

## **Section 11**

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## Section 11 The concept of first country of asylum

### Introduction: International Standards

The concept of first country of asylum is defined in Article 26 of the APD:

*A country can be considered to be a first country of asylum for a particular applicant for asylum if:*

*(a) s/he has been recognised in that country as a refugee and s/he can still avail him/herself of that protection; or*

*(b) s/he otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement;*

*provided that s/he will be re-admitted to that country.*

*In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Article 27 (1).*

It should be noted that Member States are not required to apply the concept of first country of asylum, as Article 26 is a permissive provision.<sup>1</sup> However, in accordance with the APD, those Member States which apply the concept are not required to examine whether an applicant qualifies as a refugee or for subsidiary protection status, where a country which not a Member State is considered as a first country of asylum for the applicant pursuant to Article 26.<sup>2</sup> In other words, the Member State may consider such applications as inadmissible.

Destination countries may have interests in reducing irregular movements. As such, the concept of first country of asylum may be seen as a potential deterrent to irregular movements by refugees. However, UNHCR notes that the causes of secondary movements are manifold and include, among other things, a lack of durable solutions, limited capacity to host refugees and a failure to provide effective protection in some third countries. Therefore, the assessment of whether a third country does constitute a first country of asylum requires a careful and individualised case-by-case examination.

It is worth underlining that both criteria in Article 26 (2) (a) and (b) APD are subject to the proviso that the designated first country of asylum will re-admit the applicant. This is a critical safeguard, as it seeks to ensure that the application of the first country of asylum concept does not result in refugees 'in orbit', who are denied admission by the third country and shuttled consecutively from one country to another. If admission to

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<sup>1</sup> Article 26 states "A country **can be** considered to be a first country of asylum ..."

<sup>2</sup> Article 25 (2) (b) APD.

the third country cannot be assured, then the application should be substantively examined by the Member State where the application has been made. The application of the first country of asylum concept without ensuring that the applicant will be re-admitted by the third country would constitute a violation of Article 26 APD.

The burden is on Member States to ensure that the applicant can avail him/herself of protection in the third country. UNHCR has welcomed the requirement that a third country be considered a first country of asylum only if the recognized refugee can still avail him/herself of that protection. However, UNHCR has serious concerns regarding Article 26 (b) APD.

UNHCR has noted that the term '*sufficient protection*' in Article 26 (b) APD is not defined. The article explicitly states only that the concept includes that the applicant should benefit from the principle of *non-refoulement*. However, individuals who qualify under the 1951 Convention acquire more than the right of *non-refoulement*. Article 26 only includes a permissive clause stating that "*Member States may take into account Article 27 (1)*" which sets out four principles to be satisfied in order to apply the safe third country concept.<sup>3</sup> The application of Article 27 (1) APD is not obligatory under the APD.

UNHCR has cautioned that the term '*sufficient protection*' may not represent an adequate safeguard or criterion when determining whether an applicant can be returned safely to a first country of asylum.<sup>4</sup> In UNHCR's view, the protection in the third country should be effective and available in practice. Therefore, UNHCR recommends using the term '*effective protection*' in national legislation and suggests the elaboration of explicit benchmarks in line with the standards outlined in the 1951 Convention and the Lisbon Conclusions on '*effective protection*'.<sup>5</sup> Furthermore, the capacity of third state to provide effective protection in practice should be taken into consideration by Member States, particularly if the third state is already hosting large refugee populations. Countries where UNHCR is engaged in refugee status

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<sup>3</sup> Art. 27 (1) APD stipulates that Member States must be satisfied that the applicant will be treated in accordance with the following principles in the third country concerned: "(a) *life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) the principle of non-refoulement in accordance with the Geneva Convention is respected; (c) 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; (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*"

<sup>4</sup> UN High Commissioner for Refugees, *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, available at: <http://www.unhcr.org/refworld/docid/42492b302.html>

<sup>5</sup> UN High Commissioner for Refugees, *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, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>

determination under its mandate should, in principle, not be considered first countries of asylum. UNHCR often undertakes such functions because the state has no capacity to conduct status determination or to provide effective protection. Generally, resettlement of persons recognized to be in need of international protection is required. The return of persons in need of international protection to such countries should therefore not be envisaged.

It is UNHCR's position that the following elements, whilst not exhaustive, are critical factors in the assessment of whether an applicant enjoys effective protection in the potential first country of asylum<sup>6</sup>:

a) The person has no well-founded fear of persecution in the third state on any of the 1951 Convention grounds, and there is no risk of serious harm, as stipulated in Article 15 of the Qualification Directive, in the third state.

b) There is and will be respect for fundamental human rights in the third state in accordance with applicable international standards, including but not limited to the following:

- there is no real risk to the life of the person in the third state;
- there is no real risk that the person would be deprived of his/her liberty in the third state without due process;

c) There is no real risk that the person would be sent by the third state to another state in which s/he would not receive effective protection, or would be at risk of being sent from there on to any other state, where such protection would not be available.

d) While accession to international refugee instruments and basic human rights instruments is a critical indicator, the actual practice of states and their compliance with these instruments is key to the assessment of the effectiveness of protection. Where the return of an asylum-seeker to a third state is involved, accession to and compliance with the 1951 Convention and/or 1967 Protocol are essential, unless the destination country can demonstrate that the third state has developed a practice akin to the 1951 Convention and/or its 1967 Protocol.

e) The person has access to means of subsistence sufficient to maintain an adequate standard of living, and steps are undertaken by the third state to enable the progressive achievement of self-reliance, pending the realisation of durable solutions.

f) The third state takes account of any special vulnerabilities of the person concerned and maintains the privacy interests of the person and his/her family.

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<sup>6</sup> *ibid.*

g) Effective protection will remain available until a durable solution can be found.

UNHCR also reminds Member States that they must take into consideration the applicant's right to family unity and consider the applicant's family links in the destination country. In UNHCR's view, a person's fundamental right to family unity is an overwhelming consideration that countries of asylum should consider. It should thus take precedence over the availability of effective protection provided by the third country, in the assessment of whether the person should be returned to that country.

### **Application in law and practice**

Belgium and France<sup>7</sup> have not transposed Article 26 in national legislation. The other surveyed Member States, i.e. Bulgaria,<sup>8</sup> the Czech Republic,<sup>9</sup> Finland,<sup>10</sup> Germany,<sup>11</sup>

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<sup>7</sup> According to the table of transposition made available by the French government, Article 26 is an optional provision which is not transposed in French legislation.

<sup>8</sup> Article 13 (2) item 2 (Amended, SG No. 52/2007) of the Law on Asylum and Refugees states that: *"The refugee status or humanitarian status determination procedure shall not start or if it has already started it shall be terminated when the alien has:*

1. *refugee status granted in another European Union Member State;*
2. *refugee status granted in a safe third country provided that s/he will be allowed to stay in that country; [...]"*

<sup>9</sup> Section 2 (3) of the Asylum Act, Act No. 325/1999 Coll. on Asylum and Amendment to Act No. 283/1991 Coll., on the Police of the Czech Republic, as amended (the Asylum Act), and Amendment to Act No. 359/1999 Coll. on Social and Legal Protection of Children, as amended; published in Issue No. 106/1999 of the Collection of Laws of the Czech Republic (pp. 7385-7404) on December 23, 1999, and entered into force on 1 January 1 2000.

<sup>10</sup> Section 99 of the *Ulkomaalaislaki* (Aliens' Act 301/2004, in force 28.4.2009) defines a safe country of asylum: *"When deciding on an application in the asylum procedure, a State may be considered a safe country of asylum for the applicant if it is a signatory, without geographical reservations, to the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights (Treaty Series of the Statute Book of Finland 8/1976) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Treaty Series of the Statute Book of Finland 60/1989) and adheres to them"*. The legal preparatory works implementing the APD, the Hallituksen esitys 86/2008 (Government Bill 86/2008), state that the Finnish legal concept of safe country of asylum is equivalent to Article 26 and 27 together in the APD. Compared to the concept of first country of asylum in the APD, the major difference lies in the fact that the safe country of asylum concept is applicable both to countries where the applicant has enjoyed or *could have enjoyed* international protection. In practice, however, the concept of safe country of asylum is applied mainly to other EU countries (see section 12 on safe third countries for further details).

<sup>11</sup> Even though Sections 27 and 29 APA in this regard remained unaffected by transposition legislation and do not fully reflect the wording of Article 26 APD, these are the norms reflecting the concept of first country of asylum in German law. See Bundestag printed papers 16/5065, p. 217. Section 29 (3) APA was deleted by the Transposition Act 2007; this amendment was not prompted by the transposition of the APD. The version valid before the Transposition Act 2007 entered into force contained the rule that an application for which another country was responsible under the Dublin system would be turned down as "irrelevant". With a view to such decisions in the Dublin system, a new Section 27 a APA was introduced providing for turning down the respective application as "inadmissible".

Greece,<sup>12</sup> Italy,<sup>13</sup> the Netherlands,<sup>14</sup> Slovenia,<sup>15</sup> Spain<sup>16</sup> and the UK<sup>17</sup> have transposed or reflect the concept of the first country of asylum in their respective national laws.

Belgium, Bulgaria, the Czech Republic, Greece<sup>18</sup> and Slovenia do not apply in practice the concept of first country of asylum. All other Member States of focus in this research applied it rarely.

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<sup>12</sup> Article 19 of Presidential Decree 90/2008 is a verbatim transposition of Article 26 of the APD.

<sup>13</sup> Article 29 of the Legislative Decree 25/2008.

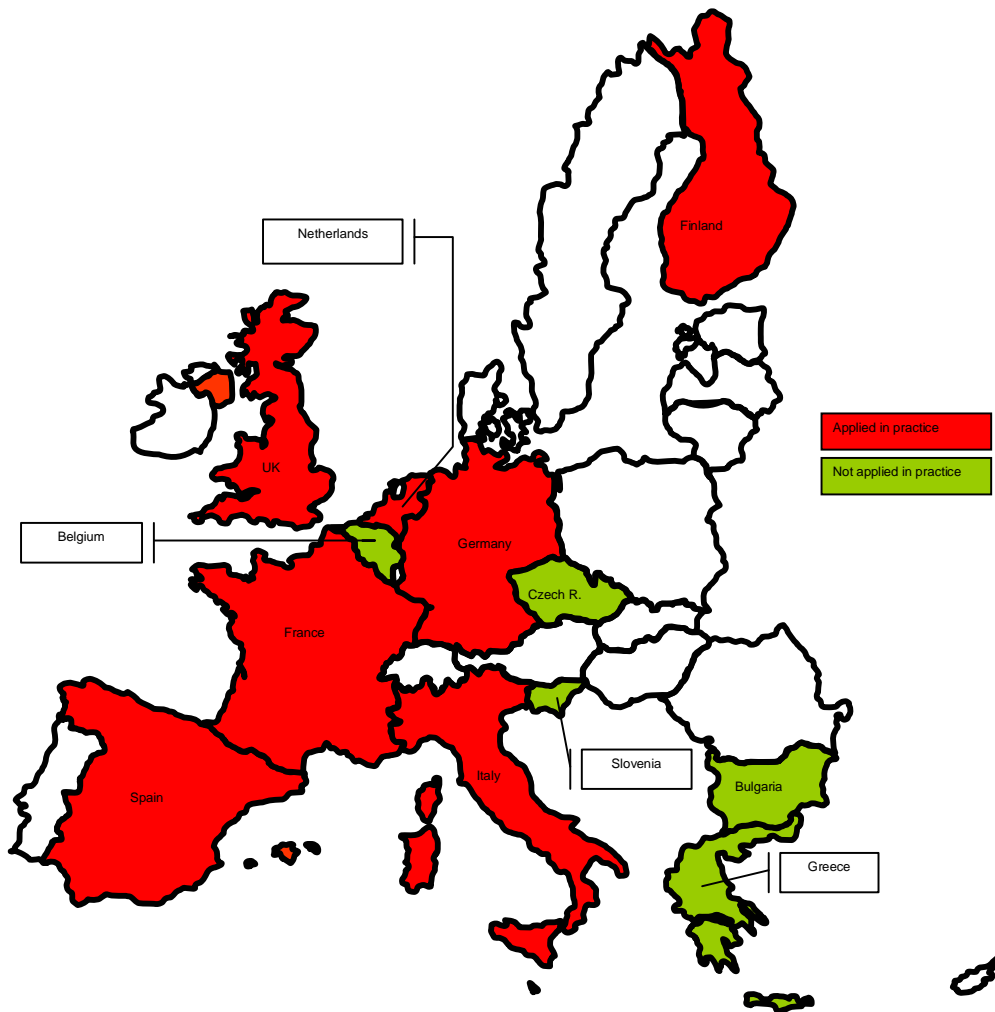
<sup>14</sup> Article 30 (1) (d) and Article 31 (2) (i) of the Aliens Act. Article 30 (1): *“An application for the issue of a residence permit for a fixed period as referred to in section 28 shall be rejected if: (d) the alien will be transferred to a country of earlier residence on the grounds of a treaty obligation between the Netherlands and the other country concerned, which is a party to the Convention on Refugees, the Convention for the Protection of Human Rights and Fundamental Freedoms (Trb. 1951, 154) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Trb. 1985, 69) or has otherwise undertaken to observe Article 33 of the Convention on Refugees, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.”* Article 31 (2) (i) provides that: *“The screening of an application [for the issuance of a residence permit] shall take account, among other things, of the fact that: (i) the alien will be admitted to a country of earlier residence until s/he has found lasting protection elsewhere.”*

<sup>15</sup> Article 67 of the International Protection Act provides that *“(1) A country can be considered to be a first country of asylum where: the applicant has been granted refugee status which still applies; or the refugee enjoys sufficient protection, including benefiting from the principle of non-refoulement (2) The concept of first country of asylum shall be applied provided that s/he will be readmitted to that country. (3) In applying the concept of first country of asylum the competent authority shall take into account Article 63 of this Act”* [on the concept of safe third country].

<sup>16</sup> Article 5.6 (f) of the Asylum Law 9/1994 provides that the concept of first country of asylum applies *“If the applicant has already been recognized as a refugee and has the right to reside or to be granted asylum in another State, or if s/he has arrived from another State whose protection s/he could have asked for. In either case, there must be no danger to his life or liberty in the said State, nor may s/he be exposed to torture or other inhuman or degrading treatment there and s/he must also be effectively protected against refoulement to the persecuting country, under the conditions laid down in the Geneva Convention”*. Article 5.6 (f) covers the concepts of first country of asylum and safe third country. The New Asylum Law separates both concepts and states that a case might be declared inadmissible if: *“according to Article 25.2 (b) and Article 26 of Directive 2005/85/CE, the applicant has been recognized as a refugee and has the right to reside or obtain effective international protection in a third state provided that s/he will be re-admitted to that country, his/her life or liberty are not threatened, nor may s/he be exposed to torture or inhuman or degrading treatment and s/he is effectively protected against refoulement to the persecuting country, in accordance with the Geneva Convention.”*

<sup>17</sup> The First Country of Asylum concept has not been transposed in the UK. It is subsumed within the third country provisions. The UK transposition table says that no action is required.

<sup>18</sup> Interviews with S1, S2, S7, S9 and S10.



In Bulgaria, the concept as laid down in Article 13 (2), item 1 and 2 LAR, is not applied in practice. Being a beneficiary of protection in another country has been used simply as a ground for rejecting an application (rather than a ground for inadmissibility or discontinuation of proceedings).<sup>19</sup>

In Finland, the concept has been applied solely to other European Union countries, such as Hungary and Poland.<sup>20</sup> In addition, Section 104 of the Aliens' Act 301/2004 stipulates the requirement for a document to be issued to all removed applicants whose

<sup>19</sup> Information from interviews with stakeholder – interviewees and the Head of Proceedings and Accommodation Department.

<sup>20</sup> During the past years, Finland has received a number of asylum seekers from Russia who had already been recognized in Hungary or Poland. As such, the determining authority has considered it impossible to use Dublin II mechanisms to facilitate return to these countries, as protection had already been granted. Instead, the Council of Europe *Agreement on the Transfer of Responsibility for Refugees*, signed in Strasbourg on 16 October 1980 (available at: <http://www.unhcr.org/refworld/docid/3ae6b37620.html>) has been used, and Poland and Hungary have been considered to be safe countries of asylum. Finland has no readmission agreements with either Poland or Hungary.

applications are rejected on grounds of safe country of asylum, stating that the application has not been examined in substance in Finland. The same Section states that a decision applying the safe country of asylum or origin concepts must be taken within seven days of completion of the record of the personal interview, thus implicitly requiring that an interview should take place. However, UNHCR's interviews with the determining authority revealed that interviews are not arranged and conducted when it is considered that the applicant enjoyed protection in a safe country of asylum, is still protected there, and may be returned. The omission of the personal interview is based on an interpretation of Section 103 (1) of the Aliens Act, which provides that an application for international protection may be dismissed if the applicant has arrived from a safe country of asylum. As the application may be dismissed and not examined on its merits, it is considered by the determining authority that an interview is not required. In consideration of the above, this interpretation of Section 103 (1) of the Aliens Act would appear to be inconsistent with Section 104 (1), which states that a decision applying the safe country of asylum concept must be taken within seven days of completion of the record of the personal interview. Statistics collated by the Finnish determining authority do not mention the application of the first country of asylum concept in their asylum procedure. However, the lists of decisions made available to UNHCR did include decisions taken on the ground of first country of asylum, as did the decisions audited.<sup>21</sup> Both the Government Bill transposing the APD and stakeholders in the procedure confirm that the safe country of asylum concept is only used in cases where an *ad hoc* agreement on the readmission of the specific applicant to the first country of asylum has been reached.

French law has not transposed the concept of first country of asylum, and in practice, an applicant for asylum with refugee status in another country may still benefit from protection in France, provided s/he fulfills the requirements for legal entry to French territory applied to all foreigners in France, and receives a long-term residence permit. On the basis of this document, the OFPRA examines his/her application and, provided no exclusion or cessation clauses apply, transfers his/her refugee status to France, under a "transfer of protection" arrangement. Transfer of protection is applied only when a recognized refugee holds a long term entry visa (which subsequently allows him/her to apply for the requisite long-term residence permit). The Council of Europe Agreement on Transfer of Protection<sup>22</sup> is not explicitly cited as the legal basis for this practice. If the refugee claims international protection based on threats to his/her security in the first country of asylum, an examination of the application, with reference to the country of first asylum, takes place without the need for the applicant to fulfill

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<sup>21</sup> The lists of decisions made available to the NPO included five decisions on safe country of asylum grounds. Of the audited cases, cases 98, 99, 100, 102, 106 and 107 concerned safe countries of asylum and applicants with protection status in Hungary and Poland. Of the additionally audited cases, 11 made reference to the concept of safe country of asylum (including an applicant with refugee status in Poland) but were granted nonetheless residence permit in Finland on the grounds of family ties.

<sup>22</sup> Council of Europe *Agreement on the Transfer of Responsibility for Refugees*, signed in Strasbourg on 16 October 1980 (available at: <http://www.unhcr.org/refworld/docid/3ae6b37620.html>)



the requirement of holding a long term-residence permit. In such a case, the applicant has to establish that s/he has a well founded fear of persecution within the meaning of Article 1A (2) of the 1951 Convention. However, this practice is limited to beneficiaries of the 1951 Convention. For those who were protected in a third state on another basis (for instance based on the OAU Convention or subsidiary protection), the application would be examined with reference to potential protection needs in the country of origin.

In Germany, Section 29 APA related to the concept of safety elsewhere is of very little practical application. According to the BAMF, there are so few rejections as to be “irrelevant” in practice.<sup>23</sup> In 2008, only three decisions were based on Section 29 APA. They all concerned a Bosnian family which had applied for protection after having lived for seven years in the USA and held a 15-year residence title for that country.

In the Netherlands, the Aliens Circular states the order in which issues need to be examined. Under its provisions, the examination starts with safe third country grounds, and only if that concept is not applicable, should first country of asylum then be considered.<sup>24</sup> This approach implies a hierarchy between Articles 26 and 27 of the APD, which the Directive itself does not stipulate nor require. However, UNHCR’s audit of case files included no such cases, and interviews with stakeholders confirmed that the concept of first country of asylum is rarely applied in practice.

In Spain, it is noteworthy that although the concept of first country of asylum may be applied as a ground for inadmissibility (see further details below), in practice the concept is seldom applied. When used, it is never the sole ground for inadmissibility. In the UK, the first country of asylum concept is subsumed within the safe third country provisions. Information on countries considered safe in 2008 based on the Article 26 criteria is not available.

### **Criteria for designating a country as a first country of asylum**

Some Member States in this study have not transposed or do not reflect elements of the specific Article 26 APD criteria in their national legislation.

Bulgaria,<sup>25</sup> the Czech Republic<sup>26</sup> and Italy,<sup>27</sup> for instance, have only reflected Article 26 (a), i.e. the fact that the applicant “has been recognized in that country as refugee and

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<sup>23</sup> This is confirmed by interviews with the lawyers. Section 27 APA, establishing a concept of safety elsewhere from persecution, is outside the scope of the APD since it only applies directly to constitutional asylum under Art. 16a Basic Law. However, according to information submitted by the asylum authority, in reviewing the application of Section 29 APA, the criteria of Section 27 (2) and (3) APA are taken into account.

<sup>24</sup> Aliens Circular C 4/3.9.1

<sup>25</sup> Article 13 (2) item 2 (Amended, SG No. 52/2007) of the Law on Asylum and Refugees states that: “The refugee status or humanitarian status determination procedure shall not start or if it has already started it

s/he can still avail him/herself of that protection”, thereby setting a higher standard of protection in these three countries.

In Slovenia, Article 67 of the International Protection Act omits an important part of Article 26 (a) of the APD i.e. “and s/he can still avail him/herself of that protection”, which has been replaced by a requirement that the refugee status remains valid. However, even if the applicant's refugee status still applies, it may be that s/he is unable to avail him/herself of that protection in practice. Given that the APD sets minimum standards, including in its permissive provisions, such transposition raises questions about compatibility with the APD.

Likewise, in Spain, the wording of the Asylum Law does not require that the applicant can still avail him/herself of the refugee protection. Instead, it requires that the applicant has the “right to reside” in the third country. The new Asylum Law maintains the same wording. In practice, however, claims are not rejected on this ground where protection would no longer be available. The absence of a right of residence in the third country is taken to mean that the applicant cannot avail him/herself of the refugee protection, as in the case of mandate refugees recognized by UNHCR in Morocco, or in the case of applications by recognized refugees at Spanish embassies around the world.<sup>28</sup>

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*shall be terminated when the alien has: 1. refugee status granted in another European Union Member State; 2. refugee status granted in a safe third country provided that s/he will be allowed to stay in that country;[...]*”

<sup>26</sup> Section 2 (3) of the Asylum Act provides that “*The first country of asylum means a country other than that of which the alien is a citizen, or in case of a stateless person, the country of his/her last permanent residence, where the alien had stayed before s/he entered the Territory if the other country granted him/her refugee status pursuant to an international agreement*”. In addition, a footnote in the ASA adds: “*1b) in case the alien may still avail him/herself of the protection and may safely return to the other country.*”

<sup>27</sup> Decreto legislativo 25/2008, Article 29 (a); available at: [www.camera.it/parlam/leggi/deleghe/testi/08025dl.htm](http://www.camera.it/parlam/leggi/deleghe/testi/08025dl.htm)

<sup>28</sup> Article 5.6 (f) of the Asylum Law 9/1994 provides that the concept of first country of asylum applies “[i]f the applicant has already been recognized as a refugee and has the right to reside or to be granted asylum in another state, or if s/he has arrived from another state whose protection s/he could have asked for. In either case, there must be no danger to his/her life or liberty in the said state, nor may s/he be exposed to torture or other inhuman or degrading treatment there and s/he must also be effectively protected against refoulement to the persecuting country, under the conditions laid down in the Geneva Convention”. Article 5.6 (f) covers the concepts of first country of asylum and safe third country. The New Asylum Law separates both concepts and states that a case might be declared inadmissible if: “*according to article 25.2 (b) and Article 26 of Directive 2005/85/CE, the applicant has been recognized as a refugee and has the right to reside or obtain effective international protection in a third state provided that s/he will be re-admitted to that country, his/her life or liberty are not threatened, nor may s/he be exposed to torture or inhuman or degrading treatment and s/he is effectively protected against refoulement to the persecuting country, in accordance with the Geneva Convention.*”

In Finland, the concept of a safe country of asylum can be applied if the applicant “*may be returned*”<sup>29</sup> to a country “*where s/he enjoyed or could have enjoyed protection*”. That country can be considered as safe “*if it is signatory, without geographical reservations, to the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and adheres to them.*”<sup>30</sup>

Despite the fact that the law does not make reference to Article 26 (a) APD, requiring that s/he can still avail him/herself of the protection of that state, the preparatory works for the Finnish legislation clearly state that the concept of safe country of asylum can only be used in respect of countries where the applicant in question is still protected in accordance with international standards, and where s/he enjoys protection from *refoulement*. Further, the preparatory works require that the country be willing to take back the person in question.<sup>31</sup>

In the United Kingdom, the provisions of Section 33 and Schedule 3 of the 2004 Act give power to the Secretary of State to remove an applicant to a ‘safe country’ (which encompasses a ‘first country of asylum’), subject to being satisfied that the safe country is a place where the applicant’s life or liberty will not be threatened for a 1951 Convention reason, or is a place from which the person will not be *refouled*. However, the second limb of Article 26 (a) APD, i.e. that the applicant can still avail him/herself of that protection, and Article 26 (b) with respect to the requirement that the applicant enjoys “sufficient protection,” are not reflected in Section 33 and Schedule 3 of the 2004 Act. The criterion found in the Immigration Rules, that there is clear evidence of his/her admissibility to the safe country at hand, does not correspond to the requirement in Article 26 APD that the applicant will be re-admitted to that country.<sup>32</sup> The Immigration Rule expressly states that, provided the Secretary of State is satisfied that a case meets this criterion, s/he is “under no obligation to consult the authorities of the third country or territory before the removal of an asylum applicant to that country

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<sup>29</sup> Section 103 of the Aliens’ Act: “*An application for international protection may be dismissed if: 1) the applicant has arrived from a safe country of asylum defined in section 99 where s/he enjoyed or could have enjoyed protection referred to in sections 87 and 88 and where s/he may be returned*”, *ibid*.

<sup>30</sup> Section 99 of the *Ulkomaalaislaki* (Aliens’ Act 301/2004, as in force 28.4.2009) gives the definition of a safe country of asylum: “*When deciding on an application in the asylum procedure, a state may be considered a safe country of asylum for the applicant if it is signatory, without geographical reservations, to the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights (Treaty Series of the Statute Book of Finland 8/1976) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Treaty Series of the Statute Book of Finland 60/1989) and adheres to them.*” Available at:

<http://www.migri.fi/netcomm/content.asp?path=2760>

<sup>31</sup> *Hallituksen esitys 28/2008* (Government Bill 28/2008), 36. In the audited cases where the safe country of asylum concept was used in a first country of asylum sense, the decisions focused to a great extent on providing reasons for why a future safe return and stay were possible. See audited cases 98, 99 and 106.

<sup>32</sup> Immigration Rule Paragraph 345.

or territory.” The Immigration Rules do not further clarify what is meant by “clear evidence of admissibility.”

In Greece, Article 19 of PD 90/2008<sup>33</sup> is a *verbatim* translation of Article 26 APD. However the wording of paragraphs 1 a and 1 b of Article 19 leaves some in clarity. In fact, it is not clear if the condition “s/he will be readmitted to that country” applies to both paragraphs, or to paragraph (b) only.

In the Netherlands, the Aliens Act seems to require a previous stay, but the Aliens Circular states otherwise. Article 31 (2) (i) Aliens Act refers to a “country of earlier stay,” while the Aliens Circular C4/392 and 3.93 defines as one of the criteria that the asylum seeker stayed or *could have stayed* in that country, under circumstances that are not abnormal according to the local standards. According to the Aliens Circular C4/3.9.3, (under ‘b’), Article 31 (2) (i) of the Aliens Act is only applicable if it appears from objective facts or circumstances that the applicant did not have the intention to travel to the Netherlands, at the moment s/he was in the country of origin. In the same paragraph of the Circular, under “ad b”, a further criterion is included, relating to the asylum seeker’s intention to travel to the Netherlands. A stay of two weeks or more in the third country is taken to indicate that the applicant did not intend to travel to the Netherlands, whereas a stay of less than two weeks indicates that the applicant did intend to travel to that country. This indication can be rebutted, however, on the basis of objective facts and circumstances. If the authorities conclude there was no intention to travel to the Netherlands, they can assume protection was available in the third country. Under the Aliens’ Circular, the claim can also be rejected if the applicant did not stay in that third country, for two weeks or at all - but could have stayed there, in the authorities’ view.

By contrast, Spain has expanded upon the criteria included in Article 26 of the APD. In fact, the Spanish Asylum law further defines the concept of *refoulement* referred to in Article 26 of the APD.<sup>34</sup> While the concept of danger to the applicant’s life or liberty is transposed without further elaboration, that of protection against *refoulement* is limited

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<sup>33</sup> “1. A country shall be considered to be a first country of asylum for a particular applicant for asylum if: a. s/he has been recognized in that country as a refugee and can still avail him/herself of that protection; or b. s/he otherwise enjoys sufficient protection in that country, including benefiting from the principle of non refoulement provided that s/he will be readmitted to that country ...”

<sup>34</sup> Article 5.6 (f) of the former Asylum Law 5/1984 provides that: “there must be no danger to his/her life or liberty in the said state, nor may s/he be exposed to torture or other inhuman or degrading treatment there and s/he must also be effectively protected against refoulement to the persecuting country, under the conditions laid down in the Geneva Convention”. Article 20 (1) c of the New Asylum Law (Law 12/2009) transposing the APD states: “...there must be no danger to his/her life or liberty in the said state, nor may s/he be exposed to torture or other inhuman or degrading treatment and s/he must also be effectively protected against refoulement to the persecuting country, under the conditions laid down in the Geneva Convention”

to the 1951 Convention grounds, and solely linked to return to “the persecuting country,” as opposed to any territories where his life or freedom would be threatened.<sup>35</sup>

In Germany, Section 27 APA<sup>36</sup> provides that constitutional asylum will not be granted if the applicant has been safe from persecution in another State (i.e. in a state not covered by the safe third country concept). Safety from persecution is assumed if the applicant has been issued a refugee travel document by that third state, or has stayed for more than three months in that country. This provision does not have legal consequences with a view to refugee or subsidiary protection. However, according to information provided by BAMF, the criteria of Section 27 (2) and (3) APA are also reviewed when applying Section 29 APA, and thus used for an eventual rejection of an application as irrelevant.<sup>37</sup> Section 29 APA, which may also be applied with a view to refugee protection, provides that an application is “irrelevant” (*unbeachtlich*)<sup>38</sup> if the applicant evidently was safe from persecution in another third country, and can be returned within three months to that state, or another state where s/he is safe from persecution. In this case, the application is turned down as irrelevant. This means that an asylum procedure reviewing the material criteria of the claim is not carried out.

### **The notion of ‘sufficient protection’**

As described earlier, Bulgaria, the Czech Republic and Italy have not transposed Article 26 (b) of the APD in their respective national legislations; as such no interpretation of the notion of ‘sufficient protection’ is provided in law.

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<sup>35</sup> 1951 Convention Relating to the Status of Refugees, Article 33.1.

<sup>36</sup> Section 27 APA: Safety elsewhere from persecution: “(1) A foreigner who was already safe from political persecution in another third country shall not be recognized as a person entitled to asylum. (2) If the foreigner holds a travel document issued by a safe third country (Section 26a) or by another third country pursuant to the Convention related to the status of refugees, it shall be presumed that s/he was safe from political persecution in that country. (3) If before entering the Federal territory, a foreigner has lived for more than three months in another third country where s/he is not threatened by political persecution, it shall be presumed that s/he was safe there from political persecution. This shall not apply if the foreigner provides plausible evidence that deportation to another country where s/he is threatened by political persecution could not be ruled out with reasonable certainty.”

<sup>37</sup> Section 29 APA: [Irrelevant] applications for asylum: “(1) An asylum application shall be [irrelevant] if it is obvious that the foreigner was already safe from political persecution in another third country and if it is possible to return him to this country or to another country where s/he is safe from political persecution. (2) If it is impossible to return him within a period of three months, the asylum procedure shall be continued. The Aliens Authority shall inform the Federal Office without delay.”

<sup>38</sup> The translation provided on the internet by the Federal Ministry of the Interior ([www.en.bmi.bund.de](http://www.en.bmi.bund.de)) speaks of “unfounded” applications. This is not an accurate translation. The term used in German is “*unbeachtlich*” which means “irrelevant”. More particularly, the subsumption of an application under this provision has the procedural consequence that an application is not examined on the merits. Therefore, the concept of “irrelevant” applications in German asylum procedures law constitutes a concept of inadmissibility.

While Article 5.6 (f) of the former Spanish Asylum Law only mentions (actual or possible) refugee status and the right to reside in the third country,<sup>39</sup> the new Asylum Law introduces the notion of ‘effective protection.’<sup>40</sup>

In the United Kingdom also, Article 26 (b) APD encompassing the notion of “sufficient protection” is not reflected,<sup>41</sup> and there is no requirement for the Secretary of State to be satisfied that there is “sufficient protection” before removing an applicant to a first country of asylum. UNHCR<sup>42</sup> and others<sup>43</sup> have noted that the term “sufficient protection” has not been defined in the Directive, and may not represent an adequate criterion when determining whether an asylum seeker or refugee can be returned safely to a first country of asylum. In turn, the provisions in UK law do not define “sufficient (or effective) protection.” UNHCR and others therefore have recommended that the national legislative provisions should state that the applicant should have “effective” (and not merely “sufficient”) protection in the first country of asylum.

Greece has a verbatim translation of Article 26 of the APD, and thus no interpretation is offered in its legislation of the notion of ‘sufficient’ protection. However, interviewees declared that ‘sufficient protection’ is interpreted to mean subsidiary or humanitarian protection.<sup>44</sup> In Slovenia, the official translation of Article 67 of the International Protection Act states ‘sufficient protection’ (without further details as in Article 26 (b) of the APD), though the original Slovene word could be interpreted to mean ‘actual protection’. As there is no practice as yet applying this concept, no further interpretation is available in Slovenia.

In defining ‘sufficient protection’, the Dutch legislation requires that the applicant already received or could have received sufficient protection against refoulement;<sup>45</sup> the existence of an agreement to readmit with the third country; and an undertaking by that to respect the principle of *non-refoulement* or Article 3 of the relevant human rights treaties.<sup>46</sup> This compliance must be confirmed by agreements, treaties or written

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<sup>39</sup> Article 5.6 (f) of the Asylum Law provides that the concept of first country of asylum applies “*If the applicant has already been recognized as a refugee and has the right to reside or to be granted asylum in another state, or if s/he has arrived from another state whose protection s/he could have asked for*”.

<sup>40</sup> Article 20.1 (c) “*The person has already been recognized as a refugee and has the right to reside or to obtain effective international protection.*”

<sup>41</sup> The UK’s implementation table indicates “No action required.”

<sup>42</sup> UNHCR, *Comments on the UK implementation of Council Directive 2005/85/EC (the Asylum Procedures Directive)*, 24 October 2007.

<sup>43</sup> Refugee Council, *Response to UK Implementation of Council Directive 2005/85/EC (the Asylum Procedures Directive)*, October 2007.

<sup>44</sup> Interview with S1, S2 and S9.

<sup>45</sup> According to the C4/3.9.2 Aliens Circular, the concept of first country of asylum can already apply if the asylum seeker had or could have had sufficient protection against refoulement in that country, and the asylum seeker stayed or could have stayed in that country.

<sup>46</sup> Article 30 (1) (d) of the Aliens Act provides that “*An application for the issue of a residence permit for a fixed period as referred to in section 28 shall be rejected if: (d) the alien will be transferred to a country of earlier residence on the grounds of a treaty obligation between the Netherlands and the other country*”

declarations of the state concerned, supported by practical experience. However, having signed or ratified the Conventions is not a condition.<sup>47</sup> Article 26 (b) APD requires that the applicant “enjoys sufficient protection, including benefitting from the principle of *non-refoulement*.” This suggests that the notion of “sufficient protection” extends beyond protection from *refoulement*. Given the Dutch legislation appears to only require protection from *refoulement*, it does not fulfil the requirements of Article 26 (b) APD.

In Germany, while the wording “sufficient protection” including *non-refoulement*, has not been formally transposed, section 29 APA requires safety from persecution. This includes safety from *refoulement* as well as protection from eventual persecution by third parties, and from other significant disadvantages or dangers in the third state. This is implied in the jurisprudence of the Federal Constitutional Court, which emphasises that mere safety from persecution is insufficient, but the necessary support for overcoming the negative consequences of the flight must be available to the refugee.<sup>48</sup> Moreover, section 27 (2) and (3) APA also applied in connection with section 29 APA contains an assumption of safety if the applicant holds a refugee passport issued by the other state, or has stayed there for more than three months.<sup>49</sup> As an additional criterion, German law requires that safety from persecution in the third state be evident (*offensichtlich*).<sup>50</sup>

### Recommendation

**The wording “sufficient protection” in Article 26 (b) APD is not defined and does not represent an adequate safeguard when determining whether an asylum seeker may be returned to the first country of asylum. The APD should be amended and the term “sufficient protection” replaced by “effective protection”. In addition, it is recommended to draw up an Annex to the APD, setting out the criteria for “effective**

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*concerned, which is party to the Refugee Convention, the Convention for the Protection of Human Rights and Fundamental Freedoms (Trb. 1951, 154) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Trb. 1985, 69) or has otherwise undertaken to observe Article 33 of the Refugee Convention, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.”*

<sup>47</sup> C3/5, Aliens Circular.

<sup>48</sup> BVerfGE 78, 332, 344 et seq.

<sup>49</sup> The latter assumption is rebuttable by making credible that safety from *refoulement* cannot be excluded with sufficient certainty. Despite the fact that Section 27 (2) APA does not contain an explicit provision on rebuttal, the presumption is seen as being rebuttable. (R. Marx, *Commentary on the Asylum Procedure*, 7<sup>th</sup> edition, section 27, in particular para. 57 and 58). An example for rebutting the assumption of safety is cited, namely if that the passport may have been issued for reasons of allowing onward travel to refugees not legally staying in the country in accordance with Article 28 (1) 2 of the 1951 Convention.

<sup>50</sup> The BAMF did not provide explanations or examples illustrating this approach.

protection” for the purposes of Article 26 (b) in line with the 1951 Convention and the Lisbon Conclusion on “effective protection.”<sup>51</sup>

### Inadmissibility grounds

Article 25 (2) (b) APD provides that “Member States may consider an application for asylum as inadmissible ... if: (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26”. Several Member States of focus in this research use the notion of first country of asylum as a ground for inadmissibility.

In Bulgaria, Article 13 (2)<sup>52</sup> of the Law on Asylum and Refugees provides that the procedure shall not start - or in case it has already started, shall be discontinued – if the applicant has refugee status in a safe third country. Article 13 (2), item 2, obliges the decision-maker first to establish that the third country is safe in the meaning of paragraph 1, item 9 of the Additional Provisions of the Law on Asylum and Refugees<sup>53</sup> before s/he may rely on this inadmissibility ground. In practice, however, this article is not applied as a ground for inadmissibility. Article 13 (2) item 2 LAR refers to Paragraph 1, item 9 LAR by a direct reference – using a legal term which is defined in the Additional Provisions of the law: “safe third country.”

In Finland, section 103 of the Aliens’ Act stipulates that an application for international protection may be dismissed if the applicant has arrived from a safe country of asylum where or s/he enjoyed or could have enjoyed protection,<sup>54</sup> but this provision has rarely

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<sup>51</sup> 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, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>

<sup>52</sup> Law on Asylum and Refugees, above note 26. See also Article 70 (1) of the Law on Asylum and Refugees, item 2: “In a term of three days after proceedings have started, the interviewing body may: ...2. discontinue the proceedings on the grounds of Article 13 (2). See also Article 77 (3) of the Law on Asylum and Refugee: “Acting on a proposal by the interviewing body, when the requirements of the law are present or based on an application by the alien, the Chairperson of SAR discontinues the proceedings.”

<sup>53</sup> Paragraph 1, item 9 of the Additional Provisions of the Law on Asylum and Refugees provides that: “Safe third country” shall mean a country other than the country of origin where the alien who has applied for status has resided and: a) there are no grounds for the alien to fear for his/her life or freedom due to race, religion, belonging to a particular social group or political opinions or beliefs; b) the alien is protected from being returned to the territory of a country in which there are prerequisites for persecution and risk to his/her rights; c) the alien is not in danger of persecution, torture, inhuman or degrading treatment or punishment; d) the alien has the opportunity to request refugee status and when such status is being granted s/he shall enjoy protection being a refugee; e) there are sufficient reasons to believe that the alien will be allowed on the territory of such country.”

<sup>54</sup> *Ulkomaalaislaki Aliens’ Act 301/2004* (as in force 28.4.2009) Section 103: “[...] An application for international protection may be dismissed if: 1) the applicant has arrived from a safe country of asylum defined in section 99 where s/he enjoyed or could have enjoyed protection referred to in sections 87 and 88 and where s/he may be returned;[...].” available at: <http://www.migri.fi/netcomm/content.asp?path=2760>



been used, and not at all during recent years, according to official information.<sup>55</sup> In Germany, the application is rejected as irrelevant, which means that an asylum procedure reviewing the material criteria of the claim is not carried out<sup>56</sup>. In Italy, applications are declared inadmissible and not subject to personal interviews when “the applicant has been recognized as a refugee by a state that has signed the Geneva Convention and is still able to avail him/herself of such protection.”<sup>57</sup>

In Spain, while it appears little used,<sup>58</sup> the concept of first country of asylum is applicable as a ground for inadmissibility.<sup>59</sup> In the regular refugee status determination procedure, there is no specific provision establishing the concept of first country of asylum as a ground for rejection. Nevertheless, if a claim that could have been declared inadmissible passes the admissibility stage, the definition of first country of asylum in article 20 (1) (c) may then be used, if applicable, for rejection in practice. In the Czech Republic, section 10a of the Asylum Act provides that “*The application for international protection shall be inadmissible (...) (d) if the alien have found effective protection in the first asylum country*”. However, UNHCR was informed that this provision has never been used. In Slovenia,<sup>60</sup> the concept of first country of asylum is not applied in practice. However, the law foresees that claims are dismissed.

In Bulgaria, the direct reference to “safe third country” means the applicant should be given the opportunity to rebut at least the presumption of safety (Article 99 LAR). However, there is no evidence of practice in the use of any of the concepts. In Germany, section 29 APA qualifies the respective applications as “irrelevant” (“*unbeachtlich*”), thus providing a ground for inadmissibility, since an irrelevant application would not be examined on the merits. However, according to the BAMF, section 29 APA in practice is applied in connection with the rebuttable presumptions of section 27 (2) and (3) APA. In Slovenia the applicant may show evidence that the relevant country is not a safe country for him. According to Article 67 (3) of the IPA in

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<sup>55</sup> *Hallituksen esitys* (Government Bill) 86/2008. Some decisions made on safe country of asylum grounds may be recorded as manifestly unfounded, based on the rule in *Ulkomaalaislaki* (Aliens' Act 301/2004) section 104 (1) requiring a decision to be made within seven days of filing the record of the asylum interview. The lists made available to the NPO included five references to safe country of asylum decisions, which were not included among those audited. Some of the audited cases were not included in these lists, as some of the decisions using safe country of asylum considerations were only included in the decisions reviewed at the District Administrative Court.

<sup>56</sup> *Infra*, note 39.

<sup>57</sup> Article 29 (1) (a) of the Legislative Decree 25/2008.

<sup>58</sup> None of the cases and decisions audited showed that the concept of first country of asylum had been applied.

<sup>59</sup> In application of Article 5 (6) (f) of the Asylum Law.

<sup>60</sup> Article 67 (3) of the International Protection Act refers to the Article 63 of the same Act when applying the concept of first country of asylum. The latter provides that “(1) *The competent authority shall dismiss by decision the application of any alien who arrives from a safe third country in the sense of the procedures under Articles 60 and 62 of this Act*”.

connection with Article 63 (2) of the IPA, this applies also to concept of first country of asylum (in both cases, the same procedural rules apply).

### **Recommendation**

**The APD should be amended to state explicitly that asylum seekers should have the possibility to rebut the presumption of safety and, where applicable, to challenge a decision to declare their claims inadmissible under the concept of first country of asylum.**

### **Readmission: how Member States satisfy themselves that an applicant will be readmitted to the first country of asylum**

In Finland, both the Government Bill transposing the APD and participants in the procedure confirm that the safe country of asylum concept is only used in cases where an agreement on readmission of the applicant to the first country of asylum has been reached.

In most other surveyed Member States, it is difficult to ascertain which criteria they apply to ensure that applicants will indeed be readmitted to the first country of asylum before returning them to that country. This is due in part to the fact that this concept has not been extensively used in practice, but also to the absence of details regarding the implementation of this provision in the relevant rules and regulations.

In Bulgaria and Spain, the procedure involves contacting the authorities of the first country of asylum. In Bulgaria, according to the determining authority, there is a general obligation for all state authorities to provide information necessary to clarify the circumstances of a particular claim if requested by the State Agency for Refugees (SAR) within the Council of Ministers of the Republic of Bulgaria.<sup>61</sup> This means that in principle, SAR could contact the Foreign Ministry, who would further contact the relevant authorities in the first country of asylum, and receive information on their position regarding a particular applicant. In addition, the Ministry of Interior is the competent authority to execute expulsion orders and remove aliens from the territory of the Republic of Bulgaria. SAR decision-makers on applications for asylum would be advised when the requirement for readmission by the first country of asylum is satisfied, enabling a decision to be taken on this ground.<sup>62</sup>

Spanish determining authorities seek confirmation of the readmissibility of the applicant either through UNHCR or the authorities of the first country of asylum.<sup>63</sup> Of additional

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<sup>61</sup> Article 64 of the Law on Asylum and Refugees.

<sup>62</sup> This was based on the hypothetical conclusions of the Head of the Proceedings and Accommodation Department of RRC-Sofia, as there is no relevant practice.

<sup>63</sup> Information provided by UNHCR.

note for Spain is the fact that the new Asylum Law introduces the concept of readmission in connection with use of the first country of asylum rule.<sup>64</sup> For both Bulgaria and Spain, the criteria applied in this procedure are legally uncertain, as they are not defined in legislation.

In Germany, Article 29 APA requires that the return to the country must be “*possible*”. According to commentators, this requires certainty that the person will be re-admitted to the third state.<sup>65</sup> According to information provided by the BAMF, the legal availability of return options is reviewed (for instance, based on eventual readmission agreements, residence titles, issuing of a travel document). Moreover, the factual possibility to return is reviewed. In cases where obstacles to return arise, for instance, because of illness impeding travel, the asylum procedure is opened.

Finally, in the United Kingdom, provided the applicant did not arrive directly from the country where s/he fears persecution, and there is clear evidence of his/her admissibility to a third country, there is no obligation to consult the authorities of the receiving country before removal to that country.<sup>66</sup> Paragraph 345 of the Immigration Rules does not clarify what is meant by “clear evidence of admissibility.” There is therefore no methodology set out in the United Kingdom law by which the authorities satisfy themselves that the applicant will be readmitted to the first country of asylum.

### **Recommendation**

**Member States’ legislation and practice should require that the competent authority is satisfied that an applicant will be re-admitted by the third country before dismissing a claim based on the first country of asylum concept.**

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<sup>64</sup> The new Asylum Law retains the same definition of first country of asylum but adds “... *provided that s/he is readmitted to the said country...*”.

<sup>65</sup> R. Marx, *Commentary on the Asylum Procedure Act*, 7<sup>th</sup> edition, Section 29, in particular para. 27 and 31.

<sup>66</sup> According to Immigration Rule Paragraph 345 (of HC 395) as amended by HC 112 with effect from 25 October 2004, and by HC 82 from 1 December 2007: “(1) *In a case where the Secretary of State is satisfied that the conditions set out in Paragraphs 4 and 5 (1), 9 and 10 (1), 14 and 15 (1) or 17 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 are fulfilled, s/he will normally decline to examine the asylum application substantively and issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as appropriate. (2) The Secretary of State shall not issue a certificate under Part 2, 3, 4 or 5 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 unless: (i) the asylum applicant has not arrived in the United Kingdom directly from the country in which s/he claims to fear persecution and has had an opportunity at the border or within the third country or territory to make contact with the authorities of that third country or territory in order to seek their protection; or (ii) there is other clear evidence of his admissibility to a third country or territory. Provided that s/he is satisfied that a case meets these criteria, the Secretary of State is under no obligation to consult the authorities of the third country or territory before the removal of an asylum applicant to that country or territory.*”

See also API on Safe Third Country Cases (Feb 2007, re-branded December 2008).

## **Authorities responsible for taking decisions applying the concept of first country of asylum**

In all Member States of focus in this research, the refugee status determination authorities are responsible for taking decisions relating to the concept of first country of asylum.

There may be some national variations. For instance, in the United Kingdom, the Third Country Unit (TCU) is responsible for taking decisions applying the concept of the first country of asylum. The TCU is a specialist unit within the determining authority. In Spain, the application is examined by the Asylum and Refuge Office (OAR) in the Ministry for Interior (determining authority), during the admissibility procedure, and the decision is made by the Minister of Interior (acting as the determining authority), upon proposal of the OAR. In a regular RSD procedure, the decision is taken by the Minister of Interior upon proposal by the Inter-ministerial Commission on Asylum and Refuge (CIAR), which is adopted after examination and initial proposal by the OAR. In Italy, following the decentralization of the asylum determining authorities, each Territorial Commission for the Recognition of International Protection (CTRPI) has the authority to apply the concept of first country of asylum.

In Bulgaria, the interviewers in the State Agency for Refugees<sup>67</sup> may take a decision to discontinue the proceedings based on the concept of first country of asylum.<sup>68</sup> The Chairperson of SAR may also take a decision to discontinue the proceedings<sup>69</sup> based on a proposal by the interviewing body. In Germany, the decision is taken by the BAMF, the determining authority responsible for asylum procedures.

## **Use of the criteria set out in Article 27 (1) when applying the concept of first country of asylum**

Article 27 (1) requires that, before applying the safe third country concept, the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

*“ (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;*

*(b) the principle of non-refoulement in accordance with the Geneva Convention is respected;*

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<sup>67</sup> Art. 48 (1), item 10 LAR.

<sup>68</sup> Decision under Article 70 (1), item 2 (directly referring to Article 13 (2) of the Law on Asylum and Refugees) in the accelerated procedure.

<sup>69</sup> Decision under Article 77 (3) of the Law on Asylum and Refugees: *“Acting on a proposal by the interviewing body, when the requirements of the law are present or based on an application by the alien, the Chairperson of SAR discontinues the proceedings.”*

*(c) 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; and*

*(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.”*

Most Member States of focus in this research, who have transposed or reflect the concept of first country of asylum in their respective national laws and use this provision, do not in practice take into account the criteria set out in Article 27 (1) APD relating to the concept of safe third country when applying the concept of first country of asylum.

In Finland, the definition of the concept of a safe country of asylum is not directly drawn from Article 27 (1) APD. However, the definition makes a reference to the 1951 Convention and its application in the country in question (as per Article 27 (1) (b)).

In the Netherlands, the Dutch government does not use the criteria set out in Article 27 (1) APD when applying the concept of first country of asylum. In principle, the third country's compliance with the *non-refoulement* principle is required. If, however, the third country does not comply with the obligations of the 1951 Convention, the country can still be regarded as a country of first asylum if the asylum seeker has a valid residence permit in that country, which offers sustainable protection against return, or if it is proven that s/he is able to obtain such a permit.

By contrast, some Member States have explicitly transposed the criteria outlined in Article 27 (1) APD. Greece for instance, has literally transposed this article as a permissive clause.<sup>70</sup> In Spain, the transposition in the new Asylum Law has been made with some changes. The new Asylum Law in Article 20.1 (c)<sup>71</sup> does not limit the threat to life and liberty to grounds of race, religion, nationality, membership of a particular social group or political opinion, as provided by Article 27 (1) (a) APD. However, in the Spanish transposition, the principle of *non-refoulement* is linked to the persecuting country and not the third country; and the possibility of receiving protection in the third country becomes a mere possibility to ask for protection (but does not necessarily require that the applicant receive it).

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<sup>70</sup> Article 20 of Presidential Decree 90/2008. According to article 19 (2) of the Presidential Decree 90/2008, the content of Article 20 may be taken into account when applying the concept of first country of asylum.

<sup>71</sup> New Asylum Law Article 20 (1) c defines the concept of first country of asylum as one in which: “*the applicant has been recognised as a refugee and has the right to reside there or to obtain effective international protection, provided that (...) and s/he is effectively protected against refoulement to the persecuting country under the terms established in the Geneva Convention.*”

In Bulgaria, Article 13 (2), item 2 of the Law on Asylum and Refugees refers directly to the legal definition of safe third country.<sup>72</sup> This definition reflects in general the requirements under Article 27 (1) APD, which must be established by the decision-maker on a case-by-case basis.

In Germany, there is no explicit provision incorporating the criteria of Article 27 (1) APD. However, according to information provided by the BAMF, the criteria of Article 27 (1) APD are applied in practice. The BAMF emphasises that, under the German concept, the criteria must evidently be fulfilled (“*offensichtlich*”).<sup>73</sup>

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<sup>72</sup> Paragraph 1, item 9 of the Additional Provisions of the Law on Asylum and Refugees, above note 54.

<sup>73</sup> The BAMF did not provide explanations or examples to illustrate this approach.