**23 March 2016**

---

<sup>45</sup> European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L 180/31-180/59; 29.6.2013, (EU) No 604/2013, ("Dublin Regulation"), <http://www.refworld.org/docid/51d298f04.html>.

<sup>46</sup> Article 3 in conjunction with Article 7 of the Dublin Regulation. The best interests of the child (see Recital 13 and Article 6(1)) and respect for family unity (see Recital 14) are primary considerations when applying the Dublin Regulation. See also Recital 16 and 17 of the Dublin III Regulation.

<sup>47</sup> Article 9 and 10 of the Dublin Regulation.

<sup>48</sup> Article 8 of the Dublin Regulation.

<sup>49</sup> Article 4 of the Dublin Regulation, in particular Article 4(1)(c).

<sup>50</sup> Article 5 of the Dublin Regulation.

<sup>51</sup> Article 6(2) of the Dublin Regulation in conjunction with Article 25 APD.

<sup>52</sup> Article 6(4) and (5) of the Dublin Regulation.

<sup>53</sup> Recital 17 in conjunction with Article 16 and 17 of the Dublin Regulation.