Case C-134/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

7 March 2023

Referring court:

Symvoulio tis Epikrateias (Greece)

Date of the decision to refer:

3 February 2023

Applicants:

Somateio 'Elliniko Symvoulio gia tous Prosfyges'

Astiki Mi Kerdoskopiki Etaireia 'Ypostirixi Prosfygon sto Aigaio'

Defendants:

Ypourgos Exoterikon

Ypourgos Metanastefsis kai Asylou

Subject matter of the main proceedings

Application for annulment of a joint ministerial decision establishing a national list of safe third countries which includes Türkiye as a safe third country for applicants for international protection originating from Syria, Afghanistan, Pakistan, Bangladesh and Somalia.

Subject matter and legal basis of the request

The reference for a preliminary ruling pursuant to Article 267 TFEU concerns the interpretation of Article 38 of Directive 2013/32/EU.

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Questions referred for a preliminary ruling

(1) Must Article 38 of Directive 2013/32/EU, read in conjunction with Article 18 of the Charter of Fundamental Rights of the European Union, be interpreted as precluding national (regulatory) legislation classifying a third country as generally safe for certain categories of applicants for international protection where, although that country has made a legal commitment to permit readmission to its territory of those categories of applicants for international protection, it is clear that it has refused readmission for a long period of time (in this case, more than 20 months) and the possibility of its changing its position in the near future does not appear to have been investigated?

Or

(2) must it be interpreted as meaning that readmission to the third country is not one of the cumulative conditions for the adoption of the national (regulatory) decision classifying a third country as generally safe for certain categories of applicants for international protection, but is one of the cumulative conditions for the adoption of an individual decision rejecting a particular application for international protection as inadmissible on the 'safe third country' ground?

Or

(3) must it be interpreted as meaning that, where the decision rejecting the application for international protection is based on the 'safe third country' ground, readmission to the 'safe third country' need be verified only at the time of enforcement of that decision?

Provisions of international law relied on

The Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 and which entered into force on 22 April 1954 (United Nations Treaty Series, Vol. 189, p. 150, No 2545 (1954)), as supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967 and which entered into force on 4 October 1967, Articles 1 and 33.

European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, Article 3.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concluded in New York on 10 December 1984 and which entered into force on 26 June 1987, Article 3.

International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966 and which entered into force on 23 March 1976, Article 7.

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Provisions of European Union law and case-law relied on

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) (OJ 2011 L 337, p. 9), Articles 4 and 21 in particular.

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) (OJ 2013 L 180, p. 60), recitals 18, 34, 44, 46, 47, 48 and 50 and Articles 31(2), 33, 35, 38 and 39.

Charter of Fundamental Rights of the European Union ('the Charter'), Articles 18 and 19(2).

Judgments of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)* (C-564/18, EU:C:2020:218); of 14 May 2019, *M and X (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403); of 13 September 2018, *Ahmed* (C-369/17, EU:C:2018:713); of 26 February 2015, *Shepherd* (C-472/13, EU:C:2015:117); of 7 November 2013, *X and Others* (C-199/12 to C-201/12, EU:C:2013:720); and of 21 December 2011, *NS* (C-411/10 and C-493/10, EU:C:2011:865).

Provisions of national law relied on

Nomos 4375/2016 'Organosi kai leitourgia Ypiresias Asylou, Archis Prosfygon, Ypiresias Ypodochis kai Taftopoiisis, systasi Genikis Grammateias Ypodochis, prosarmogi tis Ellinikis Nomothesias pros tis diataxeis tis Odigias 2013/32/EE tou Evropaikou Koinovouliou kai tou Symbouliou schetika me tis koines diadikasies gia ti chorigisi kai anaklisi tou kathestotos diethnous prostasias (anadiatyposi) (EE 2013 L 180), diataxeis gia tin ergasia dikaiouchon diethnous prostasias kai alles diataxeis' (Law 4375/2016 on the organisation and operation of an Asylum Service, Refugee Authority and Reception and Identification Service, establishing a General Secretariat for Reception and harmonising Greek legislation with the provisions of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) (OJ 2013 L 180), provisions governing the work of beneficiaries of international protection and other provisions (Government Gazette, Series I, No 51, 3.4.2016, and corrigenda Government Gazette, Series I, No 57, 6.4.2016).

Nomos 4636/2019 peri Diethnous Prostasias kai alles diataxeis (Law 4636/2019 on international protection and other provisions) (Government Gazette, Series I, No 169, 1.11.2019), as amended by Nomos 4686/2020, Veltiosi tis metanasteftikis nomothesias, tropopoiisi diataxeon ton nomon 4636/2019 (A 169), 4375/2016 (A

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51), 4251/2014 (A 80) kai alles diataxeis (Law 4686/2020 on improving migration legislation, amending provisions of Laws 4636/2019 (GG I/169), 4375/2016 (GG I/51) and 4251/2014 (GG I/80) and other provisions (Government Gazette, Series I, No 96, 12.5.2020) (Articles 16 and 61), Articles 2 to 38, 83 to 86 and 92(1).

Succinct presentation of the facts and procedure in the main proceedings

1 On 3 June 2021, the Anaplirotis Ypourgos Exoterikon (Deputy Minister for Foreign Affairs) and the Ypourgos Metanastefsis kai Asylou (Minister for Migration and Asylum) adopted Koini apofasi yp'arith. 42799 'Kathorimos triton choron pou charaktirizontai os asfaleis kai katartisi ethnikou katalogou, kata ta orizomena sto arthro 86 tou n. 4636/2019 (A/169)' (Joint Decision No 42799 'Determination of third countries classified as safe and establishment of a national list in accordance with the requirements of Article 86 of Law 4636/2019 (GG I/169)' (Government Gazette, Series II, No 2425, 7.6.2021), based on the requirements of Article 86 of Law 4636/2019, paragraphs 2 and 3 thereof in particular, and further to the recommendation of 14 May 2021 of the Administrator of the Asylum Service, by which it was decided to 'establish a national list of safe third countries and to include Türkiye as a safe third country on that list in accordance with the requirements of Article 86 of Law 4636/2019' for applicants for international protection originating from Syria, Afghanistan, Pakistan, Bangladesh and Somalia.

2 On 7 October 2021, the applicants, that is, the Somateio 'Elliniko Symvoulio gia tous Prosfyges' (Greek Council for Refugees) and the Astiki Mi Kerdoskopiki Etaireia 'Ypostirixi Prosfygon sto Aigaio' (non-profit organisation 'Refugee Support in the Aegean') lodged an application for annulment of the above joint ministerial decision.

3 On 15 December 2021, in the context of the review and updating of the basis for the joint ministerial decision referred to above, the same ministers, on the basis of the requirements of Law 4636/2019 and further to a new recommendation of 7 December 2021 of the Administrator of the Asylum Service, adopted Koini apofasi yp'arith. 458568 entitled 'Tropopoiisi tis yp'ar. 42799/03.06.2021 koinis apofasis ton Ypourgon Metanastefsis kai Asylou 'Kathorismos triton choron pou charaktirizontai as asfaleis kai katartisi ethnikou katalogou, kata ta orizomena sto arthro 86 tou n. 4636/2019 (A/169)' (Joint Ministerial Decision No 458568 entitled 'Amendment of Joint Decision No 42799/03.06.2021 of the Ministers for Migration and Asylum 'Determination of third countries classified as safe and establishment of a national list in accordance with the requirements of Law 4636/2019 (GG I/169)' (Government Gazette, Series II, No 5949, 16.12.2021), by which Türkiye was again classified as a safe third country for the above categories of applicants for international protection, that is, for applicants originating from Syria, Afghanistan, Pakistan, Bangladesh and Somalia.

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4 Following the adoption of that decision, the applicants lodged, on 3 March 2022, pleadings requesting resumption of the proceedings and seeking annulment of the joint decision of those ministers of 15 December 2021, inasmuch as it again classifies Türkiye as a safe third country for the above applicants for international protection, and requesting resumption of the proceedings in respect of the joint ministerial decision initially contested and annulment of that act.

5 Having been seised of this case, the grand chamber of the referring court, that is, the Symvoulio tis Epikrateias (Council of State, Greece), found that only the action against the joint ministerial decision of 15 December 2021 ('the contested decision') was admissible before it.

The essential arguments of the parties in the main proceedings

6 By their application for annulment, the applicants submit that the contested classification of Türkiye as a safe third country for the five categories of applicants for international protection referred to above is contrary to Article 86 (paragraph 5 thereof in particular) of Law 4636/2019 and Article 38 (paragraph 4 thereof in particular) of Directive 2013/32, read in conjunction with recital 44 thereof, as, first, the possibility of readmitting the above foreign nationals to that third country is not safeguarded 'under international conventions' and, second, it follows from the evidence relied on and the practice in the matter followed by Türkiye that there is no reasonable prospect of the above applicants for international protection being readmitted to that country. The applicants have relied, in that connection, on the more recent recommendation of 7 December 2021 of the Asylum Service, further to which the contested decision was adopted, which states that 'returns from Greece to Türkiye have been frozen since March 2020'.

Succinct presentation of the reasoning in the request for a preliminary ruling

7 The referring court states, first, that Article 35 of Directive 2012/32 (read in conjunction with Article 85 of Law 4636/2019) provides that a country can be considered to be a first country of asylum for a particular applicant for international protection provided that, inter alia, the condition that the foreign applicant will be readmitted to that country is satisfied, while Article 38(4) of the directive on safe third countries (read in conjunction with Article 86(4) of Law 4636/2019) states that 'where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II [of Directive 2013/32]', that is, it provides in such cases for further examination of an application for international protection previously found to be inadmissible under the provisions on safe third countries.

8 The referring court concludes from those provisions that, contrary to Article 35 of the directive, which renders the application of the concept of first country of

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asylum subject to whether the foreign applicant can be readmitted to that country, Article 38(4) does not, based on its wording, render the application of the concept of safe third country subject to the condition of whether the foreign national can be admitted or readmitted to the third country.

9 The referring court recalls that, according to the settled case-law of the Court, it is necessary, in order to interpret a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part (see, for example, judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia*, C-202/18 and C-238/18, EU:C:2019:139, paragraph 45).

10 The referring court holds, with reference to the judgment of 29 July 2019 in *Torubarov* (C-556/17, EU:C:2019:626, paragraph 53), that the provisions of Directive 2013/32 relating to decisions in cases of inadmissible applications for international protection should be interpreted, in the light of the requirements of Article 18 of the Charter, so as to serve the objective pursued by the directive of guaranteeing that applications for international protection are processed as rapidly as possible. That objective is set out in recital 18 of the directive, which states that 'it is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection' and it underpins many of its provisions providing for acts of the relevant national authorities relating to the procedure for examining applications for international protection to be concluded 'as soon as possible' (see, inter alia, Article 31(2) of Directive 2013/32).

11 In fact, in the majority opinion of the referring court, Article 38 of Directive 2013/32 (and, consequently, Article 86 of Law 4636/2019), must be interpreted as meaning that it is not possible to classify a third country as safe if it is not apparent that the admission or readmission of the applicant for international protection to that third country will be feasible as, otherwise, in essence, the time taken to examine the application for international protection and the applicant's uncertainty as to his or her right to stay in the country in which he or she made the application would be extended, without precluding the danger of his or her refoulement to a country in which he or she is at risk of persecution, or the likelihood of disruption to international relations between states. The referring court adds, moreover, that the view that the classification of a third country as safe depends on whether the foreign national seeking international protection can be admitted or readmitted to that third country is reflected in soft-law texts of the Council of Europe and supported by some commentators on international law, and has been espoused by courts in other EU Member States.

12 Furthermore, in the majority opinion of the referring court, the process of verifying the condition whether the foreign national seeking international protection can be admitted or readmitted to the safe third country is satisfied includes an examination of both the current legal system in that country – that is, any legal commitment made by the third country – and compliance in practice by the third country with those commitments. It concludes from this that, where a

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Member State establishes a national list of generally safe third countries, exercising its discretion to do so granted by Article 38(2) of Directive 2013/32, it is not allowed, due to the need to bring the examination of applications for international protection to a swift conclusion, as noted above, to adopt a regulation classifying a third country as safe without determining whether both individual aspects of the condition described above – that is, whether applicants can be admitted or readmitted to that country – are satisfied.

13 However, in the dissenting opinion of two members of the referring court, the adoption of a regulatory act classifying a third country as safe for particular categories of asylum seekers (pursuant to Article 38(2) of Directive 2013/32 and Article 86(2) and (3) of Law 4636/2019) is confined to a general assessment of whether a country satisfies the criteria described in Article 38(1) of Directive 2013/32 (Article 86(1) of Law 4636/2019). By contrast, the question whether a third country permits an applicant to enter its territory does not relate to whether that country is generally safe, but to whether it is accessible (in a particular instance) and therefore depends solely on whether the application must be rejected as inadmissible (under Article 33(2)(c) of the directive) or examined on the merits (as required under Article 38(4) of the directive) (see judgment of 14 May 2020, *FMS and Others*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 153), that is, it depends on an issue which is verified, in principle, at the time of enforcement of the decision (see Opinion of Advocate General P. Pikamäe in joined cases *FMS and Others*, C-924/19 PPU and C925/19 PPU, EU:C:2020:294, points 111, 114 and 127 in particular). Where, as in the present case, it transpires that a country classified by regulatory act as a safe third country for particular categories of asylum seekers refuses to accept asylum seekers for a certain period of time, that regulatory act is not open to annulment (as it would be if the conditions of Article 38(1) of Directive 2013/32 were not satisfied). However, in order to ensure that the provisions of Directive 2013/32 have practical effect (the purpose of which is to ensure practical, easy and swift access to the procedure for granting international protection), interpreted in the light of Articles 18 and 47 of the Charter, it must be held that if, when an asylum application is made, it is already known that the third country will not permit the applicant to enter its territory, the asylum application cannot be rejected as inadmissible on the basis of the concept of safe third country and must be examined on the merits in accordance with Article 38(4) of Directive 2013/32 (Article 86(5) of Law 4636/2019).

14 Furthermore, in the opinion of two other members of the referring court, the question whether the foreign national can be admitted or readmitted to the safe third country must be examined only at the time of enforcement of the decision of the competent national authority rejecting the application for international protection as inadmissible on the 'safe third country' ground; it is not, therefore, a matter affecting the legality of the regulatory act classifying a third country as generally safe or of the individual decision rejecting that application.

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15 The referring court adds that the first article of Law 2926/2001 (Government Gazette, Series I, No 139, 27.6.2001) ratified the Agreement of 20 January 2000 between the Hellenic Republic and Türkiye on cooperation between the Ypourgeio Dimosias Taxis (Ministry of Public Policy) of the Hellenic Republic and the Ministry of Internal Affairs of Türkiye on combating crime, especially terrorism, organised crime, illicit drug trafficking and illegal immigration. Article 8 states that 'the Parties shall cooperate to combat illegal migration. Until such time as a readmission agreement is concluded, the Parties shall permit the readmission of persons, that is, of their nationals and of third-country nationals coming from the territory of the other Party who have crossed or intend to cross the borders of one of the Parties illegally. In order to implement the above, the Parties shall designate jointly, as soon as possible in a text on the matter, the authorities and the procedures required for the readmission of those persons.' An application protocol dated 8 November 2001 was prepared for the purpose of implementing that article and was ratified by the first article of Law 3030/2002 (Government Gazette, Series I, No 163, 15.7.2002).

16 Furthermore, the Agreement between the European Union and Türkiye on the readmission of persons residing without authorisation of 16 December 2013 was approved on behalf of the European Union by Council Decision of 14 April 2014 (OJ 2014 L 134, p. 3). Article 4 of the Agreement, headed 'Readmission of third-country nationals and stateless persons' provides as follows: '1. [Türkiye] shall readmit, upon application by a Member State and without further formalities to be undertaken by that Member State other than those provided for in this Agreement, all third-country nationals or stateless persons who do not, or who no longer, fulfil the conditions in force for entry to, presence in, or residence on, the territory of the requesting Member State provided that in accordance with Article 10 it is established that such persons: […] (c) illegally and directly entered the territory of the Member States after having stayed on, or transited through, the territory of [Türkiye] […]'.

17 In addition, on 15 October 2016, Türkiye and the European Union agreed a joint action plan designed to strengthen cooperation in the field of support for Syrian nationals granted temporary international protection and in the field of migration management in response to the crisis caused by the situation in Syria. On 29 November 2015, the Heads of State or Government of the Member States of the European Union met with their Turkish counterpart. At the end of that meeting, they decided to activate the joint action plan and, in particular, to step up their active cooperation on migrants not in need of international protection, by preventing them from travelling to Türkiye and the European Union, ensuring the application of the bilateral readmission agreements and arranging the swift return of migrants not in need of international protection to their countries of origin. Subsequently, on 18 March 2016, a statement on the results of the third meeting 'since November 2015 dedicated to deepening [Türkiye]-EU relations as well as addressing the migration crisis' between the Members of the European Council and their Turkish counterpart was published on the website of the Council of the European Union in the form of press release 144/16.

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18 According to the referring court, it follows from the international texts referred to in the above paragraphs that the legislature lawfully held that Türkiye had made a legal commitment to readmit, subject to certain conditions, foreign applicants for international protection from Greece. As such, the first ('legal') aspect of the aforementioned condition arising from Article 38(4) of Directive 2013/32 (and, consequently, from Article 86(5) of Law 4636/2019) is satisfied.

19 However, the second aspect, concerning Türkiye's compliance in practice with its said legal commitment, is not satisfied, as it is apparent that applicants for international protection whose applications have been rejected as inadmissible on the 'safe third country' ground are not being readmitted to Türkiye but, on the contrary, as stated expressly in the memorandum of the Asylum Service Department of Procedures and Training of 3 December 2021 attached to the recommendation of the Administrator of the Asylum Service of 7 December 2021 further to which the contested decision was adopted, 'returns from Greece to Türkiye have been frozen since March 2020 [that is, for a period in excess of 20 months]', without, moreover, any distinction as to the legal basis (international agreements or aforementioned joint EU/Türkiye declaration) on which the returns are ordered.

20 The referring court also finds that it cannot accept the defendants' submission that the contested decision is not vitiated by any error in that respect, primarily because this is a temporary disapplication '[of the joint declaration of 18 March 2016] which is more or less warranted [in the circumstances]', that is 'due to the COVID pandemic (a global uncontested fact), Türkiye has not been accepting readmissions recently', as the submission is not supported by the evidence in the file. Furthermore, the competent authority does not appear to have investigated the possibility that Türkiye will change its position in that regard in the near future.

21 Consequently, for that reason and in the majority opinion of the court regarding the interpretation of Article 38 of Directive 2013/32 and Article 86 of Law 4636/2019, the application under consideration should be upheld and the contested decision should be annulled inasmuch as it classifies Türkiye as a safe third country for applicants for international protection originating from Syria, Afghanistan, Pakistan, Bangladesh and Somalia. By contrast, according to the dissenting opinion, a determination that applicants for international protection have been accepted in practice for readmission is not an element of the validity of the regulatory act classifying a third country as generally safe, but is examined at subsequent stages of the administrative procedure.

22 The referring court also states that a question has previously been referred to the Court for a preliminary ruling on the interpretation, inter alia, of Article 38 of Directive 2013/32. Specifically, in *FMS and Others* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367), a Hungarian court requested a preliminary ruling in the context of a challenge to individual decisions of the national administrative authority, seeking clarification from the Court as to whether it follows from Article 33(1) and (2)(b) and (c) and Articles 35 and 38 of Directive 2013/32, read

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in conjunction with Article 18 of the Charter, that readmission to the third country is one of the cumulative conditions for the application of the corresponding grounds of inadmissibility, that is to say, for the adoption of a decision based on such a ground, or whether it is sufficient to determine that that condition is satisfied only at the time of the enforcement of such a decision. However, the Court found the above question to be inadmissible on the ground that the referring national court had failed to explain why it considered that it could not adjudicate on the disputes before it without having obtained an answer to that question (judgment of 14 May 2020, *FMS and Others*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 172 and 174). However, the referring court notes that, in that connection, Advocate General Pikamäe stated in his Opinion in that regard that, 'whilst the requirement that it is known that the applicant will be readmitted is one of the cumulative conditions for making a decision based on the first country of asylum ground under Article 33(2)(b) of Directive 2013/32, admission or readmission by a "safe third country" only has to be verified at the time of enforcement of a decision based on the "safe third country" ground under Article 33(2)(c) of that directive' (Opinion of Advocate General Pikamäe in *FMS and Others*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:294, point 127).

23 The referring court concludes from the foregoing that there are reasonable doubts as to the meaning of Article 38 of the directive and it therefore finds that it must adjourn final judgment on the application for annulment inasmuch as it challenges the classification in the contested decision of Türkiye as a safe third country for certain categories of foreign nationals, and request a preliminary ruling from the Court on the questions referred.

24 Lastly, the referring court applies for the request for a preliminary ruling to be considered under the expedited procedure established in Article 105 of the Rules of Procedure of the Court of Justice, as, due primarily to the nature of the contested decision as a regulatory act, the questions of interpretation of EU law referred concern a large number of urgent cases which come within the scope of EU law on the area of freedom, security and justice, including policies on border checks, asylum and immigration (Chapter 2 of Title V of Part Three of the Treaty on the Functioning of the European Union).

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