

TURKEY AND ASYLUM ISSUES: ALIGNING WITH THE EU ACQUIES*

Background on Turkey Asylum Laws

Although Turkey is party to the main UN, Council of Europe and ILO conventions, in the field of asylum and migration Turkey's current system is not compliant with the EU acquis. Substantial amendments of the Turkish legislation are necessary in order to achieve full compliance with EU requirements. The Turkish authorities constituted a "National Action Plan on Asylum and Migration" in December 2004 immediately after the EU Twinning Project on Asylum and Migration. In accordance with the Turkish National Action Plan (NAP) a new asylum law is also being prepared. These documents are in a way a kind of confession to the absence of a sound asylum law in Turkey. The NAP was put into practice regardless of the perspectives and criticisms of non-governmental organizations and academicians. A large majority of medium and long-term amendments appear to be very good on paper. There are some hopeful developments, for example the Turkish Asylum authorities expressing their intention to cooperate with civil society for the first time.

In this article I will briefly provide information about Turkey asylum legislations and then provide a short evaluation of the human rights perspective of the National Action Plan on Asylum and Migration together with Turkey's only legislation on asylum issues, recently amended, which is the 1994 Regulation on Asylum Seekers. I think that asylum is not only one of the EU accession negotiation chapters but also such an important humanitarian issue that it should be dealt with seriously, in cooperation with both Turkey and the EU. While writing this article, the lack of Turkish sources limited my research since asylum/refugee issues are subjects that are dealt with only by a couple of academicians and NGOs in Turkey. Turkey is party to the main UN, Council of Europe and ILO conventions such as the 1951 United Nations Geneva Convention on the Status of Refugees and its Additional Protocol, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the European Social Charter, the International Covenant on Economic, Social and Cultural Rights and so on. On the other hand, a number of different pieces of national legislation lay down the clauses and modalities regarding entry, exit, stay, residence of aliens and other provisions on legal migration in Turkey. Among these are the Turkish Citizenship Law No. 403, Law No. 4817 on Work Permits for Aliens, the Labour Law No. 4857, Law No. 2510 on Settlement, Law No. 5683 on Residence and Travel for Aliens in Turkey, the Passport Law No. 5682, and the 1994 Asylum Regulation No. 6169 and so on.

Turkey and the UN Universal Declaration of Human Rights

In the UN Universal Declaration of Human Rights Article 14, which is recognised by Turkey without abstention, "asylum right" is defined as a fundamental human right. However, Turkey

* Salih EFE

does not yet have a comprehensive asylum law. The definition of persons, procedures and institutions involved in the asylum process is regulated by a number of pieces of legislation, mentioned above, and particularly by the 1994 Asylum Regulation No. 6169, as amended in Jan 2006. The 1994 Regulation is the only national regulation that covers asylum matters. This regulation was prepared by the Turkish government to deal with the massive influx of Kurdish refugees who escaped from Saddam Hussein after the 1991 Gulf War. Up until 1994, there was neither a law nor a regulation that specifically stipulated the concept of refugee, asylum seeker, and their rights or responsibilities as such. Moreover, the asylum concept that exists only in Regulation 1994 lacks both constitutional and statutory protection.

According to the new version of Article 90 of Constitutional Law, the 1951 Geneva Convention (ratified by Turkey in 1961) and the 1967 New York Protocol (ratified by Turkey in 1968) has been qualified as domestic law and can be enforced directly by the legal authorities. Nevertheless, it will take time (even for jurists) to put it into practice. Regulations are still number one for the law enforcement authorities – as in many fields of human rights in practice in Turkey. According to the asylum authorities the government has deferred the making of a new asylum law to a much later date.

Turkey and the UN Geneva Convention on the Status of Refugees

Turkey is party to the 1951 UN Geneva Convention on the Status of Refugees and its Additional Protocol with a “geographical limitation”, which limits Turkey's obligations to persons uprooted by events in Europe. Turkey introduced geographical restrictions due to security reasons and concerns that a massive refugee influx might come from its eastern neighbours. According to the current practice, the following countries, inter alia, are considered to be “European”: Russian Federation (including the Asian part), Georgia, Armenia, Azerbaijan, Moldova, Belarus and Ukraine. Applicants for asylum from these countries might be recognised as “refugees”. However, European “refugees”, such as citizens from Bosnia-Herzegovina and Kosovo, have generally received protection without being granted formal Convention refugee status or the rights it entails but have instead been treated as “guests” under a series of administrative arrangements in case of mass influx. Others, like Chechens, do not have access to the national asylum procedure and are only able to receive and renew temporary residence permits under the normal immigration laws. Up to now, there is almost no individual who was recognised as an asylum seeker coming from countries defined as Europe by the Turkish government.

Applicants coming from non-European countries would be qualified as “asylum-seekers”. The rights arising from the Geneva Convention such as international protection as well as other types of protection, and the non-refoulement principle, are also granted by Turkey to “asylum-seekers,” pending efforts by UNHCR (<http://www.unhcr.org.tr/>) and IOM (<http://www.iom.int/jahia/page812.html>) to resettle them elsewhere. However, most of the time other liabilities such as education, social assistance, and employment are not provided to the asylum seekers by the government in practice; and the government sometimes violates the principle of non-refoulement.

It is worth mentioning here that access to the asylum procedure is another major problem that refugees face both in Turkey and Greece. To give a very recent example; the Turkish branch of Amnesty International has demanded that international procedures and a prosecution be launched in a recent Greek Coast Guard operation that turned into a human tragedy when at least nine refugees were believed to have been killed after being forced to abandon the boat

off Turkish territorial waters. The incident involves a covert Greek "return" of 40 illegal immigrants to Turkish territorial waters after their being captured in Greece. On the morning of 26th September 2006, they were then forced off a boat to survive on their own in the Aegean Sea. Some of the immigrants reportedly still had their hands tied when thrown overboard.

The AI-Turkey branch demands that international procedures and a court case be launched against Greek authorities. On the other hand, on September 21st, a statement was made by Metin Corabatir, spokesman for the UNHCR-Turkey, in which he said it was widespread practice both in Turkey and Greece to capture illegal immigrants in their territory and then return them back to the other country by land or sea. While protective mechanisms for human rights and refugee demands exist on paper, people caught in the territorial waters of one country and then released into the territorial waters of another do not benefit from any of these procedures. Such asylum seekers should be evaluated in terms of eligibility for refugee status or temporary protection before "exclusion criteria" are sought, keeping in mind the persons' statuses in their countries. After the AI-Turkey section press meeting, for reasons of diplomacy, and because the issue became public, both the UNHCR and the Turkish authorities contacted the asylum seekers to assess their claims.

Protection types granted in Turkey

There are three main types of protection granted in Turkey: Regular protection for refugees/asylum seekers, temporary protection in the case of mass influx and subsidiary protection on humanitarian grounds. Although widely used in European countries the terms secondary protection, tolerated foreigners and residence permits based on humanitarian considerations, which were first introduced in the NAP, have not yet been defined in our laws. Planned to be implemented in the medium term, the concepts are thought to turn a new leaf in Turkish asylum law and practice. Human rights organizations hope that the scope will be put into practice as per its purpose without restricting it with limitations.

Turkey cooperates with the UNHCR for processing requests by applicants coming from outside Europe. The government communicates the decision about the application in writing to the applicant, who may object within fifteen days; and the appeal has suspensive effects. In the event of a final negative administrative procedure, an appeal to cancel the decision may be filed to the court. Finally, an appeal to the Council of State is possible as well. When a positive decision is made, the applicant is allowed to reside in Turkey either in specified guesthouses or in designated cities.

After the amendments made to the 1994 Regulation in January 2006, the 1994 Regulation still maintains the false impression that the final decision taken upon the received objection terminates all procedural mechanisms for the person involved and he/she is supposed to be deported from Turkey under "general provisions related to foreigners". The NAP prepared in December 2004 offers other legal ways for a person to resort to even after the final decision and states that the process will be prolonged for such people who take these procedures. However, in practice it is projected as if no judicial review existed –as seen in the articles of this Regulation. Irrespective of the attitudes of the Turkish Administrative Jurisdiction in Jabari/Turkey, decisions such as not being quick enough to meet the claims for "termination of execution" prevent this review mechanism from achieving the deserved popularity.

As part of the common practice in Turkey, the parties are not informed about any possible legal option or about any administrative act. However, with the indent inserted in Article 40/2

of Constitutional Law on Oct. 2001 the relevant person must be informed about the contact information of judicial mechanisms and the required time period as well as the final decision of any administrative act. Moreover, considering that they do not know about the language, legislation and ways to access certain people-institutions and attorneys, these asylum-seekers should be treated more sensitively as they are in a delicate phase of their lives. We therefore see the absence of such provisions – relating to informing the parties about their rights – which also applies to the new version of the 1994 Regulation, as a gap.

The overall number of asylum applications in the period 1995-2005 is 40,898. Among these, 20,545 applications received asylum status while 6,869 were rejected. This indicates that the recognition rate is quite high in Turkey. Ongoing processes are currently 11,723. Abandoned requests amount to 1,761. The great majority of applications originate from Iranian and Iraqi citizens. On the other hand, in the decade up to 2006, 580 000 illegal migrants have been apprehended in Turkey and in the period 1998-2006, 5500 organisers including smugglers have been captured.

The 1994 Asylum Regulation and the National Action Plan on Asylum and Migration

In view of the accession negotiations, the Turkish government signed the Accession Partnership for Turkey prepared by the EU Commission on 8 March 2001, which was subsequently revised on 26 March 2003. This document provides a key framework for the alignment of Turkish immigration and asylum policies as well as other chapters of the EU acquis. Turkey announced a National Program as part of the Acquis Communautaire on 24 July 2003, committing itself to passing a specific Asylum Law, inter alia, by the year 2005 which would at least cover related subjects and regulations. On 3 October 2005, the EU Council gave a go-ahead to the accession negotiations with Turkey. Without prejudging the results of these negotiations, this decision constitutes an essential step in the relationship between Europe and Turkey. With regard to asylum and immigration, the accession process requires the full alignment of the Turkish national legislation with the so-called “EU acquis”, namely the set of rules adopted by EU Member States as the EU gradually edges towards a common asylum and immigration policy. Turkey’s current system is not compliant with the EU acquis in the field. Substantial amendments of the Turkish legislation are necessary in order to achieve full compliance with EU requirements.

On 8 March 2004, Turkey together with the partner countries of Denmark and England launched the Asylum-Migration Twinning Project in order to harmonize asylum and migration procedures with European acquis. By the end of the Twinning Project, in December 2004 the project experts (Task Force) constituted a “National Action Plan on Asylum and Migration (the NAP)”. The National Action Plan was drawn up confidentially by academicians, public and NGOs acting for refugee rights, and it has hardly been promoted in national media from the first day it was created till the text could be accessed couple of months later, as was the case with many similar “national plans” before. There is no doubt that a large majority of medium and long-term amendments seem very good on paper. This document is a kind of confession to the absence of a sound asylum law in Turkey. When assessed as a whole the document brings out the fact that it is mostly a matter of Turkey’s EU membership process and “burden-share” problem rather than a humane perspective securing the human rights of refugees.

Moreover, in accordance with the NAP a new asylum law is being prepared; however, Turkey has not indicated a precise timeframe for the adoption and implementation of the law. There are no plans to lift the geographic limitations on the Geneva Convention in the short term; and the provisions in the NAP adopted by the Turkish government in June 2005, indicate that a decision on the matter might be taken in 2012. On the other hand, due to the commitment made by the Turkish authorities in line with the NAP and also due to the critics of UNHCR-Turkey and Human Rights NGOs, the Turkish government finally made some amendments on the 1994 Regulation in January 2006. This new regulation offers small but potentially innovative possibilities to law enforcement authorities.

After the amendments to the 1994 Regulation the authority making decisions on asylum applications has been changed; the right of decision making was transferred from the Ministry of Interiors to “appropriate” Governorships. It also abolished the Ministry of Interior’s obligation to accept the opinion of the Ministry of Foreign Affairs and of other related Ministries during decision-making on refugee applications. Nonetheless, immediately following such hopeful improvements to reduce bureaucracy, the “accelerated procedure or fast track” concept, which is being criticized intensely by human rights organizations in Europe, has sneaked into our legislation without any legal definition and background. The human rights environment and NGOs are concerned about the problems that may emerge in Turkey in terms of scope and practice of this method. Although the procedure should specify who will be addressed under what circumstances, it only refers to the expression “when needed” thereby offering a wide and open-ended interpretation margin for authorities. This mechanism, based on faster decision-making, is unacceptable as it allows the possibility of “shortening” the period of objection, which is normally 15 days.

Moreover, the deadline for establishing the Migration and Asylum Authority is given as 2012 but the deadline for the selection and training of personnel to be employed in the field of asylum and migration is set for 2005. Nevertheless, the status and structure of the proposed Migration and Asylum Authority is not clear. As stipulated in the NAP, the matter of establishing and developing a specialized unit which will operate as a qualified authority and employing and training of the staff therein is a belated issue which should have been dealt with long ago. As a medium term plan within the framework of the EU Twinning Project, the opening of a training academy (institute) for assuring the sustainability of training for staff working now and later in the field of asylum and migration is another delayed positive development. It is hoped that with a trained staff many problems can be avoided that may emerge in practice.

The Ministry of Interior is supposed to transfer the exclusive right of interviewing asylum seekers and decision-making to Governorships. This will apparently contribute to procedural economy, which includes centralism, bureaucracy and time factor. The staff will be employed by Governorships, which is a hopeful development for the future of the Foreigners’ Office staff as they have been criticized for a long time for their lack of training. Even though the case applies only for Ankara and Istanbul Governorships for now, this article paves a legal way for prevailing the practise gradually to all Governorships. According to the same article, the “interviewer’s opinion also” will be included in the dossier to be submitted to MoI and the “foreigner” who is supposed to be “kept under supervision and custody” as stated in 1994 Regulation will be allowed to have “free residence” either in a shelter or guesthouse.

As they may cause some problems in terms of scope and practice because of their nature, the Refugee Acceptance Shelters and Refugee Guesthouses – each with an average capacity of 750 refugees – which are planned to be established in 7 different provinces around Turkey between 2006 and 2010 should be allowed to be monitored closely by human rights organizations that care about refugee rights. The EU claim that funding the construction of

reception centres for refugees, which is a priority for Turkey, could only be envisaged if it is clear when and how such centres will start functioning. As their function is still unknown, “Repatriation Centres”, in which the refugees are supposed to be kept until their repatriation procedures are finalized, are another matter of concern for human rights organizations. Among other positive regulations that the NAP refers to are “the reasonable time period” rather than “a definite one” for accession asylum procedure and allowing asylum seekers who are even without identity cards to access these procedures. After the amendment in the 1994 Regulation in Jan 2006, the much criticized “10 days limited period” of applying to the government for asylum was abolished and replaced by the concept of a “reasonable time period” by inserting such indents as “immediately” and “as early as reasonable”. In fact, since both the State Council and ECHR (with Jabari/Turkey decision) criticised this time limit, the Police Foreigners’ Office has adopted a softer approach to applications. However, the introduction of the concept of a “reasonable time period” in our legislation is undoubtedly reassuring. On the other hand, Administrative Law falls short of the asylum/refugee issues. Therefore, as the issue requires a qualified approach, NGOs fostering specific specialized courts should be established in this case. It also stipulates many in-depth and specific criteria for interpreters; however, the practice takes more than this into account.

Although it has been expressed that sensitivity toward the practice of non-refoulement policy will be respected, AI-Turkey (Amnesty International Turkey), which is working in particular on stopping the violation of rights of non-refoulement, thinks that Turkey has not been sensitive enough toward this policy. The most recent example was the deportation case of the Syrian Kurdish refugee Mr. Ahmet Ibrahim Muhammed; Mr. A. Muhammed was not even allowed to access to asylum procedures. Indeed, in some cases there have even been attempts to deport recognized refugees (for example in the Iranian refugee case of Envar Mohammedi) or examples where refugees have not been granted exit permit by the Turkish government, for example in the case of 1204 recognized Iranian Kurdish refugees who came from Northern Iraq to Turkey. In a very recent judgment the ECtHR has found Turkey guilty of violating the refugee rights (the D and others v. Turkey, Application No: 24245/03, Decision on 22 June 2006)

Moreover, in the medium term the NAP stipulates the actions such as “integration of refugees, training programs, health issues, labour rights, social assistance, and accession to social and cultural rights”. Indeed, this is also another improvement in the field of refugees’ rights and hope on the part of the NAP. On the other hand, all these rights need to be implemented in practice in a way that fits and complies with the 1951 Geneva Convention. Accordingly the NAP aims at raising the awareness of the public with the support of non-governmental organizations. The amended 1994 Regulation enables cooperation with NGOs for the first time as well as with the UNHCR and International Organization for Migration (IOM) in order to meet the fundamental needs of “the person involved” including social needs primarily. In fact the role of civil society should be expanded in a way to include municipalities as well as human aid organizations to create active fields of aid. However, the practice should not be limited to certain NGOs but prevailed to all.

In the NAP, provisions concerning mass influx and temporary protection are rather brief and do not set out in detail a scheme for aligning with Directive 2001/55 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences therefor.

No formal system of subsidiary protection currently exists under Turkish law, though subsidiary protection may be granted in practice as a matter of discretion. A “free residence” option, which may become possible in 2006 with the amendments made on Regulations 1994,

deserves to be supported in order to integrate those either regarded as refugees or awarded secondary protection in Turkish community.

In the context of the Action Plan for the alignment with the acquis on migration and asylum, Turkey should adopt a detailed roadmap for legislative alignment and institutional enhancement (including recruitment and training of specialised staff) with a clear priority-setting covering the short, medium and long term and including a realistic plan (with budgetary calculations) to considerably upgrade the infrastructure required to accommodate asylum seekers, refugees and illegal migrants waiting for their return. This roadmap should reflect a clear priority setting covering the short, medium and long term. In the roadmap, Turkey should indicate how and when it intends to fully implement the Geneva Convention and its Protocols, including lifting the "geographic limitation" currently in force. Turkey should pursue readmission negotiations with the EC at a steady pace in view of concluding them. Refugee policies must be governed by clear and concise laws, not by regulations, bylaws and circulars that can be changed overnight by the government.

Conclusions

The time schedule set out in the National Action Plan on Asylum and Migration, adopted in 2005, does not make it clear when Turkey will precisely start to implement the acquis in asylum area. Most of the estimated deadlines are given simply as "mid-term", while it appears that the asylum and migration authority will not start operating until 2012.

Establishing an asylum and migration system capable of implementing the acquis is a complex task, which will take several years to accomplish; accordingly, it is essential that Turkey takes steps as from now to commence alignment in accordance with the provisions of the Action Plan.

Overall, Turkey is partially in line with the acquis in the areas of justice, freedom and security. Major efforts are necessary to align with the EU acquis in the field of asylum and migration. Turkey needs to change its policies towards the refugees and asylum seekers and the administrative and judicial capacity should be enhanced at all levels. The recently adopted National Action Plan on Asylum and Migration and the amendments on the 1994 Asylum Regulation lack clarity on a number of substantial points. Regarding the provisions as assessed above we regard the absence of benefits of the non-refoulement policy in the 1994 Regulation as a gap. The planned amendments to be made in refugee law should not be considered only from a harmonization perspective; both human and asylum rights should be taken into consideration in line with Turkey's historical mission in refugee law. Turkey was the country of choice for hundred thousands of refugees with the Jewish refugees coming from Spain from 1492 until the present. On the other hand, it is a worrying thought that geographical limitation might be removed in 2012, in earliest case, only after the asylum law is passed and all these problems are solved. The expectations that the EU has of Turkey should not be too great and it should not have to bear the total burden alone because of its geographical location. Neither economic reasons nor prospective disputes or burden-share problems should be used against people to prevent them from accessing to certain refugee procedures. The human rights of asylum seekers, who are among the most vulnerable people in the world, should not be sacrificed either for economic reasons, because of the national interests of the Turkish government, or for the EU interests.

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Salih Efe, Amnesty International, Ankara (Turkey)