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The safe third country concept

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Section 12

The safe third country concept

Introduction

Within the framework of the procedures at first instance set out in Chapter III of the Asylum Procedures Directive (APD), Article 27 concerns the possibility for Member States to apply the safe third country concept. The safe third country notion, as set out in the APD, is the concept that Member States may send applicants to third countries with which the applicant has a connection, such that it would be reasonable for him/her to go there, and in which the possibility exists to request refugee status and if s/he is found to be a refugee, it must be possible for him/her to receive protection in accordance with the 1951 Convention. In that third country, the applicant must not be at risk of persecution, *refoulement* or treatment in violation of Article 3 ECHR. On the basis of this presumption, Member States may decide to consider the application as manifestly unfounded in accordance with Article 28 (2) APD¹ or inadmissible in accordance with Article 25 (2) (c) APD.² It should be underlined that Article 27 APD is a permissive provision, allowing but not obliging Member States to apply the concept.

The safe third country concept is also reflected in Article 36 APD which foresees the possibility to establish a list of European safe third countries. However, Article 36 (3) APD requiring the adoption of a common list of European safe countries by the Council was annulled by the European Court of Justice as the procedure was deemed to infringe EC law.³ As such, no common list of European safe third countries has been adopted and Article 36 APD can not be applied at the time of writing. Therefore, this research study did not address Article 36 APD.

According to the APD, a third country can only be designated as a safe third country if it fulfills four conditions relating to safety and asylum practices in the third country⁴:

(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;

¹ The application must be unfounded in the sense that the applicant does not qualify for refugee status pursuant to the Qualification Directive.

² Recital 23 APD states that “Member States should also not be obliged to assess the substance of an asylum application where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country.”

³ *European Parliament v. Council of the European Union*, C-133/06, European Union: European Court of Justice, 6 May 2008, available at: <http://www.unhcr.org/refworld/docid/4832ddb92.html>.

⁴ Article 27 (1) APD.

(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.

In addition, certain conditions relating to the applicant have to be fulfilled, including:

- the applicant must have a connection with the third country in accordance with rules laid down in national legislation (Art. 27 (2) (a) APD);
- given the nature of the connection, it must be reasonable for the applicant to go that third country (Art. 27 (2) (a) APD);
- the determining authority should have conducted an individual examination to ensure that the putative safe third country is safe for the particular applicant;
- the applicant, as a minimum, must have had the opportunity to challenge the application of the safe third country concept on the grounds that s/he would be subjected to torture, cruel, inhuman or degrading treatment or punishment (Art. 27 (2) (c) APD);
- if the decision is based solely on safe third country grounds, the applicant must have been informed of the decision and provided with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance (Art. 27 (3) (a) and (b));
- it is implicit in Art. 27 (4) APD, that application of the concept is subject to the proviso that the applicant is admitted to the third country. If an applicant is not admitted to the third country, in accordance with Art. 27 (4) APD, the applicant must be given access to an asylum procedure in the Member State.

Also, the concept cannot be applied unless the Member State has laid down rules in national legislation regarding the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe.⁵ Finally, it should be noted that Article 27 (5) APD requires Member States to periodically inform the Commission of the countries to which the concept is applied.

⁵ Art. 27 (2) (b) APD.

The safe third country notion is far less relevant in the EU following the accession of twelve new Member States since 2004, as the Dublin II Regulation supersedes the safe third country concept within the EU. Other States outside the EU (Iceland, Norway⁶ and Switzerland⁷) have been included in the Dublin II regime so that the safe third country concept is no longer relevant with regard to those countries. Beyond these borders, none of the remaining countries now at the periphery of the Union could legitimately be considered safe. As emerged during the research, of the 12 Member States surveyed, only two reportedly apply the safe third country concept in law and in practice.⁸ The UK has applied the concept to Canada and the United States of America.⁹ Only Spain seems to extend the use of the concept, in practice and on a case-by-case basis, to some Latin American and African States.¹⁰

If a Member State nevertheless wishes to rely on the safe third country concept, UNHCR considers that certain conditions should be met to ensure that the third country is safe, i.e. that it is able and willing to determine needs for international protection and to provide effective protection, including:¹¹

- a) The applicant should be protected against *refoulement*¹² and be treated in accordance with accepted international standards in the third country. Safety

⁶ Council Decision 2001/258/EC of 15 March 2001 concerning the conclusion of an Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway. Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001D0258:EN:HTML>.

⁷ Council Decision 2008/147/EC of 28 January 2008 on the conclusion on behalf of the European Community of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland. Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:053:0003:0004:EN:PDF>.

⁸ Spain and the UK. In the Czech Republic, national law provides for the concept and there is an internal list of safe third countries that was last updated in May 2007 but not made public. Reportedly the list has not been applied since 2006. In the Netherlands, there is no available record of the application of the concept, nor the countries to which the concept has been applied, and UNHCR found no evidence of the application of the concept in its audit of case files and decisions.

⁹ In the UK, the Asylum Procedures Instruction on Safe Third Countries (dated Feb 2007, rebranded December 2008) gives United States of America, Canada and Switzerland as examples of countries to which returns have taken place under Part 5 of Schedule 3. Information on countries considered safe in 2008 is not available.

¹⁰ Although the safe third country concept is reportedly never applied as the sole ground for inadmissibility or rejection of an application.

¹¹ Council of Europe: Parliamentary Assembly, *Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States*, 7 October 2005, 1471 (2005), paragraph 8(3), available at: <http://www.unhcr.org/refworld/docid/43f349e04.html>.

¹² UN High Commissioner for Refugees, *General Conclusion on International Protection*, 8 October 1999, No. 87 (L) – 1999, letter j), available at: <http://www.unhcr.org/refworld/docid/3ae68c6ec.html>.

should be ensured in practice, and not just under formal obligations that it may have assumed.¹³

- b) The applicant should have a genuine connection or close links with the third country. In UNHCR's view, the mere fact of having had the opportunity to seek protection or having transited through a country does not represent a meaningful link.¹⁴
- c) While the Directive foresees that national legislation shall permit the applicant to challenge the presumption on the ground that s/he would be subject to torture, cruel, inhuman or degrading treatment or punishment, it does not ensure the possibility to rebut the presumption on the basis of a fear of persecution on 1951 Convention grounds, and other individual risks which would found an entitlement to protection such as, for instance, the fact that the third state would apply more restrictive criteria in determining the claimant's status than the State where the application has been presented¹⁵ or the fact that the third state would not assess whether there is a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.¹⁶ Moreover, the APD does not explicitly permit the applicant to challenge the application of the concept on the ground that the criteria stated in Article 27 (2) (a) APD are not fulfilled and it would not be reasonable for him/her to go to the third country.

As highlighted by the preamble to the 1951 Convention and a number of Conclusions adopted by UNHCR's Executive Committee,¹⁷ satisfactory solutions to the problems of refugees cannot be achieved without international cooperation. The primary responsibility to provide protection remains with the state where the claim is lodged. Transfer of responsibility for an asylum application might be envisaged in some circumstances, but only between states with comparable protection systems, on the basis of an agreement which clearly outlines their respective responsibilities. By contrast, the concept of safe third country as defined in the Directive rests on a unilateral decision by a state to invoke the responsibility of another state to examine an asylum claim. Application of this concept is, therefore, less preferable to such

¹³ This partially reflected by Art. 27 (1) (a), (b) and (c) APD.

¹⁴ UN High Commissioner for Refugees, *Aide Mémoire: Directive on Minimum Standards on Procedures on Granting and Withdrawing Refugee Status*, 18 November 2003, available at: <http://www.unhcr.org/refworld/docid/402a2d6e4.html>.

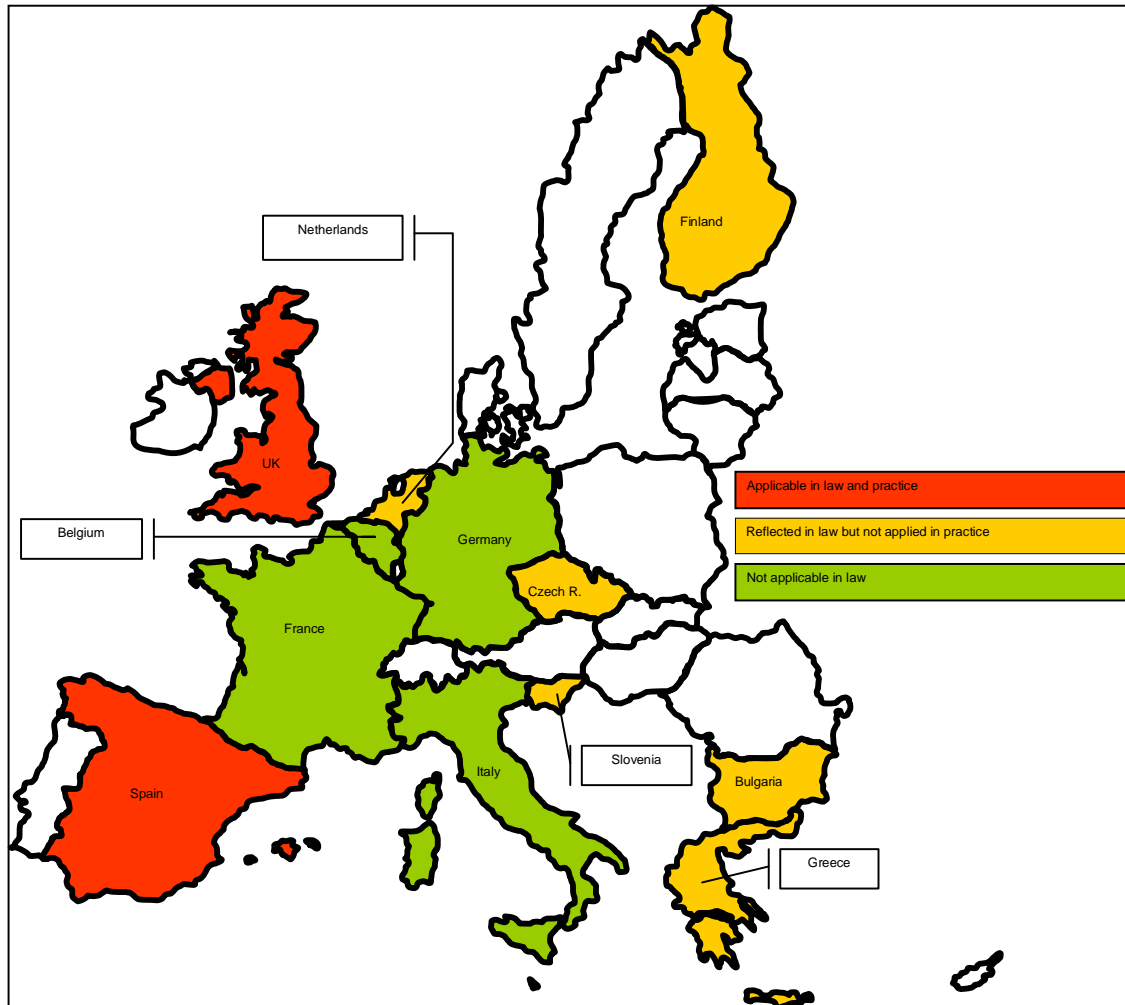
¹⁵ See, *inter alia*, *T.I. v. The United Kingdom*, Appl. No. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b6dfc.html>.

¹⁶ This is a ground for qualification for subsidiary protection status in accordance with Article 15 (c) Qualification Directive.

¹⁷ UN High Commissioner for Refugees, *Thematic Compilation of Executive Committee Conclusions*, August 2008, Third edition, available at: <http://www.unhcr.org/refworld/docid/48b6c62f2.html>.

multilateral agreements,¹⁸ which ensure access to effective protection for asylum seekers under legally-defined conditions.¹⁹ Under both kinds of arrangement, the third country should expressly agree to admit the applicant to its territory and to consider the asylum claim substantively in a fair procedure.

Application of the safe third country concept



Article 27 of the APD is a 'may' provision – which permits, but does not require, its transposition in national legislation, regulations and/or administrative provisions.

¹⁸ UN High Commissioner for Refugees, *Global Consultations on International Protection/Regional Meetings: Conclusions (Regional Meeting in Budapest, 6-7 June 2001)*, paragraph 14, 15 June 2001, EC/GC/01/14, available at: <http://www.unhcr.org/refworld/docid/3b36f29b1.html>.

¹⁹ 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>.

The 12 Member States of focus in this research fall into three broad categories in relation to their use of the safe third country concept. Firstly, there are two countries only which apply the safe third country concept in law and in practice: Spain²⁰ and the United Kingdom.²¹ However, in Spain, the concept is reportedly never used as the sole ground for inadmissibility or rejection, and UNHCR's research found no evidence of the UK applying the safe third country concept to countries other than the USA, Switzerland or Canada.²² In addition, there are no publicly available statistics confirming the numbers of removals nor to which countries the UK removes applicants under this concept.

The second group comprises Bulgaria,²³ Czech Republic,²⁴ Finland,²⁵ Greece,²⁶ the Netherlands²⁷ and Slovenia²⁸, where the concept is reflected in the law. However, it is not applied, or it is unclear whether and how it is applied in practice.

In the third group, namely Belgium,²⁹ France and Italy³⁰, the concept of the safe third country is not reflected in national legislation, nor is it applied in practice.

Germany represents an exception to these categories in that the concept exists in German law and practice but only outside the scope of the APD. In the German asylum procedure, the safe third country concept is only applied in relation to constitutional asylum.³¹ According to section 26a APA, an applicant who has entered Germany through a safe third country is not granted constitutional asylum.³² However, the denial of

²⁰ Article 20 (1) of the New Asylum Law.

²¹ Section 33 and Schedule 3 (part 3, 4 and 5) to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

²² In the UK, the Asylum Procedures Instruction on Safe Third Countries (dated February 2007, rebranded December 2008) gives United States of America, Canada and Switzerland as examples of countries to which returns have taken place under Part 5 of Schedule 3.

²³ Para.1, item 9 Additional Provisions of LAR.

²⁴ Section 2(2) ASA.

²⁵ Section 99 of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 28.4.2009).

²⁶ Article 20 of PD 90/2008.

²⁷ Articles 30 (1) (d), 31 (2) (h) and 31 (3) Aliens Act and Article 3.106a Aliens Decree.

²⁸ Articles 60, 61, 62, 63 and 64 IPA.

²⁹ Since the Aliens Act was modified by the Law of 22 December 2008, this concept is not applicable in Belgium in law.

³⁰ Article 40 (1) (a) of the d.lgs. n. 25/2008.

³¹ The institution of constitutional asylum has a strong tradition in Germany since the adoption of the Basic Law in 1949. However, being based on a particular concept of persecution (so called "political persecution"), it is in certain respects different from the concept of 1951 Convention refugee status.

³² Section 26a APA: "(1) Any foreigner who has entered the Federal territory from a third country within the meaning of Article 16a (2) first sentence of the Basic Law (safe third country) **cannot invoke Article 16a (1) of the Basic Law**. He shall not be recognized as being entitled to asylum. The first sentence above shall not apply if: 1. the foreigner held a residence title for the Federal Republic of Germany at the time he entered the safe third country; 2. the Federal Republic of Germany is responsible for processing an asylum application based on European Community law or an international treaty with the safe third country; or if 3. the foreigner has not been refused entry or removed on account of an order pursuant to Section 18 (4)

constitutional asylum does not impact on the granting of refugee status, since the safe third country concept as defined in Article 27 APD has not been transposed into German law. According to the Explanatory Report of the Transposition Act 2007, the additional application of the safe third country rule was regarded as superfluous due to the application of the Dublin II system.³³

Within the first group of Member States (i.e. those applying the safe third country concept in law and practice), Spain has transposed Article 27 but with some differences.³⁴ The UK law provides for three categories of safe third countries. The first and second categories refer to lists of safe countries. However, the lists have never been adopted, and hence these categories have never been used. The third category refers to countries that are not listed, but that are considered safe for individuals because they meet certain criteria.

With regard to the second group of Member States described above, i.e. those reflecting the safe third country concept in legislation without implementing it in practice, Bulgaria, Finland, Greece and the Netherlands are noteworthy.

The safe third country concept is reflected in Bulgarian law, but it is currently inapplicable as it is related to the designation of a list of safe third countries. No such list is currently in force.³⁵

Finland does not apply the safe third country concept *per se*. Instead, it uses the 'safe country of asylum' concept that encompasses the 'first country of asylum' (Article 26 APD) and 'safe third country' concepts.³⁶ During recent years, the 'safe country of asylum' concept has solely been applied to 'first country of asylum' cases.

no. 2 above. (2) In addition to the Member States of the European Union, safe third countries are those listed in Appendix I. (3) The Federal Government shall resolve by statutory ordinance without the consent of the Bundesrat that a country listed in Appendix I is no longer deemed a safe third country if changes in its legal or political situation give reason to believe that the requirements mentioned in Article 16a (2) first sentence of the Basic Law have ceased to exist. The ordinance shall expire no later than six months after it has entered into force."

³³ Bundestag printed papers, 16/5065, page 215.

³⁴ Article 20 (1) New Asylum Law.

³⁵ The last list was adopted in 2005, and is no longer applicable, as it should be adopted or re-adopted each year.

³⁶ Section 99 of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 28.4.2009): "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". Section 103 of the *Ulkomaalaislaki*: "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 he or she **enjoyed or could have enjoyed** protection referred to in section 87 and 88 and where he or she may be returned". Emphasis added.

It is doubtful if and how the safe third country concept is applied in practice in Greece. Until March 2009, there was no relevant precedent-setting case-law, and all the reviewed decisions lacked specific reasoning which could indicate whether and how the concept is used.

In the Netherlands, there is no recording of statistics on cases where the concept is applied, nor information on the countries to which it is applied. In addition, UNHCR found no evidence of the application of the safe third country concept in the case files and decisions audited. The Aliens Act foresees two provisions referring to the safe third country concept. The first provision states that the asylum claim will be rejected if the asylum seeker will be transferred to a safe third country on the ground of a treaty obligation.³⁷ The asylum seeker must have stayed in that country, and the country should be party to the 1951 Convention, the ECHR and the CAT, or have undertaken to observe the *non-refoulement* principle laid down in these conventions.³⁸ If the conditions of this provision are met, the authorities are not allowed to examine the application in substance.³⁹ The second provision states that the assessment of an application shall take account, *inter alia*, of the fact that the alien has stayed in a third country that is party to the 1951 Convention and the ECHR or the CAT, and that that alien has not made plausible his/her claim that this country does not fulfill its treaty obligations with regard to him/her.⁴⁰ It follows that if the conditions of the provision are met, the authorities can reject the application, but they are not obliged to do so.

Within the third group of Member States, i.e. those that do not reflect the safe third country concept in law and practice, in Italy there may be a constitutional problem. In fact, while Article 12 of the l. 13/2007 that has delegated the Government to adopt the d.lgs. 25/2008, provided for the maintenance of the safe third country concept; Article 40 (1) (a) of the d.lgs. n. 25/2008 itself has expressly repealed the safe third country concept.

UNHCR has also undertaken a limited review, outside the terms of the research, of the state of application of the safe third country concept in other Member States (other than those which are the subject of this survey). It found that of the remaining 14 Member States,⁴¹ it is contained in the law of and utilised in practice by three Member

³⁷ Article 30(1)(d) Aliens Act. In the Explanatory Memorandum of the Royal Decree that implements the Directive, it is explained that in this context the term "treaty obligation" refers to a readmission agreement or a readmission clause in a general agreement.

³⁸ Reneman, M., *Implementation of the Procedures Directive in the Netherlands*, in AAVV, *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, 2008, p.134.

³⁹ Aliens Circular C3/5.

⁴⁰ Article 31(1)(h) Aliens Act.

⁴¹ Note that, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark did not take part in the adoption of the APD and is, therefore, not bound by it or subject to its application.

States.⁴² Ten Member States have transposed the concept in law, but do not apply it in practice;⁴³ while Poland does not feature the concept in law or practice. This leads UNHCR to conclude that, while Member States appear to support the notion, the concept is largely symbolic, and holds little practical use.

The responsible authority

In the Member States reflecting the safe third country concept in national law, the determining authority under Article 4 (1) APD is responsible for taking the decision to apply the safe third country concept.

In only one Member State of those surveyed - the UK - decisions applying the safe third country concept and the Dublin II Regulation are taken by a specialised unit, the Dublin/Third Country Unit (TCU), within the determining authority.

Criteria for designating countries as safe third countries

Article 27 (1) of the APD provides that:

Member States may apply the safe third country concept only where 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;

(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

⁴² Austria, Hungary and Portugal. The Austrian Federal Asylum Agency informed that 25 first instance decisions were issued in 2009 in application of the safe third country concept (Article 4 of the 2005 Asylum Act available at:

http://www.unhcr.at/fileadmin/unhcr_data/pdfs_at/information_in_english/asyl2005-eng-logo.pdf).

No information is available with regard to which third countries were considered as safe in these decisions. According to an internet research, for the period 1 January 2009 to 25 February 2010, the Asylum Court (second instance) issued 6 decisions related to the safe third country concept. Four of them concerned the application of the safe third country concept to Switzerland. The Asylum Court quashed all these decisions as the Dublin II Regulation should have been applied instead. In the remaining two decisions the Asylum Court confirmed the Federal Asylum Agency's assessment that Croatia was a safe third country. No information is available regarding practice in Hungary and Portugal.

⁴³ Cyprus, Estonia, Ireland, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovakia, and Sweden.

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

In Greece,⁴⁴ the Netherlands⁴⁵ and Slovenia,⁴⁶ the criteria set out in the national legislation for designating countries as safe third countries correspond to those of Article 27 (1).

In the other Member States reflecting the safe third country concept in law, the criteria do not precisely correspond. The Bulgarian legislature has expanded the criterion of Article 27 (1) (a) introducing the subjective element of fear,⁴⁷ but has not included the prohibition of removal in Article 27 (1) (c) APD.⁴⁸ In the Czech Republic, the legislature modified the wording of the APD, thereby expanding the provision of Article 27 (1) (a).⁴⁹ However, it did not transpose the provision related to the prohibition of *refoulement* under Article 27 (1) (b) APD or the prohibition of removal in Article 27 (1) (c) APD. In Finland, the criteria set out in the national legislation do not make explicit reference to the criteria of Article 27 (1) APD. The legislature required rather that a state may be considered as a “safe country of asylum” if it is a signatory and adheres to the 1951 Convention, the ICCPR and the CAT.⁵⁰

In Spain, the New Asylum Law reflects the wording of Article 27 (1) of the APD (except for the fact that respect for the principle of *non-refoulement* is not linked to the 1951 Convention). In the United Kingdom, the criteria set out in the national legislation for designating countries as safe third countries correspond to those of Article 27 (1), except for the requirements of Article 27 (1) (c) and (d), *i.e.* the prohibition of removal and the possibility to request refugee status and receive protection.

Recommendation

Where the “safe third country” concept is used, the APD’s criteria should be articulated in law and observed in practice. In addition to the existing criteria in Article 27 (1), the APD should require that in the third country there be: (a) no risk of serious harm, as defined in the Qualification Directive;⁵¹ and (b) the possibility to request a complementary form of protection against a risk of serious harm.

⁴⁴ Article 20 of PD 90/2008 contains a verbatim translation of Article 27 (1).

⁴⁵ Article 3.106a Aliens Decree.

⁴⁶ Article 61 (1) of the IPA.

⁴⁷ Item 9(a) of Paragraph 1 of the Additional Provision of the LAR: “*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 opinion or beliefs*” (emphasis added).

⁴⁸ Item 9(c) of Paragraph 1 of the Additional Provision of the LAR: “*the alien is not at risk of persecution, torture, inhuman or degrading treatment or punishment*”.

⁴⁹ Section 2(2) ASA: “[...] without being subject to persecution, torture, inhuman or degrading treatment or punishment”.

⁵⁰ Section 99 of the *Ulkomaalaislaki* (Aliens’ Act 301/2004, as in force 28.4.2009).

⁵¹ This is suggested in proposed recast Article 32 (1): APD Recast Proposal 2009.

The methodology for applying the safe third country concept

Article 27 (2) (b) APD requires that the application of the safe third country concept is subject to the establishment of rules, in national legislation, on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or a particular applicant. It further states that “[s]uch methodology shall include case-by-case consideration of the safety of the country for a particular applicant **and/or** national designation of countries considered to be generally safe.”⁵² [Emphasis added]. Although Article 27 (2) (b) APD would appear to permit the option of national designation alone, Article 27 (2) (c) APD nevertheless requires an individual examination of whether the third country concerned is safe for a particular applicant.⁵³

The question of whether a particular third country is safe for the purpose of sending an asylum seeker cannot, in UNHCR’s view, be answered in a generic fashion, for example by ‘national designation’ of Parliament or another body, for all asylum seekers in all circumstances. In UNHCR’s view, the question of whether an asylum seeker can be sent to a third country for determination of his/her claim must be answered on an individual basis.⁵⁴

In Bulgaria, Article 98 (2) of the LAR defines the methodology the Council of Ministers should follow to approve the nationally designated list of safe third countries.⁵⁵ The list should be adopted by the Council of Ministers and reviewed every year following the same procedure. In addition, case-by-case consideration of applications is guaranteed by Article 13 (3)⁵⁶ and Article 99 of the LAR.⁵⁷ However no list of designated safe third

⁵² Emphasis added.

⁵³ Article 27 (2) (c) APD states that “[t]he application of the safe third country concept shall be subject to rules laid down in national legislation, including rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant”.

⁵⁴ 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>.

⁵⁵ Article 98(2) of the LAR: “In the process of approval the Council of Ministers shall take into account sources of information from European Union Member States, the United Nations High Commissioner for Refugees, the Council of Europe or other international organizations and shall make a judgment of the extent to which a country provides protection against persecution based on:

1. pieces of legislation adopted in this area and the method by which they are enforced;
2. the manner of observing rights and freedoms provided for in the Convention on the protection of Human Rights and Fundamental Freedoms, in the International Covenant on Civil and Political Rights or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
3. the manner of enforcing the Prohibition of Expulsion or Return in the sense of the Convention relating to the Status of Refugees from 1951.
4. the existence of an effective penal system for violations of those rights and freedoms”.

⁵⁶ Stipulating that the fact that the applicant comes from a safe third country **may not be the sole ground** for rejecting an application as manifestly unfounded.

countries has been adopted after the amendments to LAR in 2007.⁵⁸ Therefore, the safe third country concept is currently inapplicable.

In the Czech Republic, the methodology is defined by an internal regulation of the director of the Department of Asylum and Migration Policy of the Ministry of the Interior, establishing a list which is not publicly available. This internal regulation reportedly states that decision-makers should use the list of safe third countries when making decisions under Section 16 (1) (e) ASA. The regulation emphasises that there is a rebuttable presumption embodied in that provision, and that in case it is found that the particular country cannot be considered safe, the application must be dealt with in a regular procedure. It seems implied in the internal regulation that the presumption must be rebutted by the applicant during the procedure. However, it is unclear how the applicant would learn (before the decision is taken) that the safe third country concept would be applied to him or her, given that the list of safe third countries is confidential. The list of safe third countries, which is not public, was last updated in May 2007, but reportedly the list has not been applied since 2006.⁵⁹

In Finland, there is neither in law nor in administrative guidelines any reference to the precise methodology by which countries are to be designated as 'safe countries of asylum'. It appears that the concept of 'safe countries of asylum' is not applied in practice with regards to the 'safe third country' concept.⁶⁰ However, in practice, with regard to the 'first country of asylum' concept, the cases audited showed that the designation of a country as a safe country of asylum is made on an individual basis taking into account the particular applicant.

It should perhaps be mentioned here, as a point of interest only, that under the German constitutional asylum concept (which is outside the scope of the APD), safe third countries include all EU Member States plus Norway and Switzerland.⁶¹

No rules on methodology are stated in Greek legislation and, therefore, Article 27 (2) (b) APD has not been transposed. All interviewees participating in this research concurred that Greece does not have a list of nationally designated safe third countries. However, according to the Head of the Asylum and Refugees Department in the Aliens'

⁵⁷ Stipulating the right to rebut the presumption of safety.

⁵⁸ The last list of safe third countries was adopted in 2005 and included: Bosnia and Herzegovina; Republic of Macedonia; Romania; Russian Federation; Serbia and Montenegro; and Ukraine. It also included a general comment: "*The Republic of Bulgaria acknowledges as Safe Third Countries, all countries which have ratified the 1951 Geneva Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees and which provide effective protection to asylum seekers*".

⁵⁹ This was confirmed by the Head of Asylum Procedure Unit in an interview of 7 April 2009 and verified by UNHCR's review of all applications rejected as manifestly unfounded since December 2007.

⁶⁰ No evidence of the use of the safe third country concept was found by this research and the *Hallituksen esitys* 86/2008 (Government Bill 86/2008) implementing the APD states that the possibility to dismiss applications on the ground of a "safe country of asylum" has rarely been used.

⁶¹ Section 26a(2) APA, Annex I to the APA.

Directorate of the Greek Police Headquarters, there is case-by-case consideration of the safety of relevant third countries, on the basis of precise and up-to-date information as to the general situation prevailing in the countries through which applicants have transited.⁶² However it is unclear if and how the safe third country concept is applied in practice, and the decisions audited by UNHCR lacked any specific legal reasoning which would allow identification of the application of the concept.

In the Netherlands, in response to the obligation to lay down rules on the methodology in Article 27(2)(b) APD, the law provides for application of the safe third country concept when *'[i]n the opinion of our Minister, all relevant facts and circumstances being taken into account'*.⁶³ There is no list of nationally-designated safe third countries, but a case-by-case consideration of the safety of the country for a particular applicant should be conducted. However, if applied in practice, there is no available record of the number of times it has been applied, nor with regard to which countries it has been applied and UNHCR found no evidence of the application of the concept in the case files and decisions audited during this research.

In Slovenia, Article 61 (2) and (3) of the IPA requires that a list of safe third countries is adopted by the Government. No reference is made in law to case-by-case consideration of the safety of the country for a particular applicant, but the law does state that *"[a]n applicant may, during the course of the procedures ... show evidence that the relevant country is not a safe country for him/her"*.⁶⁴ Slovenia does have a safe third country list which contains only one country – the Republic of Croatia.⁶⁵ However, in practice, the safe third country concept and procedure, as defined in Article 63 of the IPA, is not applied and an application has not been dismissed on this legal ground. However, it should be noted that UNHCR audited decisions which rejected applications as manifestly unfounded in the accelerated procedure on the basis of Article 55 indent 5 of the IPA (*"the applicant has failed without reasonable cause to make his/her application as soon as possible, having had the opportunity to do so"*). This provision was applied extra-territorially in the sense that it was considered that an applicant could have applied for protection in a third country.⁶⁶ The following was cited in decisions audited:

*"Since the applicants were travelling to the Republic of Slovenia through Bosnia and Herzegovina and stayed there for two days, and through the Republic of Croatia, they could have applied for asylum already there";*⁶⁷ and *"the applicant did not present any*

⁶² Such information is gathered by ADGPH in *Police Online* database.

⁶³ Article 3.106a (3) Aliens Decree.

⁶⁴ Article 63 (2) IPA.

⁶⁵ Ordinance on the proclamation of the Republic of Croatia as safe third country, Official Gazette of the Republic of Slovenia No. 50/2008, of 23 May 2008.

⁶⁶ See section 9 of this report on prioritised and accelerated examination of applications.

⁶⁷ Case No. 26-2008, 27-2008 and 19-2008.

*founded reasons for not applying for asylum in one of countries through which he was travelling.”*⁶⁸

Spain does not yet provide rules in national legislation on the methodology by which the competent authorities decide that the safe third country concept may be applied to a particular country or to a particular applicant. There is no legal provision stipulating designation by list, nor stipulating case-by-case consideration. However, the latter is carried out in practice.⁶⁹ The New Asylum Law refers to application of the concept “...*in view of the applicant’s personal circumstances...*,” but no more specific rules are established. Such rules should be addressed in the implementing regulation to the New Asylum Law that must be elaborated within six months of entry into force of the Law (i.e. by May 2010). UNHCR was informed that the countries that are most regularly considered to represent safe third countries are those with a solid democratic system, for which COI reveals there is an effective legal system, and that it is feasible for the applicant to request and eventually obtain effective protection, bearing in mind the applicant’s nationality. The concept has been applied in relation to Canada, Australia, some Latin American States (Argentina, Brazil, Chile, and Mexico). UNHCR was also informed that it has been applied to some African States, although details regarding which states were not available. No statistics are kept regarding the number of cases to which the concept is applied. Depending on the applicant’s travel route, it is apparently often used as an additional inadmissibility/ rejection ground, on the assumption that the applicant could have applied for protection in a ‘safe’ country through which s/he transited or stayed. It is not, however, used as the sole ground for inadmissibility or for rejecting a claim.

In the UK, Schedule 3 to the Asylum and Immigration Act 2004 sets out the methodology by which the determining authority satisfies itself that the safe third country concept may be applied.⁷⁰ These are supplemented by Asylum Policy Instructions (APIs)⁷¹ and Guidance. At present, the provisions contained in Section 33 and Schedule 3 part 3 and part 4 of the 2004 Act permitting the adoption of lists of safe third countries are not used and, therefore, there has been no national designation or listing of countries considered to be generally safe. The countries considered to represent safe third countries are those to which applicants are sent as a result of individual certification in terms of Part 5 of Schedule 3, i.e. case-by-case consideration. The Asylum Policy Instruction on Safe Third Countries lists Canada, Switzerland and the USA as countries to

⁶⁸ Case No. 33-2008 referring to Croatia, Bosnia and Herzegovina, and Montenegro.

⁶⁹ Information provided by the OAR Direction and confirmed by UNHCR.

⁷⁰ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 [United Kingdom of Great Britain and Northern Ireland], 2004 Chapter 19, 22 July 2004, available at:
<http://www.unhcr.org/refworld/docid/46e5350e2.html>

⁷¹ API Safe Third Countries (dated February 2007, updated December 2008) paragraph 7.1 and 7.4, available at:
<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/safethirdcountrycases?view=Binary>.

which applicants have been removed under Schedule 3 Part 5.⁷² Information on countries considered safe in 2008 is not available. Article 27 (5) APD - which requires Member States to inform the Commission periodically of the countries to which the safe third country concept has been applied - has not been transposed. In its transposition note, the UK authorities state that they will inform the Commission of how the concept is used “*as requested*”. In terms of the procedure, there is no personal interview held to inquire about the potential safety of a country for an applicant, little case analysis and no apparent opportunity to rebut the presumption of safety. Considering that the rules laid down in national legislation do not provide for adequate case-by-case consideration, questions have been raised about conformity with the requirements of Article 27 (2) (b) APD.

Recommendations

Member States should ensure that, if the concept is applied, case-by-case consideration of the safety of a particular country for a particular applicant is always assured, even where there has been national designation of the country as safe.

Any Member State which provides for the national designation of countries considered to be generally safe should have a clear, transparent and accountable process for such national designation and any lists of safe third countries should be made publicly available along with the sources of information used in designating a particular country as safe.

In view of the need to take account of both gradual and sudden changes concerning the safety of a particular country, Member States should have in place appropriate mechanisms for the review of safe third country lists, as well as “benchmarks” and criteria that would trigger and inform such a review.

Country information

Article 8 (2) (b) APD requires that “*precise up-to-date information is obtained from various sources [...] as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited and that such information is made available to the personnel responsible for examining applications and taking decisions.*”

In Bulgaria, Article 98 (2) LAR requires that, in the process of approval of the list of safe third countries, the Council of Ministers shall take into account different sources of

⁷² API Safe Third Countries (dated February 2007, updated December 2008) paragraph 7.1 to 7.3, available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/safethirdcountrycases?view=Binary>.

information.⁷³ In addition, Article 75 (2) LAR stipulates a general obligation to take into consideration all relevant facts concerning the personal situation of the applicant, his/her country of origin, or third countries. This rule is provided in Section III, Chapter Six LAR and thus is related to the general procedure only. Interviewers at SAR were of the opinion that a country information report would be necessary in all cases. However, as stated above, a current list of safe third countries required by national legislation has not been established, and hence the concept is not applied.

In the Czech Republic, there is no provision in the ASA requiring personnel taking a decision on the safe third country concept to consult information related to that country. A binding internal list of safe third countries is drawn up by the Head of the COI Unit in the asylum authorities, and thus it would appear that country information is taken into account when preparing the list. However, the list does not specify potentially more vulnerable categories of applicants, for whom the presumption of safety may be rebuttable.

In Finland, there is no legal or administrative rule stating that the decision-maker is obliged to consult country information before taking a decision in cases of 'safe countries of asylum'. However, in practice, all of the audited 'safe country of asylum' decisions included extensive analysis of country information. Even though the audited cases related exclusively to 'first country of asylum' and not to 'safe third country' decisions, there is nothing to suggest that the same approach would not be used in cases relating to a safe third country.

In Greece, according to Article 6 of PD 90/2008, ADGPH should gather and assess precise and up-to-date information as to the general situation prevailing in the countries of origin of applicants for asylum, and in countries through which they have transited. According to the Head of ARD in ADGPH, the determining authority should consult this information before taking a decision to apply the safe third country concept.

In the Netherlands, the official proposing to take a decision on the application of the safe third country concept is obliged to consult country information on the third country before doing so.⁷⁴

In Slovenia, the obligation is not transposed in national law. Likewise, in Spain, as the safe third country concept is in practice considered on a case-by-case basis, updated country information would appear to be needed in each case, although there is no specific formal obligation. The New Asylum Law does also not establish any rules in that respect.

⁷³ *Ibid.*

⁷⁴ Aliens Circular C4/3.8.1.

In the UK, the Asylum Policy Instruction on Safe Third Countries indicates that “if relevant”, decision makers “should also consider information about the third country”.⁷⁵ The research was unable to verify if that took place in individual cases.

Recommendations

If the safe third country concept is reflected in national law, Member States should ensure a specific obligation for the authorities taking a decision on the application of this concept, or designating countries considered to be safe, to consult updated country information on the third country in their assessment.

The future European Asylum Support Office (EASO) could usefully support the identification and collation of common information sources to be used by Member States for the purpose of designating a third country as a safe third country.

Connection with the safe third country

Article 27 (2) (a) APD requires a “connection” between the person seeking asylum and the third country concerned, on the basis of which it would be reasonable for that person to go to that country.

In UNHCR’s view, this requires that the applicant has a meaningful link with the third country. Mere transit alone does not constitute such a connection or meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between the relevant countries, based on their comparable asylum systems and standards. Transit through a particular country is often the result of fortuitous circumstances, and does not necessarily imply the existence of any meaningful link or connection. Similarly, a simple entitlement to entry would not alone constitute a meaningful link on the basis of which it would be reasonable for the person to go to that country. Examples of links which might be reasonably considered are family links, including between members of extended families. In some cases, links to a broader community could also amount to such a connection; as well as previous residence, such as long-term visits or studies; and linguistic or cultural links. Such links should be required in addition to transit through the country.

Formally, only the domestic legislation of the Netherlands seems to require forms of connection that, according to the above, may be considered a meaningful link. The Dutch legislation requires in Article 3.106a (2) and (3) Aliens Decree⁷⁶ a connection

⁷⁵ API, *Safe Third Countries*, paragraph 8.4 accessed as above.

⁷⁶ Article 3.106a(2) and (3) Aliens Decree: “(2). An application for the issue of a residence permit for a fixed period as referred to in section 28 shall only be rejected on the grounds of Article 30(1)(d) or Article

between the applicant and the third country that would make it reasonable for the person to go to that country. For the application of Article 30 (1) (d) Aliens Act⁷⁷, the connection must be so close that it is reasonable to require the asylum seeker to return to that country and resume his/her earlier residence. In the examination, all relevant facts and circumstances will be taken into account, including the type, the duration and the circumstances of the stay. The acceptance by that country of a request from the Netherlands to readmit the person based on a readmission agreement will be regarded as an indication of such a connection.⁷⁸ With regard to the interpretation of the term “stay”, the content of the readmission agreement will be decisive.⁷⁹

The application of Article 31 (2) (h) Aliens Act⁸⁰ depends on the intention of the applicant to travel to the Netherlands, which is more than the APD requires. The following criteria, laid down in C4/3.8.2 Aliens Circular, are applied in determining if the applicant’s passage constituted a “stay” in the country:

- A stay of two weeks or more in a third country indicates that the asylum seeker did not have the intention to travel to the Netherlands, unless from objective facts and/or circumstances it appears that s/he had this intention.
- If the asylum seeker stayed less than two weeks in a third country, it is assumed that the asylum seeker had the intention to travel to the Netherlands, unless the opposite appears from objective facts or circumstances; for instance, if his/her travel documents lack any indication of onward travel to the Netherlands.

Article 27 (2) (a) APD has not been transposed in Bulgaria. However, it is partially reflected in the very definition of a safe third country – requiring that the applicant

*31(2)(h) Aliens Act, if there is a **connection** between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
3. In the assessment whether the connection, as meant in paragraph 2, can be established, all relevant facts and circumstances will be taken into account, such as the character, the period and the circumstances of the earlier stay in that country”.*

⁷⁷ 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”.

⁷⁸ Aliens Circular C3/5.

⁷⁹ Parliament 1999-2000, 26732, nr. 7, p. 143.

⁸⁰ Article 31 (2) (h) Aliens Act 2. “The screening of an application shall take account, among other things, of the fact that: (h) the alien has resided in a third country that is a party to the Convention on Refugees and one of the conventions referred to in section 30 (d) and the alien has not made a plausible case that such country does not fulfil its treaty obligations with regard to him”.

should have resided in the concerned country.⁸¹ Residence is not further defined. No requirements as to duration or intentions of the alien need to be taken into consideration by the determining authority (SAR). In this context, Article 44 (2) of the Law on the Foreigners in the Republic of Bulgaria⁸² might be applied, by analogy, but there is no such explicit obligation on the competent authorities. The provision requires only that, after protection has been refused and the alien is to be removed from Bulgarian territory (by an authority different from SAR), his/her ties (connection) with his/her country of origin should be examined.⁸³

In the Czech Republic, there are no specific rules regarding examination of the connection between the applicant and the third country. The national law merely requires that it must be a country “*where the alien had stayed before s/he entered the territory and to which the alien may return*”.⁸⁴ As the safe third country concept has not been applied since December 2007, no case law has been developed. In the past, an additional provision was added, stating that the safe third country concept could not be applied to applicants who were merely “*crossing*” (*projížďel*) third countries. Since that provision was annulled, it is unlikely that prior case-law might be applied today, except with regards to the term “had stayed”. In case No. 3 Azs 372/2005 – 64 of 30 November 2006⁸⁵, the fact the applicant had an opportunity to contact local offices and apply for asylum was interpreted as satisfying the term “had stayed”. This interpretation might differ today as the interpretation of S. 2(2) ASA might take into account the wording of the APD.

In order for the ‘safe country of asylum’ concept to be used in Finland, it is required that the applicant has or could have enjoyed protection in the allegedly safe country.⁸⁶ In the cases where this concept has been applied, there has been an obvious link to the

⁸¹ Paragraph 1, item 9 Additional Provisions, LAR: “*Safe third country*” shall mean a country other than the country of origin where the alien who has applied for status **has resided**.

⁸² Law on the Foreigners in the Republic of Bulgaria, Article 44 (2) (Amend. SG No.36/2009: “*When imposing compulsory administrative measures, the competent authorities shall take into consideration the duration of the residence of the alien in the Republic of Bulgaria, his/her family status, as well as the existence of family, cultural and social ties in the country of origin of the person.*”

⁸³ Article 44 (2): “*When executing the compulsory administrative measures, the competent authorities should take into account the duration of the alien's stay on the territory of the Republic of Bulgaria, his/her family situation, as well as family, cultural and social ties (connection) with his/her country of origin.*”

⁸⁴ Section 2(2) ASA.

⁸⁵ “*..In the case it was proven, and the petitioner did not rebut this fact, that she entered the Czech Republic through Poland, where she **stayed** for about 18 hours, and she had to undergo control of identity at the border, so she was in contact with Polish police and customs authorities. The petitioner had a real opportunity to apply for asylum already in Poland, which is (...) so-called safe third country within the meaning of Section 2(2) ASA*”.

⁸⁶ Section 103 of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 28.4.2009): “*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 he or she enjoyed or could have enjoyed protection referred to in sections 87 and 88 and where he or she may be returned*”.

country in that the applicant has previously lived there.⁸⁷ The preparatory works consider the connection requirement of Article 27 (2) (b) APD satisfied by the rules in the Aliens' Act,⁸⁸ on the basis that the Directive does not impose any more detailed requirements.⁸⁹

Article 27 (2) (a) APD has not been transposed in Greek legislation and the term "reasonable" has not been interpreted. However, it is worth noting that, according to Article 18 (b) of PD 90/2008, an application can only be rejected as inadmissible if the safe third country has granted to the applicant international protection status or a residence permit, *inter alia* protecting him/her against *refoulement*.

Article 60 of the IPA stipulates that a safe third country shall be a country where the applicant was present prior to coming to the Republic of Slovenia, and which is thus competent to examine an application in substance.⁹⁰ Since the concept is not applied in practice, it is difficult to define how the requirement of 'presence' in the safe third country prior to coming to the Republic of Slovenia would be interpreted.

The New Asylum Law reflects Article 27 (2) (a) as it allows use of the concept, "*provided that there is a connection on the basis of which it would be reasonable for that person to go to that country.*" Conditions that are normally taken into account are:⁹¹

- how long the person stayed in the third country;
- the possibility to have asked for protection there; and
- whether the person has a legal status in that country.

In the UK, the connection between the applicant and the third country based upon which the determining authority can return the person to that country is set down in Immigration Rule 345.⁹² To establish the connection required by Article 27 (2) (a) APD, this Rule requires that the applicant:

⁸⁷ Ibid. However, again, these decisions concerned first countries of asylum, not safe third countries.

⁸⁸ *Ulkomaalaislaki* 103 (1) (1) (Aliens' Act 301/2004, as in force 11.7.2009).

⁸⁹ *Hallituksen esitys 86/2008* (Government Bill 86/2008), 37.

⁹⁰ Article 60 of the IPA: "*(nacionalni koncept varne tretje države)*Varna tretja država je država, v kateri se je prosilec nahajal pred prihodom v Republiko Slovenijo, in je zato pristojna za vsebinsko obravnavanje prošnje." "A safe third country shall be a country where the applicant was present prior to coming to the Republic of Slovenia and which is thus competent to examine an application in substance".

⁹¹ Information provided by the Special Procedures Unit at the OAR and confirmed by UNHCR.

⁹² Immigration Rule 34: "345 (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, 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 he claims to fear persecution and has had an opportunity at the border or within

- did not arrive directly from the country in which s/he fears persecution;
- had had an opportunity at the border or within the third country or territory to make contact with the authorities of that country or territory in order to seek their protection; or
- there is other clear evidence of his/her admissibility to a third country or territory.

Provided it is satisfied that a case meets these criteria, the determining authority 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.⁹³ Transit alone seems to suffice to establish a connection.⁹⁴ “Clear evidence of admissibility” suggests an even more tenuous link with the third country, as this may be established even without the applicant having been to the third country. UNHCR (and others) consider that transit alone or clear evidence of admissibility is not a meaningful link. Therefore, this rule does not satisfy the UK’s obligations under the APD which require a connection between the person seeking asylum and the third country, based on which it would be reasonable for him/her to go there in accordance with Article 27 (2) (a).⁹⁵ Paragraph 345 of the Immigration Rules further states that the determining authority is under no obligation to consult the authorities of the third country before the removal of an asylum applicant to that country or territory. This also applies in the case of non-EU states.

Recommendation

Member States should ensure that in the transposition and interpretation of Article 27 (2) (a), a meaningful link is required to establish a connection between the asylum seeker and the third country, on the basis of which it would be reasonable for the person to go to that country.

Opportunity to rebut the presumption of safety

National designation of a safe third country raises a rebuttable presumption under Article 27 APD. The individual concerned should be given an effective opportunity to

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 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.”

⁹³ The *Enforcement Instructions and Guidance (Chapter 27 on Third Country cases)* states that documentary evidence is required by the Third Country Unit that the applicant arrived directly from a safe third country and had the opportunity to seek asylum there.

⁹⁴ UNHCR Comments on the UK implementation of Council Directive 2005/85/EC page 24.

⁹⁵ UNHCR Comments on the UK implementation of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status page 24; ILPA response to the BIA Consultation on the transposition of the EU Asylum Procedures Directive 2005/85/EC into National Law 19 October 2007 page 18,19.

challenge the application of the safe third country concept during the first instance examination. This is an essential safeguard. A right of appeal should not be relied upon alone, in view of the challenges faced by applicants in accessing an effective remedy in some Member States.⁹⁶ This would create a risk of return to persecution or serious harm, in contravention of the 1951 Convention and other relevant instruments.⁹⁷

Given that this research found that, of the Member States surveyed, the concept is only applied in Spain and the UK, UNHCR's observations with regard to the opportunity to rebut the presumption of safety, is largely based on a review of legislation and administrative provisions; and interviews with stakeholders. Among the Member States of focus in this survey, it would appear that only the law and procedure in the Netherlands would provide the applicant with an effective opportunity to challenge the presumption of safety.

In Bulgaria, LAR provides explicitly for an opportunity to rebut the presumption of safety (Article 99 LAR). This is further supported by the fact that Article 13 (1), item 13 LAR, which regulates the application of the concept, is not an inadmissibility ground but a ground which is considered in the accelerated procedure; and Article 13 (3) LAR⁹⁸ stipulates that the application of the concept may not be the sole ground for rejecting an application as manifestly unfounded. However, although the concept is not currently applied in practice, a serious concern arises as to whether there would be an effective opportunity to rebut the presumption of safety if it were to be applied in practice. This is because all of the interviewed stakeholders, who were interviewees with the asylum authority, stated that if they considered a certain country a safe third country for the applicant or a safe country of origin, they would not inform the applicant of their presumption. This would seriously undermine the right of the applicant to know the case 'against' him/herself, and in practice would considerably limit the opportunity to rebut the presumption.

Similarly, in the Czech Republic, whilst the opportunity to rebut the presumption of safety exists in law; it is unclear whether the applicant would be informed in advance that s/he might be sent to a safe third country. The safe third country list in the Czech Republic is internal and not made public. Information, about the applicable law, is not included in the general written information handed to applicants at the beginning of the procedure; and from the ASA, it does not follow that this information should be given to applicants, unless the internal regulation with the list of safe third countries is part of the individual case files, and the applicant learned about the fact from the case file.

⁹⁶ These are elaborated in detail in Part 2, section 16 of this report.

⁹⁷ 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>.

⁹⁸ Article 13 (3) LAR⁹⁸: "If the fact stipulated under paragraph 1, item 13 is in place, this cannot by itself be a reason to reject the application as manifestly unfounded".

Since the concept has not been applied since the entry into force of the APD, it was not possible to verify practice.

In Finland, there is no explicit legal norm, nor any administrative statement regarding the grounds on which the applicant can rebut the presumption of safety. However, on the basis of the findings of the research, it is clear that, with regard to the application of the first country of asylum concept, considerable effort is devoted to actually determining that the third country is safe by assessing relevant COI and providing reasoning in support of removal to the third country.⁹⁹ However, applicants are not informed of the intention to apply the 'safe country of asylum' concept in advance. Although, all applicants in the Finnish asylum procedure, including those in the accelerated procedure, have both in law and practice the possibility to contact legal advisers.

In Greece, Article 27 (2) (c) APD has not been transposed in national legislation. According to the determining authority, the applicant would not be informed in advance of the authorities' intention to apply the concept, but would be informed when the negative decision is issued and could appeal the decision.¹⁰⁰ However, given the standard phraseology used in all negative decisions which does not provide specific legal reasoning, it would appear unlikely, on the basis of the decisions observed by UNHCR, that the applicant would be informed of the application of the concept. Moreover, following amendment of PD 90/2008, the appeal procedure has ceased to exist and applicants may only apply for judicial review on a point of law to the Council of State.¹⁰¹

As a good practice example, only the Netherlands seems to offer the guaranteed opportunity, in both law and practice, to rebut the presumption of safety. The standard practice in the Dutch procedure, both in the accelerated procedure (Article 3.117 Aliens Decree) and in the regular procedure (Article 3.115 Aliens Decree), is that, before issuing a decision, the determining authority first gives the applicant its 'intended decision'. This gives the applicant and his/her lawyer the opportunity to formulate a view on the intended decision and submit any counter-indications. The view of the applicant and his/her lawyer is taken into account before the decision is issued by the determining authority. This procedure is called the intention procedure, and is applied in all asylum procedures. The applicant would, therefore, be informed, in advance of a decision being taken, that the determining authority considers a country as a safe third country and the applicant would have the chance to rebut the presumption of safety.

⁹⁹ Ibid. In Finland, the 'safe country of asylum' concept exists in law. This encompasses both the 'first country of asylum' concept and the 'safe third country' concept. However, UNHCR was informed that the 'safe third country' concept is not applied. These findings are based on practice which relates to first countries of asylum.

¹⁰⁰ Interview with the Head of the Asylum and Refugees Department (ARD) in the ADGPH, and the Police Warrant Officer/Examiner of case-files in ARD in the ADGPH.

¹⁰¹ For further information, see section 3 on the requirements for a decision and section 16 on the right to an effective remedy.

In Slovenia, Article 63(2) of the IPA foresees that the applicant may, during the course of the procedure, submit evidence that the relevant country is not a safe country for him/her. This implies that s/he should be informed, in advance of a decision being taken, that the determining authority considers a particular country as a safe third country. However, as the concept has not been applied in practice, it is difficult to say how the Ministry would conduct this procedure and implement the provision.

In Spain, the applicant is not informed of the presumption of safety, as in the Spanish asylum procedure, prior to the adoption of the inadmissibility or rejection decision, the applicant is not informed of the proposed decision on the case. The only possibility to obtain any information about the grounds that are being taken into consideration in the examination of the case is through lawyers and specialized NGOs. These could potentially contact the OAR officials who are sometimes open to disclosing this information. The decision will state that the application is considered inadmissible.¹⁰² The applicant has the opportunity to consult with a legal advisor, to assist him/her to challenge the country information which has led to the determination of the safe third country. The applicant or his/her legal advisor, in general, can present arguments and supporting documentation at any moment. If the legal advisor learns in advance that the case could be declared inadmissible on third country grounds, s/he may take the opportunity to present supporting documentation or relevant argumentation. However there is no formal opportunity to rebut the presumption of safety.

In the UK, the opportunity to rebut the presumption of safety is given in law, but not effectively in practice. In practical terms, the applicant is not informed, in advance of a decision, that the determining authority considers that there is a potential safe third country to which the person could be sent. Although applicants should be informed at the start of screening that information may be shared with other countries which may have responsibility for determining their claim, they are not given a realistic opportunity to comment or object to the application of the safe third country concept before a decision is taken. Therefore, the applicant does not have an opportunity to consult with a legal adviser, in advance of a negative decision, regarding the potential application of the safe third country concept. Under Parts 3 and 4 of Schedule 3 (list 2 and 3) to the 2004 Act, there is an opportunity to rebut the presumption of safety on appeal in-country, on human rights grounds, only if the Secretary of State does not certify the claim as clearly unfounded. Part 5 of Schedule 3 to the 2004 Asylum and Immigration Act provides for individual certification of cases. The applicant can in theory rebut the presumption of safety in cases considered under Part 5 of Schedule 3 to the 2004 Act on any ECHR grounds, not merely Article 3 as provided for in Article 27 (2) (c) APD. However, there is normally just three working days between the date of certification

¹⁰² By application of Article 20 (1) of the New Asylum Law.

and the date for which removal directions are set. This does not give the individual a practical opportunity to challenge the decision in-country via judicial review.¹⁰³

Recommendation

Member States must ensure, in law and in practice, that the applicant is given an effective opportunity to rebut the presumption of safety, by informing him/her in advance that his/her claim might not be examined in the Member State based on safe third country grounds, with the result that s/he might be sent to that third country. S/he must have a reasonable time to challenge the presumption of safety of that country in his/her particular circumstances.

Personal interviews

Article 12 (2) (c) APD, together with Article 23 (4) (c) (ii) APD, permits Member States to omit the personal interview on the ground that the determining authority considers that there is a safe third country for the applicant. However, as mentioned above, in accordance with Article 27 (2) (c) APD and international law, Member States must conduct an individual examination and ascertain whether any proposed safe third country is actually safe for the particular applicant. Moreover, the applicant must be given the opportunity to, at least, challenge the application of the safe third country concept. An interview of the applicant would provide the applicant with the opportunity to raise grounds, if any, to challenge the application of the concept and enable the determining authority to ascertain whether any proposed safe third country is actually safe for the particular applicant.

Of the Member States of focus, the interview can only be omitted in Greece, Slovenia and the UK on safe third country grounds.¹⁰⁴

¹⁰³ UNHCR Comments on the UK implementation of Council Directive 2005/85/EC page 25: “Part 5 of schedule 3...provide for an individual determination as to whether a third country is safe. However, there are no safeguards for asylum seekers, and there is a real risk of return to persecution or serious harm for the following reasons: there is no in-country or out of country right of appeal on 1951 Convention grounds either on the basis that the applicant would be at risk of persecution in the third country or on the ground that the third country may send the applicant on to another country such as to expose them to a risk of persecution; the applicant can only challenge the Secretary of State’s certificate that the third country removal is safe on 1951 Convention grounds by judicial review. While an in-country right of appeal exists against refusal of a claim for protection based on risk of human rights violations the Home Office may certify any such claim as ‘clearly unfounded’. If the claim is certified, the applicant will have to successfully challenge the certificate by judicial review in order to retain the human rights in-country right of appeal. Alternatively the applicant can only appeal from out of the country on human rights grounds; normally just three working days are allowed from the date of certification before removal takes place. Therefore, Part 5 of Schedule 3 does not allow the applicant to challenge the application of the safe third country concept effectively in accordance with Article 27(2)(c) of the Directive, the 1951 Convention and other international human rights instruments.”

In Greece, according to Article 10 (2) (c) of PD 90/2008, on the basis of a complete examination of information provided by the applicant, the interview can be omitted if the applicant comes from a safe third country. In Slovenia, the possibility is stipulated in Article 46 (1), indent 3 of the IPA: “*when an application is examined within the Dublin procedure and procedures according to the concept of the national or European safe third country, and the concept of the country of the first asylum.*” In the UK, asylum applications are not considered substantively in safe third country cases. This means that applicants do not have the opportunity of a personal interview. Guidance instructs officers to refer cases to the Third Country Unit before screening is concluded.¹⁰⁵

However, in the majority of Member States surveyed which have reflected Article 27 APD in national legislation, the interview may not be omitted in safe third country cases. This is the case in Bulgaria, the Czech Republic, Finland, the Netherlands and Spain.

It is worth mentioning that in the Netherlands, if a readmission agreement is applicable in accordance with Article 30 (1) (d) Aliens Act, the personal interview can be focussed on the question whether the applicant can be transferred to that third country (C3/13.6 of the Aliens Circular).

Recommendation

Member States should ensure, if they apply the safe third country concept, that the applicant is always given the possibility of an interview in which to challenge the application of the concept. The APD should be amended to guarantee this safeguard in all safe third country cases.¹⁰⁶

Grounds to challenge the presumption of safety

Article 27 (2) (c) APD at present foresees that national legislation shall permit the applicant to challenge the presumption of safety on the ground that s/he would be subject to torture, cruel, inhuman or degrading treatment or punishment. However, it

¹⁰⁴ In Germany, the omission of the personal interview is possible, according to Section 24 (1) Sentence 4, 2nd Alternative APA. However, this refers only to constitutional asylum and does **not affect** cases covered by the APD: “[t]he interview may be dispensed with if [...] the foreigner claims to have entered the Federal territory from a safe third country (Section 26a).” This provision was already introduced in 1993 and was justified with the aim of securing an expedient deportation as provided for in Section 34a APA (Bundestag printed papers, 12/4450 page 20). Thus, the assessment of the danger of being persecuted was not seen as being decisive any longer, and the asylum authority only investigated the travel route (Bundestag printed papers, 12/4450 page 20; cf. also R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 24, paragraph 65).

¹⁰⁵ Chapter 27.2 of Enforcement Instructions and Guidance document available at: <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/enforcement/>.

¹⁰⁶ This is suggested in the proposed recast Article 13(2), read together with recast Article 27(6): APD Recast Proposal 2009.

does not ensure the possibility to rebut the presumption of safety or the application of the concept based on wider international protection grounds and non-fulfillment of any of the other stipulated criteria for application of the concept.

Of the countries of focus in this research, the applicant can rebut the presumption of safety on any grounds in Bulgaria and Slovenia.

In Bulgaria, the applicant may challenge the presumption of safety on any ground as per the legal definition under Para.1, item 9 Additional Provisions, LAR. It may relate to the fact of residence in the country; the lack of possibility for readmission; alleged fear of threats to his/her life and freedom based on race, religion, nationality, belonging to a particular social group, or political opinion; non-observance of the *non-refoulement* principle, or the possibility to be returned to a country where his/her rights are threatened; Article 3 ECHR grounds; access to an RSD procedure; and being able effectively to enjoy the rights of a refugee.

In Slovenia, no special limitations are defined in the law. Normally, however, the applicant would be permitted to rebut his/her alleged connection with the country, and other criteria upon which it was assessed that a particular country is considered as a safe third country for him/her.

In the Czech Republic, in theory, the applicant can rebut the presumption of safety on any grounds within Section 2 (2) ASA, i.e. (1) that s/he had not stayed in that country; (2) that s/he may not return and/or apply for refugee status there; (3) that s/he would be subjected to persecution, torture, inhuman or degrading treatment or punishment. Since the definition of a safe third country is somewhat different in the ASA than that in the APD [see above], the examination of Article 3 ECHR grounds should be automatically part of the examination of the claim. However, there is no practice to date.

In Finland, there is no explicit legal norm, nor any administrative statement regarding the grounds on which the applicant can rebut the presumption of safety. As the argumentation in some of the audited cases related to issues beyond the scope of Article 3 ECHR, this would appear to suggest that the presumption may be rebutted on grounds beyond Article 3 ECHR. However, this could not be verified as the audit did not include any cases where the presumption was in fact rebutted and all the audited cases relating to the 'safe country of asylum' concept concerned first countries of asylum.

In Greece, Article 27 (2) (c) APD has not been transposed and none of the audited decisions contained reasoning relating to the safe third country concept.

In the Netherlands, with regards to application of Article 30 (1) (d) Aliens Act, the grounds on which the applicant can challenge the application of the safe third country

concept are limited to Article 3 ECHR grounds, as stated in Article 27 (2) (c) APD.¹⁰⁷ The Netherlands implemented paragraph (c) in a minimal way, as this provision refers to international law. It adds that the examination shall, as a minimum, permit the applicant to challenge the application of the safe third country concept on the grounds that s/he would be subjected to “torture, cruel, inhuman or degrading treatment”.

In the UK, the applicant can in theory rebut the presumption of safety in cases considered under Part 5 of Schedule 3 to the 2004 Act (relating to individual certification of safe third countries). This can be on any ECHR ground, and not merely Article 3 as stated in Article 27 (2) (c) APD.

Recommendation

Article 27 (2) (c) APD should be amended to include the possibility for the applicant to challenge the application of the safe third country concept on wider international protection grounds, including all the grounds set out in Article 27 (1), and on the grounds that Article 27 (2) (a) APD is not fulfilled.¹⁰⁸

Humanitarian exceptions

Of the states examined in this research, only in Spain, and to a limited extent in the Netherlands, does the law permit exceptions from the application of the safe third country rule.

In Spain, Article 37 of the New Asylum Law establishes that in case of inadmissibility or rejection, according to the Aliens Law, the applicant may be granted authorization to stay or reside in Spain on humanitarian grounds.

With regards to the Dutch legislation, the wording of Article 30 (1) (d) Aliens Act (the claim “shall be rejected” if the applicant “shall be transferred”), would suggest that exceptions may not be made on humanitarian grounds when applying this safe third country rule. However, in the Parliamentary documents, the Government explained that there is an individual examination in which ‘all relevant facts and circumstances’ are taken into account. Moreover, Article 31 (1) Aliens Act makes clear that the asylum seeker has the possibility to make a reasonable case that the country does not comply with its treaty obligations in his/her specific situation. Furthermore, according to Article 29 (1) (c) Aliens Act, an applicant can be admitted on humanitarian grounds, if the humanitarian reasons (for instance, trauma) are related to his/her situation in the country of origin. It should also be noted that the general obligation to weigh different interests, laid down in the administrative law, is applicable.¹⁰⁹ Finally, the Secretary of

¹⁰⁷ Article 3.106a(4) Aliens Decree.

¹⁰⁸ If adopted, the proposed recast Article 32(2) would address this concern: APD Recast Proposal 2009.

¹⁰⁹ Article 3:4 Awb, the General Administrative Law Act.

State is empowered to grant a residence permit, if s/he deems this to be the right decision, but there are no criteria in law for the use of this discretion.

In Finland, according to stakeholders, although the law and administrative provisions do not define any exception to the application of the 'safe country of asylum' concept, exceptions based on humanitarian reasons have been made in practice, granting the applicants other (non-asylum) forms of residence permits.

In Bulgaria, no exceptions are defined in law, apart from the general exception regarding applications by unaccompanied minors/juveniles and persons granted temporary protection, which are not examined in the accelerated procedure. In the Czech Republic, Greece and Slovenia, no exceptions to the application of the safe third country for humanitarian reasons are defined in law. In Greece, according to the determining authority, although it is not defined by law, the concept of the safe third country would not be applied in cases where there are humanitarian considerations.¹¹⁰

In the UK, Parts 4 and 5 of Schedule 3 give the determining authority some discretion about whether to certify an asylum application for removal to a safe third country. However, no specific exceptions for humanitarian or other reasons are defined in law. The case of *R (AM) Somalia [2009] EWCA Civ 114 C of A*¹¹¹ considered the operation of Schedule 3 to the 2004 Act (with regards to Dublin II Regulation) and observed that it did not allow for challenges to the safe third country rule for humanitarian reasons. This stands in contrast with the previous certification regime, which did allow for such challenges.

Unaccompanied children and safe third countries

In the Member States of focus in this research, there are no specific provisions related to the exemption of unaccompanied children from the application of the safe third country concept. However, in Bulgaria¹¹² and the Czech Republic¹¹³, unaccompanied children are automatically exempted from accelerated procedures. Thus the concept of safe third countries should not apply to them.

UNHCR was informed by the determining authority in a number of the Member States surveyed that the safe third country concept would not be applied to unaccompanied children.¹¹⁴

¹¹⁰ Interview with the Head of ARD in ADGPH.

¹¹¹ *R (on the application of AM (Somalia)) v. Secretary of State for the Home Department*, [2009] EWCA Civ 114, United Kingdom: Court of Appeal (England and Wales), 25 February 2009, available at: <http://www.unhcr.org/refworld/docid/49abde822.html>.

¹¹² Article 71 (1) LAR.

¹¹³ Section 16(4) ASA: "An unaccompanied minor's application may not be dismissed as manifestly unfounded."

¹¹⁴ Bulgaria, Finland and Greece.

In Bulgaria, the law does not provide for an explicit exception to the application of the safe third country concept with regard to unaccompanied minors.¹¹⁵ However, the ‘best interests of the child’ principle is stipulated in the general provision of Article 6a LAR¹¹⁶ and applies to all procedures under LAR. Furthermore, as mentioned above, applications by unaccompanied minors are exempted from the accelerated procedure. Interviewed stakeholders from the determining authority stated that the concept of safe third country would not be applied with regard to unaccompanied minors/juveniles in any procedure .

In Finland, the ‘safe country of asylum’ concept is not applied in practice to unaccompanied minors.¹¹⁷ Similarly, although there is no specific provision in Greek legislation, according to the Head of the Asylum and Refugees Department in the Aliens’ Directorate of the Greek Police Headquarters, there is a verbal instruction to the competent authorities that the safe third country concept should not apply to unaccompanied minors.¹¹⁸

However, in a number of other Member States, it appeared that, by law, the concept may be applied to unaccompanied children.¹¹⁹

In Spain, applications by unaccompanied minors are be automatically admitted to the regular RSD procedure.¹²⁰ However, the safe third country concept may be applied only if a child has relatives in a third country that would take care of him/her and it is feasible for the child to go there. Such cases are very rare.¹²¹

In the UK, the safe third country concept is applied with regard to applications by unaccompanied minors.¹²² The API *Third Country Cases: Referring and Handling* refers to the principle of the ‘best interests of the child’ where the child has not claimed asylum in the third country, but statements or evidence suggests that family members are in the third country.¹²³ The methods used by the determining authority for family tracing in unaccompanied minors’ cases have been criticised.¹²⁴

¹¹⁵ Except that their applications are exempted from examination in the accelerated procedure.

¹¹⁶ Article 6a LAR: (New, SG No. 52/2007) *The interests of the child are of utmost priority with respect to the application of this law.*

¹¹⁷ This is not based on a legal provision, but has emerged as a practice of the determining authority.

¹¹⁸ Interview with the Head of ARD in ADGPH.

¹¹⁹ The Netherlands, Slovenia, Spain, and the UK.

¹²⁰ Information provided by the Special Procedures Unit and the Protection Procedures Unit.

¹²¹ Information provided by the UNHCR.

¹²² API *Third Country Cases: Referring and Handling* 14.1.09 accessed via UKBA website 2.05.09.

¹²³ API *Third Country Cases: Referring and Handling* paragraph 4.3.4.

¹²⁴ Crawley H., *When is a child not a child ? Asylum, age disputes and the process of age assessment* ILPA May 2007.

Recommendation

National legislation, regulations or administrative provisions should permit for exceptions to be made to the application of the safe third country concept when, *inter alia*, it is not considered in the best interests of separated children and other vulnerable persons.

Safe third country claims as inadmissible or manifestly unfounded

Article 28 (2) APD permits Member States, in the case of an unfounded application, to declare the application “manifestly unfounded” where a third country is considered to be a safe third country for the applicant; or, in accordance with Article 25 (2) (c), to declare the application inadmissible. The wording of Article 28 (1) and (2) APD indicates that Member States are required to examine the application in substance and establish that the applicant does not qualify for refugee status (or subsidiary protection status), as well as establish that the safe third country concept applies, before an application could be declared manifestly unfounded on this ground. However, it is not clear from UNHCR’s research whether this occurs in practice. In practice, the designation of a case as inadmissible may make it extremely difficult for the applicant to rebut the presumption of safety, and may negatively impact on the applicant’s rights on appeal.

Applications, to which the safe third country concept is applied, may be declared manifestly unfounded in Bulgaria, Czech Republic, Finland, and the UK. In Finland, Greece, Slovenia, Spain and the UK such applications may be declared inadmissible. It should be noted that in two Member States, the application of the safe third country concept may result in an application being declared either inadmissible or manifestly unfounded.¹²⁵

In the Netherlands, applications that raise safe third country grounds are not declared ‘inadmissible’ in terms of Article 25 (2) (c), nor as ‘manifestly unfounded’ under Article 28 (2) APD. The rejection of the application on the grounds of a safe third country is a standard decision with the regular procedural rights. That implies a right to an appeal to the courts.

In Bulgaria, applications rejected on safe third country grounds may be deemed manifestly unfounded under Article 13 (1), item 13 LAR. As such, they may be decided in the accelerated procedure. The LAR provides, however, that the fact that the applicant comes from a designated safe third country and the grounds for protection (Article 8 and 9 LAR) are not met does not constitute sufficient grounds for declaring an application manifestly unfounded.¹²⁶

¹²⁵ See section 10 on inadmissible and manifestly unfounded applications for further information.

¹²⁶ Article 13 (3) LAR: “If the fact stipulated under paragraph 1, item 13, is in place, this cannot by itself be a reason to refute the application as manifestly unfounded”.

In Finland, an application for international protection may be dismissed as inadmissible if the “*applicant has arrived from a safe country of asylum ... where he or she enjoyed or could have enjoyed protection ... and where he or she may be returned*”.¹²⁷ In order to dismiss the application on this ground, the decision must be made within seven days of the date when the minutes of the interview were completed and the information on their completion was entered in the Register of Aliens.¹²⁸ Alternatively, the application may be assessed and declared manifestly unfounded “*if the applicant comes from a safe country of asylum or origin where he or she may be returned, and the Finnish Immigration Service has, for weighty reasons, **not been able to issue a decision** on the application **within the time limit** laid down in section 104 (973/2007)*”.¹²⁹ [Emphasis added.]

In Greece, applications are declared “inadmissible”. According to Article 18 (b) of PD 90/2008, an application can be rejected as inadmissible if the safe third country has granted to the applicant international protection status or a residence permit, *inter alia* protecting him/her against *refoulement*.

In Spain, if the safe third country is identified and applied in the admissibility procedure, the application will be declared inadmissible. If it is identified and applied at a later stage, the case will be rejected in the regular procedure. The New Asylum Law maintains the same approach.

In the UK, applications to which safe third country grounds apply are generally declared inadmissible in line with Article 25 (2) (c) APD. Where countries are treated as safe for individuals under Part 5 of Schedule 3, the instructions are not to conduct a full screening interview prior to referring to the Third Country Unit (TCU). If the removal is approved by the TCU, a Third Country Certificate and a non-suspensive appeal notice will be issued.¹³⁰ This amounts to a claim being treated as inadmissible. Alternatively, the provisions of Part 5 of Schedule 3 of the 2004 Act and the provisions of the Nationality Immigration and Asylum Act 2002 S94 permit safe third country applications to be ruled as clearly unfounded in line with Article 28 (2) APD.

Recommendation

Where applications to which the safe third country concept is applied are to be declared inadmissible, the decision should indicate clearly that the application was not examined in substance and should be examined by the third country.

¹²⁷ Section 103 (1) of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 28.4.2009).

¹²⁸ Section 104 (1) of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 28.4.2009).

¹²⁹ Official translation, available at www.migri.fi.

¹³⁰ Chapter 27 of the Enforcement Instructions and Guidance (EIG). Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectione/>

Effective remedies

Article 39 (1) provides that Member States must ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a decision taken on their application for asylum. This encompasses a decision to declare an application inadmissible, unfounded or manifestly unfounded on safe third country grounds.¹³¹

However, as found in this research and set out in greater detail in section 16, in practice, various and numerous impediments face prospective appellants in some Member States, relating among other things to inadequate information provided to applicants on how to appeal, and to which appeal body; extremely short time-limits within which to appeal; lack of linguistic assistance for applicants with regard to information on how to appeal and with the submission of the appeal; a shortage of legal advisers and a lack of competent legal advisers; a requirement to lodge the appeal in person, which is impossible for some applicants to fulfil in practice; difficulties in accessing the case file in a timely manner; and limited physical access to the court or tribunal due to distance and lack of financial resources to travel. Moreover, in some Member States, submission of an appeal may not afford automatic suspensive effect and the applicant must request suspension of the execution of any removal order, sometimes within very short time limits. An overview of the circumstances in which automatic suspensive effect is not afforded to an appeal is set out, for each Member State surveyed, in section 16 of this report.

However, the following specific concerns relating to applications rejected on 'safe third country' grounds should perhaps be highlighted here.

In the Czech Republic, although in practice the safe third country concept has not been applied since the entry into force of the APD, if it were applied, the applicant would have the right to seek a remedy before a court against the decision, but the appeal would not have suspensive effect.¹³² It is not clear whether the right to a remedy before a court against a decision would be effective, as a court may discontinue proceedings if the applicant's place of stay cannot be established.¹³³ As the appeal has no suspensive effect, the applicant may be expelled to the third country following delivery of the decision and it is not clear whether s/he would have sufficient opportunity to contact the local Czech court (1) to file an appeal, (2) to give the court a new address in the third country in order to be contacted, (3) to communicate with the court, as all communication is in the Czech language, and it is unlikely that the applicant would

¹³¹ Article 39 (1) (a) (i) APD explicitly refers to decisions of inadmissibility.

¹³² Section 32 (3) ASA: "*The filing of an action pursuant to Subsection (1) and (2) has a suspensive effect, except for an action against discontinuation of the proceedings pursuant to Section 25 and an action against a decision pursuant to section 16(1)(d) and (e).*"

¹³³ Section 33 ASA "*The court shall discontinue the proceedings if (...) b) the place of stay of an applicant for international protection (petitioner) cannot be established*".

understand the documents of the court, or would be able to find a translator into the Czech language abroad. While in practice the safe third country concept has not been applied, similar problems have been observed in Dublin II cases and court proceedings related to those cases.

In Finland, when the determining authority takes a negative decision on an application, on the ground that a country is a safe country of asylum or origin, or declares an application manifestly unfounded, an expulsion order is enforceable eight days after notification.¹³⁴ Applicants in remote areas of Finland, where legal representation and interpreter services are scarce, experience difficulties in applying for the suspension of the expulsion order within the eight days. Moreover, notwithstanding a pending request for suspensive effect, an expulsion order may nevertheless be executed.

In Greece, following amendment of PD 90/2008, Article 25 has been repealed and the former appeal procedure no longer applies. An applicant may only submit a request for judicial review on a point of law to the Council of State.

In the Netherlands, if an application is rejected in the regular procedure, an appeal has automatic suspensive effect.¹³⁵ However, if an application is rejected in the accelerated procedure or if the applicant has been taken into custody, the appeal does not have automatic suspensive effect.¹³⁶ Asylum seekers have the right to request the court for an interim measure to suspend removal. However, a request to the President of a District Court in the Netherlands to grant suspensive effect does not in itself have automatic suspensive effect. There is therefore no guarantee in law that an expulsion order will not be executed before the President of the District Court takes a decision on the request for suspensive effect.¹³⁷ Moreover, the Aliens Circular is explicit in stating that, notwithstanding a request for suspensive effect, an expulsion order may be executed where there is a risk that the opportunity to return the person to the country of origin or **a third country** will be missed.¹³⁸ [Emphasis added].

In the UK, where a Safe Third Country Certificate is issued under Schedule 3 and an application is treated as non-admissible, there will either be no appeal right at all to challenge the safety of the third country, or if there is one, it will be non-suspensive (out of country). The only remedy is judicial review. If a challenge to removal on human rights grounds is certified as clearly unfounded, any appeal right will also be non-

¹³⁴ Section 201 (2) and (3) *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 29.4.2009).

¹³⁵ Article 82(1) Aliens Act.

¹³⁶ Article 82(2)(a) and (4) Aliens Act.

¹³⁷ According to the Aliens Circular, however, an asylum applicant is **in general** allowed to await the decision of the President of the District Court, **provided that the request has been submitted in a timely fashion.**

¹³⁸ C22/5.3 Aliens Circular.

suspensive.¹³⁹ The only potential challenge to the certificate is by judicial review.¹⁴⁰ UNHCR has expressed the view that Part 5 of Schedule 3 does not allow the applicant to challenge the application of the safe third country concept effectively in accordance with Article 27 (2) of the Directive, the 1951 Convention and other international human rights instruments.¹⁴¹

Recommendations with regards to the right to an effective remedy are set out in section 16 of this report.

Time limit to lodge the appeal

In practical terms, the applicant must have sufficient time and facilities in order to undertake all the steps required to exercise the right of appeal. This is also in line with the principle of equality of arms.¹⁴² In this regard, short time limits for lodging appeals may render a remedy ‘ineffective’. European Community law has established that:

“the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law (...) must not render practically impossible or excessively difficult the exercise of rights conferred by Community law”.¹⁴³

UNHCR is concerned that in some Member States, the time limits imposed may be too short, given the procedural steps that need to be taken and the general circumstances of applicants. These time limits may render excessively difficult the exercise of the right to an effective remedy conferred by the APD. They may result in a failure to exercise the right of appeal, or in incomplete or hastily-completed appeals which run the risk of being dismissed.

Information regarding applicable time limits in each of the Member States surveyed for this research is set out in section 16 of this report.

UNHCR also notes that the time limit within which an applicant must apply for suspensive effect should not be so short as to render the remedy ineffective. In this

¹³⁹ NIAA 2002 S94 provides for non-suspensive appeals in “unfounded” cases, and this can include Safe Third Country Certificates under Schedule 3 to the 2004 Act. If the claim has been certified under Schedule 3 to the 2004 Act, and there is an appeal right, it will be non-suspensive.

¹⁴⁰ API of Feb 2007 on Safe Third Country Cases (re-branded December 2008) at paragraph 9.1- 9.4.

¹⁴¹ UNHCR Comments on the UK implementation of Council Directive 2005/85/EC page 25.

¹⁴² Article 34 ECHR read in conjunction with Article 13 ECHR.

¹⁴³ Unibet vs Justitiekanslern, Case C-432/05, European Union: European Court of Justice, 13 March 2007, para. 47; and Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, Case C-33/76. European Union: European Court of Justice, 16 December 1976, para. 5.

regard, UNHCR is concerned that, for example, the time limit within which applicants must apply for suspensive effect in the Netherlands is 24 hours.¹⁴⁴ UNHCR is also concerned that, in the UK, in safe third country cases, there are only 72 hours between the date when a safe third country certificate is issued and the date for which removal is set. This does not give the applicant a practical opportunity to challenge the decision by judicial review.

Recommendations in this regard may be found in section 16 of this report.

Provision of a document on rejection regarding non-examination in substance

According to Article 27 (3) APD, when implementing a decision solely based on Article 27, Member States shall:

- (a) inform the applicant accordingly; and
- (b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

UNHCR's research revealed that only five of the eight Member States of focus which have implemented this concept in national legislation, have transposed or partially transposed this provision.¹⁴⁵ In two Member States where this has not been transposed, it was reported that Article 27 is never the sole basis for a negative decision. However, in one Member State which applies the concept, Article 27 (3) APD has not been transposed and is not implemented in practice.

*In the Czech Republic, "if the Ministry rejects the application for international protection as manifestly unfounded due to the fact that the alien came from a safe third country, its decision will be accompanied by a document notifying the safe third country in its official language that during the proceedings on granting of international protection the compliance with reasons for granting asylum or subsidiary protection was not considered."*¹⁴⁶

In Finland, legislation states that any alien who is returned to a safe country of asylum is issued with a document stating that his or her application was not examined in substance.¹⁴⁷

¹⁴⁴ In the Netherlands, the decision itself states that the asylum seeker must formally request an interim measure within 24 hours.

¹⁴⁵ Czech Republic, Finland, Greece, Slovenia and the UK.

¹⁴⁶ Section 28 (3) ASA.

¹⁴⁷ Section 104 (2) of the *Ulkomaalaislaki* (Aliens' Act 301/2004, as in force 28.4.2009).

In Greece, Article 27 (3) APD has been literally transposed in domestic legislation through a verbatim translation.

In Slovenia, *“In the implementing procedures of the European and national safe third country concept stipulated in Articles 60 and 62 of this Act, the competent authority shall provide the applicant with a document informing the safe third country that the application has not been examined in substance in the procedure for international protection. The document shall be translated into the language of the safe third country.”*¹⁴⁸

The UK has transposed Article 27 (3) APD through Immigration Rule 345 (2A). It provides that the asylum applicant shall be informed in a language that s/he may reasonably be expected to understand regarding his/her removal to a safe third country, and be provided with a document informing the authorities of the safe third country, in the language of that country, that the asylum application has not been examined in substance by the authorities in the United Kingdom.

In Bulgaria, the application of the safe third country concept may not be the sole basis for a decision. It may not be the sole ground for a decision establishing that the application is manifestly unfounded in accordance with Article 13 (3) LAR. It may also not be the sole basis for a decision establishing that an application is unfounded as the lack of grounds for protection (Article 8 and 9 LAR) would need to be established in any case.¹⁴⁹ This means that the claim is always examined in substance and no document in the terms of Article 27 (3) APD would be needed.

In the Netherlands, Article 27 (3) APD is not implemented, and the Parliamentary documents do not refer to this provision. Thus, an applicant transferred to a third country cannot prove that his/her application has not yet been examined substantively.

In Spain, this provision has not been transposed in domestic law. In practice, the safe third country concept should not be the sole ground for a decision, and the decision notified to the applicant would indicate if the non-admission/rejection decision is based on, *inter alia*, safe third country grounds.

Recommendation

Member States should ensure that all applicants who are removed to safe third countries are furnished with a document in accordance with Article 27 (3) APD, stating that their applications have not been considered in substance.

¹⁴⁸ Article 64 of the IPA.

¹⁴⁹ This was confirmed by interviews with stakeholders, Methodology Directorate.

Refusal by third country to readmit applicant

According to Article 27 (4) APD, where the third country does not permit the applicant for asylum 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.

Out of the eight Member States that have transposed the safe third country concept in national law, only three have transposed Article 27 (4) APD: Greece¹⁵⁰, the Netherlands¹⁵¹ and Spain¹⁵².

In the Czech Republic, this article is not explicitly transposed, and if the applicant were not permitted to enter the territory of the safe third country, access to the procedure on international protection is not sufficiently guaranteed. The applicant might in theory fall within inadmissibility procedures under 10a (e) ASA.¹⁵³

In Finland, Article 27 (4) APD has not been transposed as such. However, the preparatory works to the legal transposition of the Directive make direct reference to the fact that Finnish administrative legislation demands that applicants have their applications considered in substance.¹⁵⁴ This implies, according to the same preparatory works, that if the applicant cannot be returned to the safe country of asylum, the application must be considered in Finland.

Where the asylum applicant is not admitted to the safe third country, admission to the asylum procedure in the UK will be “*subject to determining and resolving the reasons for his non admission*”. This does not comply with Article 27(4) APD, because it imposes an additional condition. Information was not available on how this provision is implemented in practice.

Recommendation

Where the individual is not readmitted to the safe third country, access to a substantive asylum examination in the Member State should be guaranteed in law and practice.

¹⁵⁰ Article 20 (2) and (3) of PD 90/2008.

¹⁵¹ Article 31a Aliens Act.

¹⁵² Article 21 (1) d of the New Asylum Law.

¹⁵³ Section 10a ASA: “*The application for international protection shall be inadmissible (...) e) if the alien repeatedly filed an application for international protection without stating any new facts or findings, which were not examined within reasons for granting international protection in the previous proceedings on international protection in which final decision was taken, if non-examination of those facts/findings in the previous procedure was not due to the alien.*”

¹⁵⁴ *Hallituksen esitys 86/2008* (Government Bill 86/2006).