

Section 13

The safe country of origin concept

Introduction

National designation of third countries as safe countries of origin

Applicable criteria for designating third countries as safe countries of origin

The process for and consequences of designating a third country as a safe country of origin

Procedural guarantees in the application of the safe country of origin concept

- *Provision of an individual examination*
- *The burden of proof and opportunity to rebut the presumption of safety*
- *Provision for a personal interview*

Section 13

The safe country of origin concept

Introduction

The safe country of origin concept is a presumption that certain countries can be designated as generally safe for their nationals insofar as, according to the APD, *“it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC [Qualification Directive], no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict”*.¹ The presumption is, therefore, that an application for international protection by an applicant from a country of origin which is considered to be generally safe is likely to be unfounded.

UNHCR does not oppose the notion of ‘safe country of origin’ as long as it is used as a procedural tool to prioritise and/or accelerate examination of an application in very carefully circumscribed situations. It is critical that:

- each application is examined fully and individually on its merits in accordance with certain procedural safeguards;
- each applicant is given an effective opportunity to rebut the presumption of safety of the country of origin in his or her individual circumstances;
- the burden of proof on the applicant is not increased, and
- applicants have the right to an effective remedy in the case of a negative decision.²

UNHCR recognises the inherent difficulties in making an assessment of general safety. Displacement situations, and general conditions, can be volatile in many countries. Moreover, any assessment by states is susceptible to political, economic and foreign policy considerations. This latter point is in fact recognised in recital (19) of the APD which states:

“In the light of the political importance of the designation of safe countries of origin, in particular in view of the implications of an assessment of the human rights situation in a country of origin and its implications for the policies of the European Union in the field of external relations, the Council should ...”.³

¹ Annex II of the APD on the “Designation of safe countries of origin for the purposes of Articles 29 and 30 (1)”.

² See section 16 on the right to an effective remedy for further information in this regard.

³ Recital (19) with reference to the proposed minimum common list of third countries regarded as safe countries of origin under Article 29 of the APD.

Therefore, if the safe country of origin concept is to be employed, there must be clear and objective benchmarks for the assessment of general safety; and mechanisms for the regular review of assessments. The process must be flexible enough to take account of changes, both gradual and sudden, in any given country.⁴

The APD, when originally adopted, only foresaw two modes for the designation of third countries as safe countries of origin.

The first, set out in Article 29, was a common list of safe countries of origin agreed by the European Council, acting by a qualified majority on a proposal from the Commission and after consultation with the European Parliament. However, following a decision of the European Court of Justice, Article 29 (1) and (2) of the APD was annulled as the above-mentioned procedure for the adoption of a common list of safe countries of origin was deemed to infringe EC law.⁵ Any future adoption of a common list of safe countries of origin must be carried out in compliance with the co-decision procedures stipulated by the EC Treaty and reiterated in the TFEU. At the time of UNHCR's research, no such common list had been adopted and therefore, this report does not address Article 29 APD.

Instead, at the time of UNHCR's research, the only mode for the designation of third countries as safe countries of origin under the APD was the second mode, set out in Article 30. This notion thus forms the subject of focus of this research.

Article 30 APD concerns the national designation of third countries as safe countries of origin, or the designation of part of a country as safe. It must be stressed that this is a permissive article, and the national designation of countries as safe countries of origin or part of a country as safe is optional. Article 30 sets out three specific conditions which must be met for any national designation:

- (1) Member States must have in force national legislation which permits the national designation of third countries as safe countries of origin.⁶
- (2) Designation must be in compliance with the criteria set out in the APD.⁷
- (3) Member States must notify the Commission about the countries that are designated as safe countries of origin.⁸

⁴ See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, *Global Consultation on International Protection*, EC/GC/01/12, 31 May 2001.

⁵ *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>. It must be added that, as regards the future adoption of the lists of safe countries and their amendment, the Council must proceed in compliance with the procedures established by the Treaty on the Functioning of the European Union.

⁶ Article 30 (1) APD. This may include designation of part of a country as safe.

⁷ Article 30 (1), (2), (4) and (5) APD in conjunction with Annex II.

⁸ Article 30 (6) APD.

With regard to the national designation of third countries as safe countries of origin, Article 30 APD defines the criteria to be applied, and the circumstances and sources of information to be taken into account. The APD does not prescribe the authority responsible for the national designation of third countries as safe countries of origin, nor the modalities for national designation. However, the use of the term 'national designation', and the requirement to notify the Commission of countries which have been nationally designated in accordance with Article 30, suggests a formal act of designation which is executed independently of and prior to its application in the examination of any particular individual application. However, as will be seen in the subsections below, UNHCR's research has found that there are a number of Member States which have national legislation in place which permits the application of the safe country of origin concept on a case-by-case basis without a transparent, formal, published act of national designation as foreseen by Article 30 APD.

UNHCR has voiced its reservations about the APD provision allowing Member States to retain or introduce legislation that allows national designation of third countries as safe countries of origin. UNHCR notes that such national designation is not conducive to, and indeed militates against, the uniformity of approach which is required to establish a Common European Asylum System.⁹ As will be seen, UNHCR's research has revealed that, with regard to those Member States surveyed that apply the safe country of origin concept, there is divergence regarding those countries which have been assessed to be safe countries of origin.

Recital (21) APD recognises that the "*designation of a third country as a safe country of origin ... cannot establish an absolute guarantee of safety for nationals of that country*", and states that the assessment underlying the designation of a third country as a safe country of origin, by its nature, can only take into account "*the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned*".

As such, an application by an applicant from a designated safe country of origin must nevertheless be subject to an individual and complete examination in which the presumption of safety can be rebutted. Therefore, designation of a country as a safe country of origin cannot be a ground for inadmissibility.¹⁰ It must be stressed that

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

¹⁰ The concept cannot be used to exclude an examination of the application, since to do so would be in breach of international law. It would constitute a violation of the 1951 Convention, in particular of Article 42 which prohibits reservations to Article 1 A (2), and Article 3 which requires States to apply its provisions without discrimination as to country of origin. It would de facto introduce a geographic limitation to the 1951 Convention which is incompatible with the intent of the 1967 Protocol; and it would be inconsistent with the individual character of refugee status. It would also risk violations of Article 33 of

Article 31 APD stipulates that the concept of safe country of origin cannot be applied to a particular applicant unless there has been an individual examination of the application. This individual examination must be conducted by the determining authority.¹¹ While under Article 23 (4) (c) (i) APD, it may be a ground for the prioritization and/or acceleration of the examination of the application, the examination must nevertheless be individual, and comply with the basic principles and guarantees of Chapter II APD.

According to the APD, a designated safe country of origin can only be considered to be safe for a particular applicant if, after an individual examination of the application, it is found that the applicant is a national of the country¹² and “*has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances*”.¹³ For this reason, the national designation of a country of origin as safe is not relevant for an applicant who shows that “*there are serious reasons to consider the country not to be safe in his/her particular circumstances*”.¹⁴ Moreover, recital (17) reiterates that a third country cannot be considered as a safe country of origin for a particular applicant if s/he presents serious counter-indications.¹⁵ It is, therefore, implicit that national legislation which sets out further rules and modalities for the application of the safe country of origin concept should ensure that applicants have an effective opportunity to “*present serious counter-indications*” and “*submit any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances*.”¹⁶

In this regard, UNHCR recommends that Member States inform all applicants at the outset of the asylum procedure when their country of origin has been designated as or is considered to be a safe country of origin; and explain the implications for the examination of the application. Applicants should be given an effective opportunity to consult a legal adviser in this regard. Member States should offer all applicants from nationally-designated safe countries of origin the opportunity of a personal interview, in which they are explicitly asked whether there are any grounds for considering that the

the 1951 Convention and Article 3 of the European Convention on Human Rights. See UNHCR, *Background Note on the Safe Country Concept and Refugee Status*, 26 July 1991, EC/SCP/68, available at: <http://www.unhcr.org/refworld/docid/3ae68ccec.html> [accessed 13 January 2010]. See also ‘The Application of the Safe Country of Origin Concept in Europe – An Overview’, February 2005, ELENA, ECRE. Note that it is not a ground for inadmissibility under Article 25 APD.

¹¹ Article 4 APD.

¹² Article 31 (1) (a) provides that s/he is a national of that country, or s/he is a stateless person and was formerly habitually resident in that country: Article 31 (1) (b) APD.

¹³ Article 31 (1) APD.

¹⁴ Recital 21 APD.

¹⁵ Recital 17 APD states that “*A key consideration for the well-foundedness of an asylum application is the safety of the applicant in his/her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications.*”

¹⁶ Article 31 (1) APD.

country is not safe in their particular circumstances, thereby giving an effective opportunity to rebut the presumption of safety. UNHCR regrets that Article 12 (2) (c) APD permits the omission of the personal interview on safe country of origin grounds and strongly urges Member States not to omit the personal interview on this ground in their national legislation or in practice.¹⁷

The concept of safe country of origin also has an evidentiary impact as it requires the applicant to rebut the presumption that the country of origin is safe with regard to his/her particular circumstances. However, this should not result in an unreasonably increased burden of proof on the applicant. The shared duty between the applicant and the determining authority to ascertain the facts still applies.¹⁸

Finally, it is noted that under APD, where an applicant is from a nationally-designated safe country of origin and, following an individual examination of the application, it is determined that s/he has not submitted any serious grounds for considering the country not to be safe in his/her particular circumstances, the application may be deemed to be simply unfounded¹⁹ or manifestly unfounded.²⁰ A certification as ‘manifestly unfounded’ may have an impact on the applicant’s right to an effective remedy.²¹

National designation of third countries as safe countries of origin

Article 30 APD sets out the circumstances under which Member States may, at the national level, designate third countries as safe countries of origin.

Article 30 (1) provides that *“Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries ... as safe countries of origin for the purposes of examining applications for asylum”*. Furthermore, this *“may include designation of part of a country as safe where the conditions in Annex II are fulfilled in relation to that part”*.

However, by derogation from paragraph 1 cited above and the criteria in Annex II, Member States may retain legislation in force on 1 December 2005 that allows for the national designation of countries as safe countries of origin, as long as they are satisfied that persons in the third countries concerned are generally neither subject to persecution as defined in Article 9 of the Qualification Directive, nor torture or inhuman or degrading treatment or punishment.²²

¹⁷ See also section 4 on the opportunity for a personal interview.

¹⁸ Paragraph 196, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

¹⁹ Article 28 (1) APD.

²⁰ Article 28 (2) APD in conjunction with Article 23 (4) (c) (i) APD.

²¹ See section 16 on the right to an effective remedy.

²² Article 30 (2) APD.

Moreover, Member States, again by derogation from Article 30 (1) APD, may retain legislation in force on 1 December 2005 that allows for the national designation of part of a country as safe, or a country or part of a country as safe for a specified group of persons in that country. This is possible as long as they are satisfied that persons in that part of the country, or the specified group of persons in the country, are generally neither subject to persecution as defined in Article 9 of the Qualification Directive, nor torture or inhuman or degrading treatment or punishment.²³

If Member States derogate from Article 30 (1) APD, in assessing whether a country is a safe country of origin, "*Member States shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned*".²⁴

UNHCR regrets that the APD permits Member States to derogate from Article 30 (1), as UNHCR considers the criteria laid out in Annex II of the APD broadly adequate. In UNHCR's view, the derogation undermines the uniformity of approach required to achieve the objective of a Common European Asylum System.

As regards the possibility to designate a part of a country as safe, UNHCR notes that, in principle, a country cannot be considered 'safe' if it is so only for part of its territory. Furthermore, UNHCR wishes to emphasize that the designation of a safe part of a country does not necessarily represent a relevant or reasonable internal flight alternative.²⁵ The existence of a 'safe' part of a country is but one element in an examination of whether a particular applicant has such an alternative.²⁶ The complex questions which arise in the application of the internal protection alternative require a careful examination of the individual case in the regular procedure and should not be dealt with in an accelerated procedure.²⁷

Six of the 12 Member States under focus in this research have in place national legislation permitting the national designation of third countries as safe countries of origin, namely: Bulgaria,²⁸ France,²⁹ Germany,³⁰ Greece,³¹ Slovenia³² and the UK.³³

²³ Article 30 (3) APD.

²⁴ Article 30 (4) APD. See below for more detailed analysis.

²⁵ The terminology used in Article 8 of the Asylum Procedure Directive is 'internal protection alternative'.

²⁶ Article 8 of the Qualification Directive.

²⁷ Page 8, UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at:

<http://www.unhcr.org/refworld/docid/3f2791a44.html>

²⁸ Article 13 LAR (Amended, SG No. 31/2005) (1) (Supplemented, SG No. 52/2007): "*Refugee status or humanitarian status shall not be granted with respect to an alien whose application is manifestly unfounded, where conditions under article 8 (1) and (9), respectively article 9 (1), (6) and (8) are not met and the alien: ... 13. (new, SG No. 52/2007) comes from a safe country of origin or from a safe third country listed in the Minimum Common List adopted by the Council of the European Union or in the*

However, of these six Member States, only three – France, Germany and the UK – actually have operational national lists of designated safe countries of origin.³⁴

At the time of UNHCR's research, France had designated 15 countries as safe,³⁵ and

national lists adopted by the Council of Ministers.” Article 98 (New, SG No. 52/2007) (1) “By November 30 every year the Chairperson of the State Agency for Refugees in coordination with the Minister of Foreign Affairs shall submit national lists of safe countries of origin and safe third countries to the Council of Ministers for their adoption.”

²⁹ Article L.722-1-2 *Ceseda*: “The board [of the OFPRA] [...], in compliance with relevant EC provisions in this matter, designates the list of countries considered at the national level as safe countries of origin”. [Unofficial translation]. The concept of safe country of origin did not exist in French legislation before the adoption of the Asylum Act of 10 December 2004 (entry into force on 1 January 2004).

³⁰ Section 29a APA:“(1) The asylum application of any foreigner from a country within the meaning of Article 16a (3) first sentence of the Basic Law (safe country of origin) shall be turned down as being manifestly unfounded, unless the facts or evidence produced by the foreigner give reason to believe that he faces political persecution in his country of origin in spite of the general situation there. (2) In addition to the Member States of the European Union, safe countries of origin are those listed in Appendix II. (3) The Federal Government shall resolve by statutory ordinance without the consent of the Bundesrat that a country listed in Appendix II is no longer deemed a safe country of origin if changes in its legal or political situation give reason to believe that the requirements mentioned in Article 16a (3) 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.” Article 16a (3) Basic Law: “By a law requiring the consent of the Bundesrat, states may be specified in which, on the basis of their laws, enforcement practices and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment exists. It shall be presumed that a foreigner from such a state is not persecuted, unless he presents evidence justifying the conclusion that, contrary to this presumption, he is persecuted on political grounds.”

³¹ Article 22 of PD 90/2008 (with retrospective effect from 01/12/07) states that “safe countries of origin are ... third countries ... which are included in the national list of safe countries of origin, compiled and kept, for the purpose of the examination of an asylum application, by the Central Authority”.

³² Article 65 (3) IPA: “(3) Based on the criteria referred to in Article 30 of Directive 2005/85/EC, the Government of the Republic of Slovenia may designate third countries other than those appearing on the minimum common list. The Government of the Republic of Slovenia shall notify the European Commission thereof”.

³³ The UK has legislation allowing for the designation of third countries as safe countries of origin in the Nationality Immigration and Asylum Act 2002, Section 94 (3), (4), (5) and (6). Subsection 94 (3) provides for the certification of a claim as unfounded if the applicant is entitled to reside in a safe country of origin. Subsection 94 (4) lists the states originally designated by Parliament as safe countries of origin. Subsection 94 (5) and (6) of the 2002 Act allow the Secretary of State to add or remove states to those designated in the legislation ‘by order’. The 2002 Act came into force on 7 November 2002, and was amended by the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (with effect from 1 October 2004) and by the Immigration Asylum and Nationality Act 2006.

³⁴ Bulgaria adopted a list of safe countries of origin in 2005 under the old law – Article 48 (3) LAR – before amendments were made in June 2007 which set out the principles for designation. As the legal provision on which the list was based no longer exists in the LAR, the decision of the Council of Ministers has not been amended accordingly, and the list has not been reviewed in four years. The determining authority, in an interview with UNHCR, stated that the list is considered obsolete. See below for further information.

³⁵ For the full list of safe third countries designated by France, see below (text at footnotes 107,108). A decision of the Board of the OFPRA made on 13 November 2009 added three countries to the list of designated safe countries of origin: Armenia, Turkey and Serbia. At the time of writing, there are, therefore, 18 designated safe countries of origin.

Germany had designated the Member States of the EU, plus another two countries as safe.³⁶ The UK had designated 24 countries as safe. Only eight countries appeared on the lists of both France and the UK.³⁷ Only one country (Ghana) appeared on the list of all three States - although in the UK, Ghana was considered a safe country of origin for male applicants only.

Four Member States do not have legislation in place which provides for the 'national designation' of safe countries of origin, but nevertheless do have legislation in place which provides for the application of the safe country of origin concept in the examination of applications: the Czech Republic,³⁸ Finland,³⁹ the Netherlands⁴⁰ and Spain.

Although the Czech Republic does not have legislation providing for the 'national designation' of third countries as safe countries of origin, there is a list of nationally designated safe countries of origin drawn up by internal regulation of the Director of the Department for Asylum and Migration Policies. The list is not public.⁴¹

Before the adoption of the Aliens Act 2000, the Netherlands designated countries as safe countries of origin.⁴² During the legislative process, the Parliament decided that

³⁶ Section 29a (2) APA in connection with Annex II (on Section 29a): Ghana and Senegal.

³⁷ For the full UK list at time of writing, see below (text at footnote 143). Bosnia-Herzegovina, India, Macedonia, Mauritius, Mongolia and Ukraine. Ghana and Mali were also designated as safe by France, whereas they were designated as safe for men only in the UK. See below for further details.

³⁸ Section 2 ASA which entered into force on 1 January 2000. It was amended by A379, in 2007, but merely by adding reference to serious harm (subsidiary protection). Section 2 ASA states the criteria according to which a country can be considered a safe country of origin.

³⁹ The norms on safe countries of origin were initially introduced to the Finnish asylum procedure in 2000, through an amendment to the *Ulkomaalaislaki* (Aliens' Act, 378/1991) and in force from 01/3.1991. Section 100 of the *Ulkomaalaislaki* (Aliens Act 301/2004, as in force 28.4.2009) states: "(1) *When deciding on an application in the asylum procedure, a State where the applicant is not at risk of persecution or serious violations of human rights may be considered a safe country of origin for the applicant. (2) When assessing a safe country of origin, particular account is taken of: 1) whether the State has a stable and democratic political system; 2) whether the State has an independent and impartial judicial system, and whether the administration of justice meets the requirements for a fair trial; and 3) whether the State has signed and adheres to the main international conventions on human rights, and whether serious violations of human rights have taken place in the State.*" Official translation, available at www.migri.fi

⁴⁰ Article 31 Aliens Act 2000 (in force on 1 April 2001): "1. *An application for the issue of a residence permit for a fixed period as referred to in section 28 shall be rejected if the alien has not made a plausible case that his application is based on circumstances which, either in themselves or in connection with other facts, constitute a legal ground for the issue of the permit. 2. The screening of an application shall take account, among other things, of the fact that: (g) the alien comes from a country which is a party to the Convention on Refugees and one of the other 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.*"

⁴¹ According to the internal regulation, the list should be reviewed once a year or when need arises. It was last updated in May 2007.

⁴² The national list of safe countries of origin was: Bulgaria, Ghana, Hungary, Poland, Romania, Senegal, Slovakia and the Czech Republic.

the application of the concept of safe countries of origin should not be limited to listed countries and, by amendment of the Aliens Act, all countries that have ratified the 1951 Refugee Convention and the European Convention on Human Rights or Convention against Torture can be presumed to be safe by the determining authority.⁴³

At the time of UNHCR's research, Spain did not have legislation that allowed for the designation of third countries as safe countries of origin and there were no rules or criteria laid down in law to apply the concept.⁴⁴ However, new legislation (Law 12/2009) in force since 20 November 2009 has introduced the concept into Spanish law and practice.⁴⁵

Of the Member States surveyed, only Belgium and Italy do not have legislation which permits the designation of third countries as safe countries of origin or the application of the concept in the examination of applications.

Of those ten states which provide for the national designation of third countries as safe countries of origin, or have legislation in place which provides for the application of the safe country of origin concept in the examination of individual applications, the following have retained legislation in effect prior to 1 December 2005. This allows them to continue to designate countries as safe, in derogation from the requirements under Annex II: Czech Republic,⁴⁶ Finland, France,⁴⁷ Germany,⁴⁸ the Netherlands and the UK.⁴⁹

⁴³ Note that the Government has stated in Parliamentary papers that it is a requirement that the countries also comply with their treaty obligations in practice. Senate 2000-2001, 26 732 en 26975, nr. 5b, p. 27-28; Senate 2000-2001, 26 732 and 26 975, nr.

⁴⁴ In practice, there were some situations where countries were considered generally safe, specifically for example where UNHCR was conducting return operations (e.g. Sierra Leone and Liberia). No official declaration was made, however, and this assumption was still applied on a case-by-case basis. On the other hand and in an indirect way, those applications from nationals of countries which have a democratic tradition and which are considered to have an effective protection system accessible for all nationals were declared inadmissible. This included not only EU countries, but also others such as the United States, Canada or Australia.

⁴⁵ Article 25 (1) (d) of the Law regulating the Right to Asylum and to Subsidiary Protection (Law No. 12/2009) introduces the safe country of origin concept as a ground for applying the accelerated procedure to claimants both in country and at borders. The definition is the same as that established in Article 20 (1)(d) for defining the third country concept. The safe country of origin concept is defined in article 25 (1) (d), establishing that the application shall be channeled through the urgent procedure if: *"the applicant comes from a country of origin considered as safe in the terms established in article 20(1) (d), and possesses the nationality of that country, or if stateless, is habitually resident in the country."*

⁴⁶ Although the definition of a safe country of origin in Section 2 (1) ASA is almost in line with Annex II of the APD.

⁴⁷ The concept of safe country of origin was introduced with the Asylum Act of 10 December 2003 (which entered into force on 1 January 2004). Article 30 (2) was transposed in French legislation by Article 92 of the Law dated from 24 July 2006 which modified Article L.722-1 *Ceseda* in order to take into account the adoption of the APD. The French list will be cumulative with the common EU list if it is ever adopted.

⁴⁸ Article 16 (a) (3) 1 Basic Law and Section 29 (a) APA entered into force in 1993, however, the Member States of the European Union were introduced as safe countries of origin only in 2007 (see: 2007 Transposition Act (Bundestag printed papers, 16/5065, re Section 29a, page 217).

Only two surveyed states permit designation of part of a country as safe or as safe for a specified group of persons: Greece and the UK. Greece allows designation of part of a country as safe provided that prescribed conditions are met.⁵⁰ The UK has in place legislation allowing both the designation of part of a country as safe,⁵¹ and the designation of parts of a country as safe for a specified group of persons in that country.⁵²

Although a number of the Member States surveyed have in place legislation allowing the national designation of third countries as safe countries of origin, or have legislation providing for application of the safe country of origin concept in the examination of individual applications, at the time of UNHCR's research, several of these states did not apply the safe country of origin concept in practice. These are specifically Bulgaria,⁵³ the Czech Republic⁵⁴ and Slovenia.⁵⁵

⁴⁹ The transposition note in the Explanatory Memorandum to the Asylum (Procedures) Regulations 2007 (SI 2007 No. 3187) confirms that the UK has derogated from Article 30 (1) APD.

⁵⁰ Article 22 (1) (b) of PD 90/2008.

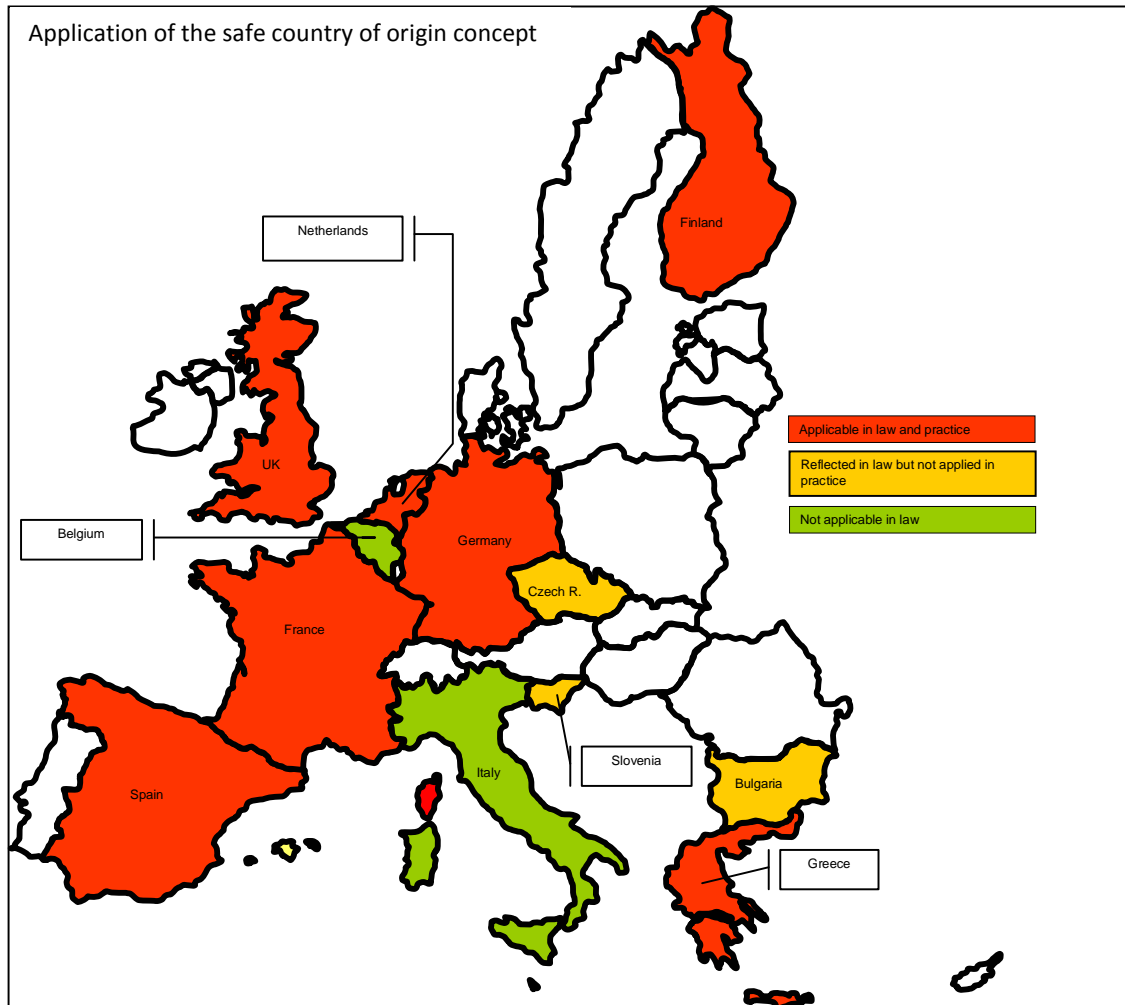
⁵¹ Nationality Immigration and Asylum Act 2002 s 94 (5): *"The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that- (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention."*

⁵² The NIAA 2002 Sections 94 (5A) (5B) and (5C) allows for the designation of part of a country as safe for a specified group of persons in that country: *"(5A) If the Secretary of State is satisfied that the statements in subsection (5) (a) and (b) are true of a State or part of a State in relation to a description of person, an order under subsection (5) may add the State or part to the list in subsection (4) in respect of that description of person. [inserted by Section 27 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004]. (5B) Where a State or part of a State is added to the list in subsection (4) in respect of a description of person, subsection (3) shall have effect in relation to a claimant only if the Secretary of State is satisfied that he is within that description (as well as being satisfied that he is entitled to reside in the State or part). (5C) A description for the purposes of subsection (5A) may refer to- (a) gender, (b) language, (c) race, (d) religion, (e) nationality, (f) membership of a social or other group, (g) political opinion, or (h) any other attribute or circumstance that the Secretary of State thinks appropriate."* [inserted by Section 27 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004].

⁵³ At the time of UNHCR's research, there was no valid list of safe countries of origin. The last was adopted in 2005 under previous legislative provisions, and therefore now considered obsolete. See below.

⁵⁴ This appears to be due to the fact that there have been no applicants from the designated safe countries of origin since 1 December 2007.

⁵⁵ At the time of research, no list of safe countries of origin had been adopted by the Slovene Government (as defined in A. 65/3 of the IPA); and Article 29 of the APD to which Article 65 of the IPA explicitly refers, has been annulled.



In the Netherlands, the concept was not applied in any of the cases which UNHCR audited for this research. Following interviews with lawyers and a judge, it was not clear whether, and if so to what extent, the concept is applied in practice at all.

Greece has national legislation which provides that “*safe countries of origin are ... third countries ... which are included in the national list of safe countries of origin, compiled and kept, for the purpose of the examination of an asylum application, by the Central Authority*”. However, at the time of UNHCR’s research, there was no national list of safe countries of origin. Due to the lack of information in case files and the lack of reasoned decisions, it was not possible to determine whether the concept of safe country of origin had been applied in the cases audited. However, according to two interviewees,⁵⁶ in practice the concept is applied indiscriminately and to the vast majority of applications.

In practice, the concept of safe country of origin is applied as a procedural tool to assign applications to the accelerated procedure in Finland, France, Spain and the UK; and to

⁵⁶ Interview with S1 and S2.

prioritise applications in Germany.⁵⁷ Of these five states, only France, Germany and the UK have nationally designated countries as safe countries of origin as foreseen in the Procedures Directive. By contrast, as stated above, there is no nationally designated list of safe countries of origin in Finland and Spain. Instead, the concept is applied on a case by case basis.

Some Member States, such as Bulgaria and the Netherlands, actually applied the concept more extensively (and had in place operative safe country of origin lists now defunct) prior to the advent of the APD. Only Greece and Spain have introduced the safe country of origin concept into national legislation as a direct consequence of transposing the APD.

Recommendation

UNHCR considers it important that continuous scrutiny be maintained of all countries with legislation in force permitting the designation of countries as safe countries of origin, given the potential prejudice to asylum applicants if this concept is applied unfairly or inappropriately.

UNHCR recommends the deletion of the optional provision under Article 30 (1) APD allowing the safe country of origin concept to be applied to a particular part of a country or territory.⁵⁸

Applicable criteria for designating countries as safe countries of origin

The applicable minimum criteria in the APD for designating a third country as a safe country of origin depend on whether this concept is exercised in accordance with Article 30 (1) or Article 30 (2) and/or (3) APD.

Designation under Article 30 (1) is subject to Annex II APD which stipulates:

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or

⁵⁷ In Germany, such applications are prioritised without any negative effect on procedural guarantees, based on the internal instructions of the BAMF, *Internal Guidelines for Adjudicators: Priority (1/1)*, Date: 12/08, p. 1. Moreover, the qualified rejection (compulsory in case of rejection) as manifestly unfounded leads to an acceleration in the deadlines applying for submitting appeals (Sections 74 (1) 2, 36 (3) APA), and, in case of confirmation of the qualified rejection as manifestly unfounded by a court, to a denial of any further appeal (Section 78 (1) APA).

⁵⁸ The European Commission has proposed deletion of the relevant wording in the current Article 30 (1). See proposed recast Article 33: APD Recast Proposal 2009.

degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

(a) the relevant laws and regulations of the country and the manner in which they are applied;

(b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;

(c) respect of the non-refoulement principle according to the Geneva Convention;

(d) provision for a system of effective remedies against violations of these rights and freedoms.

Where states rely on Articles 30 (2) or 30 (3) APD to retain alternative designation criteria under national legislation (provided the legislation was in force on 1 December 2005), this is nonetheless subject to a requirement – namely, that persons in the country of origin concerned are generally neither subject to: (a) persecution as defined in Article 9 of Directive 2004/83/EC; nor (b) torture or inhuman or degrading treatment or punishment.⁵⁹ Furthermore, in making such an assessment, it is required that “Member States shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned”.⁶⁰

UNHCR’s research revealed significant divergence in the criteria applied by Member States in designating third countries as safe countries of origin. Such inconsistency is to be regretted in the context of efforts to develop a Common European Asylum System. UNHCR is particularly concerned to observe that some national designation criteria examined are not fully in accordance with minimum standards contained in the APD, or in international refugee and human rights law.

Bulgaria, Greece, Slovenia and Spain do not have derogating legislation under Article 30 (2) APD and thus are required to comply with the designating criteria contained in Annex II APD.

⁵⁹ Article 30 (2) APD.

⁶⁰ Article 30 (4) APD.

Greece has literally transposed Annex II in its entirety.⁶¹ Slovenia does not explicitly refer to any of the requirements under Annex II in national legislative provisions, but simply makes a general reference to meeting the criteria under Article 30 (1) APD.⁶²

Although Bulgaria has transposed an almost literal translation of Annex II,⁶³ UNHCR notes some significant omissions. These include a failure to reflect terminology from the first paragraph of Annex II requiring that there is “*generally and consistently no persecution*,” as well as the omission of an explicit reference to the definition of persecution under Article 9 of the Qualification Directive. Of most serious concern is the failure to include in the definition of a safe country of origin the requirement that there be “*no torture or inhuman or degrading treatment or punishment*”. This omission could result, if the legislation was applied in practice, in potential beneficiaries of subsidiary protection being designated as originating from a safe country, and thus excluded from receiving protection to which they are entitled. Provisions transposing the second paragraph of Annex II broadly reflect its requirements,⁶⁴ and even contain higher standards, in that no distinction is made between derogable and non-derogable rights under the European Convention on Human Rights.

In Spain, the criteria for a ‘safe country of origin’ are the same as the criteria for a ‘safe third country.’⁶⁵ Article 20 (1) (d) defines the concept of safe third country in the following terms: “*...when the applicant, in accordance with article 27 of Council Directive 2005/85/CE, and with the list that might eventually be elaborated by the European*

⁶¹ Article 22 (4) (a-d) of PD 90/2008.

⁶² Article 65 (3) IPA: “(3) *Na podlagi kriterijev iz 30. člena Direktive 2005/85/ES lahko Vlada Republike Slovenije določi dodatni seznam varnih izvornih držav. Based on the criteria referred to in Article 30 of Directive 2005/85/EC, the Government of the Republic of Slovenia may designate third countries other than those appearing on the minimum common list. O tem obvesti Evropsko komisijo. The Government of the Republic of Slovenia shall notify the European Commission thereof.*”

⁶³ Definition provided in Para.1, item 8 Additional Provisions of LAR. “8. *“Safe country of origin” shall mean a country where the rule of law is respected and laws are enforced in a democratic social system whereby persecution or acts of persecution are not allowed and there is no risk of violence in situations relating to internal or international armed conflicts.*”

⁶⁴ Article 98 (2) 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 sphere 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.*

⁶⁵ The safe country of origin concept is defined in article 25 (1) (d) of Law 12/2009, establishing that the application shall be channeled through the urgent procedure if: “*the applicant comes from a country of origin considered as safe under the terms established in article 20 (1) (d), and possesses the nationality of that country, or if stateless, is the country of regular residence.*”

Union, comes from a safe third country where in view of his/ her personal circumstances, his/ her life, integrity and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; the principle of non- refoulement is respected, as well as the prohibition of removal in violation of the freedom of torture or cruel, inhuman or degrading treatment; the possibility exists to apply for asylum and, in case of being a refugee, he/she can avail him/ herself of that protection in accordance with the Geneva Convention; provided that the applicant is re-admitted to that country and there are links between the applicant and the said country that make it reasonable that the applicant goes to that country....”

As such, the above definition does not reflect the requirement of Annex II of the APD that there should be no torture or inhuman or degrading treatment or punishment, and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. Nor does it make any reference to the second paragraph and subsections a, b and d of Annex II of the APD.

Of those states permitted to derogate under Article 30 (2) or (3) APD (the Czech Republic, Finland, France, Germany, the Netherlands and the United Kingdom), the extent of incorporation of or reference to Annex II criteria contained in national legislation varies considerably.

The Czech Republic has not fully transposed Annex II, although criteria in its national legislation broadly reflect the requisite requirements under Article 30 (2) and (4) APD.⁶⁶ Notable divergences from Annex II criteria include the absence of an explicit reference to “*respect for the principle of non refoulement or the existence of a system of effective remedies against violations of rights and freedoms*”, or a requirement that there is “*generally and consistently*” no persecution in the country concerned.

Although Finland has not literally transposed Annex II, its criteria for designating safe countries of origin under national legislation broadly reflect the requirements of Annex II, and in any case fully incorporate the requirements under Article 30 (2) and (4).⁶⁷

⁶⁶ See Section 2(1) ASA: “(1) A safe country of origin means the country of which the alien is a citizen, or in case of a stateless person, the country of his/her last permanent residence, a) where the state powers respect human rights and are capable of ensuring compliance with human rights and legal regulations, b) which is not abandoned by its citizens or stateless persons for reasons referred to in Section 12 or 14a, c) which has ratified and complies with international human rights and fundamental freedoms agreements, d) which allows legal entities supervising the status of compliance with human rights to carry out their activities.”

⁶⁷ Section 100 of the *Ulkomaalaislaki* (Aliens Act 301/2004, as in force 28.4.2009) states: “(1) When deciding on an application in the asylum procedure, a State where the applicant is not at risk of persecution or serious violations of human rights may be considered a safe country of origin for the applicant. (2) When assessing a safe country of origin, particular account is taken of: 1) whether the State has a stable and democratic political system; 2) whether the State has an independent and impartial judicial system, and whether the administration of justice meets the requirements for a fair trial; and 3)

Indeed, Finnish legislative provisions that require a stable and democratic political system, and that the state has an independent and impartial judicial system (meeting the requirement for a system affording fair trials), go beyond the criteria under Annex II, as does the requirement to examine “*whether serious violations of human rights have taken place.*” UNHCR welcomes this evidence of good practice. However, while Finnish legislation does not provide for the designation of parts of countries as safe, it is of concern that in practice parts of countries have been considered as generally safe.⁶⁸

In Germany, an inconsistency between national legislation and Article 30 (2) APD results from a mixing of the German concept of constitutional asylum and refugee protection under the 1951 Convention and the Qualification Directive. The criteria established in Article 16a (3) 1 GG for declaring a country of origin as safe are not fully equivalent to the criteria of Article 30 (2) (a) APD. Article 16a (3) 1 GG refers to the concept of “political persecution” under German constitutional law, which does not encompass all cases of persecution by non-state agents. This concept clearly does not equate to Articles 6 and 9 of the Qualification Directive. Even though the absence of inhuman or degrading treatment constitutes an additional criterion, this will not necessarily cover all serious violations of fundamental human rights (for instance, a serious violation of the right to freedom of religion) which constitute an act of persecution under the Qualification Directive. If such acts emanate from non-state agents, the German legislation – theoretically – would allow such risks of persecution to be ignored in establishing the safety of the country of origin under Article 16a (3) of the Basic Law and Section 29a APA. It may be argued, however, that since the review of safety, according to the terminology, does not encompass dangers emanating from non-state agents, the concept of safe country of origin is not applicable at all in such contexts. In practice, such dangers are taken into account as a possibility for rebutting the presumption of safety, as was witnessed in UNHCR’s audit of case files.⁶⁹ According to information provided by the determining authority (BAMF), the decision makers have been instructed to be particularly alert to situations of non-state persecution for gender-specific reasons in Ghana – a designated safe country of origin.

On the other hand, the German provisions require that “*on the basis of their laws, enforcement practices and general political conditions, it can be safely concluded that neither political persecution nor inhuman or degrading punishment or treatment takes*

whether the State has signed and adheres to the main international Conventions on human rights, and whether serious violations of human rights have taken place in the State.”

⁶⁸ This has, as of 1.12.2007, concerned parts of Afghanistan other than Kabul and, based on UNHCR reports, for the majority population in these areas; and northern Iraq for Kurds stemming from this area. In addition, northern Somalia, areas outside of Kabinda in Angola, and areas other than Chechnya in Russia have been considered safe. It should be noted that despite the fact that northern Iraq is considered safe for some people, no returns to this area have been carried out, as there is no agreement between Finland and Iraq on the return of failed asylum seekers.

⁶⁹ 01GHA2; 01GHA3; 01GHA4; 01GHA7; 01GHA10.

place” in the relevant country.⁷⁰ These requirements do not reflect certain aspects of Annex II. For instance, there is no explicit requirement for a “democratic system” as in Annex II APD, even though this is required by the case-law of the Federal Constitutional Court.⁷¹ Moreover, the terms *generally and consistently* are not explicitly contained in the German provisions. Also, there is no explicit reference to *indiscriminate violence in situations of international or internal armed conflict*, nor to any of the criteria set out in sub-clauses (a) to (d). According to the interpretation of the Federal Constitutional Court, an overall assessment of all relevant factors would have to be made.⁷² Despite this requirement, past discussions about the designation of Ghana as a safe country of origin (1993) show that some criteria may still be disputed (for instance, the relevance of the abolition of the death penalty, of a catalogue of human rights in national law, or of the necessary degree of stability in a post-dictatorial state).⁷³

The German safe country of origin concept only applies to cases of constitutional asylum and cases of Section 60 (1) Residence Act. It is not applied with regard to subsidiary protection (national forms and those of the Qualification Directive).⁷⁴ This is confirmed, in principle, by UNHCR’s audit of case files which included the case files of applicants from Ghana (designated as a safe country of origin). The text modules used in these cases explicitly apply the rebuttable presumption with regard to all cases of constitutional asylum as well as all cases falling within the scope of Section 60 (1) Residence Act, but do not apply to subsidiary protection under Section 60 (2) to (7) Residence Act.⁷⁵

The criteria in Dutch legislation⁷⁶ are less detailed than those in Annex II and are simply limited to ratification (rather than observance) of the 1951 Convention and the ECHR or CAT, based on an assumption that ratification implies compliance with the requisite obligations under these treaties. The authorities are, however, obliged to assess whether the country concerned complies with the stated international treaties in practice.⁷⁷ There is notably no reference to the International Covenant for Civil and Political Rights. Moreover, the criteria do not appear adequately to reflect Articles 30

⁷⁰ Article 16a (3) 1 Basic Law, to which the provision of Section 29a (1) APA refers regarding the criteria for designating a country of origin as safe.

⁷¹ Federal Constitutional Court of Germany, official collection vol. 94, 115, at 140 et seq. In the same decision the court concluded that the term *inhuman treatment* also includes *torture*.

⁷² Federal Constitutional Court of Germany, official collection 94, 115 (139).

⁷³ See R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 29a, paras. 53, 65, 69; dissenting votes in the judgment of the Federal Constitutional Court, official collection, vol. 94, 115, at 157 et seq.

⁷⁴ Cf. also R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 29a, para 112-114.

⁷⁵ The relevance of this approach in practice could not be verified on the basis of the case files.

⁷⁶ Article 31 Aliens Act (in force on 1 April 2001): “*The alien comes from a country which is a party to the Convention on Refugees and one of the other 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.*”

⁷⁷ Aliens Circular C 4/3.7.

(2) and (4) APD, with no reference to the general political situation prevailing in the country of origin.

The United Kingdom has derogated from Article 30 (1) APD and has not transposed Annex II.⁷⁸ Instead, the UK has retained criteria under national legislation in place prior to 1 December 2005 which falls short of the requirements of Annex II.⁷⁹ Unlike Annex II, the UK legislation does not require a *consistent* (in addition to general) absence of persecution.⁸⁰ There is no explicit requirement that the application of the law *in a democratic system* be used as a basis for considering safety; no reference to *threat by reason of indiscriminate violence in situations of international or internal armed conflict*, nor a requirement that the absence of persecution *can be shown*. Nevertheless, national legislation is broadly in compliance with Articles 30 (2) and (4) APD although the criteria are expressed more generally. For example, with regard to Article 30 (4) APD, the criteria do not refer to the need to consider the *general political circumstances in the third country concerned*.

French legislation merely states that a country is considered to be a safe country of origin if “*it makes sure that the principles of freedom, democracy and the rule of law, as well as human rights and fundamental freedoms are fulfilled*”.⁸¹ According to the French authorities, the requirement that the country makes sure that these principles are respected guarantees that persons in the third countries concerned are generally neither subject to persecution, nor torture or inhuman or degrading treatment or punishment as required by Article 30 (2) of the APD. The requirement that the country concerned “*makes sure*” that these principles are respected is, according to the Senate

⁷⁸ The transposition note in the Explanatory Memorandum to the Asylum (Procedures) Regulations 2007 (SI 2007 No. 3187) states that no action is required in relation to Article 30 (1) APD.

⁷⁹ Nationality Immigration and Asylum Act 2002 s 94 “(5) *The Secretary of State may by order add a State, or part of a State, to the list in subsection (4) if satisfied that (a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention.*” “(5D) *In deciding whether the statements in subsection (5) (a) and (b) are true of a State or part of a State, the Secretary of State – (a) shall have regard to all the circumstances of the State or part (including its laws and how they are applied), and (b) shall have regard to information from any appropriate source (including other member States and international organisations).*” [inserted by the Asylum (Procedures) Regulations 2007]

⁸⁰ UNHCR has expressed its concern that the provision refers to persecution and human rights breaches “in general” rather than using internationally recognised standards. 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 procedures in Member States for granting and withdrawing refugee status*, October 2007.

⁸¹ Article L. 741-4-2 Ceseda: 2° “*The alien who applies for asylum is a national of a country to which Article 1C(5) of the 1951 Geneva Convention is applicable or of a country considered as a safe country of origin. A country is considered as such if it makes sure that the principles of freedom, democracy and the rule of law, as well as human rights and fundamental freedoms are fulfilled. The taking into account of the safe nature of the country of origin can not hinder the individual examination of each application.*” [Unofficial translation].

which introduced the legislation, a guarantee that not only the laws and regulations of the country concerned comply with these principles, but that they are enforced in practice in accordance with Article 30 (4) of the APD. Moreover, according to the Ministry of Immigration⁸², the definition given under Article L.741-4-2° is inclusive and, even though it does not explicitly incorporate Annex II of the APD, the elements contained therein are taken into account by the Board⁸³ of the OFPRA in its designation of safe countries of origin. Furthermore, the effective application of laws and remedies are taken into account in its assessment.⁸⁴

UNHCR welcomes the inclusive approach claimed by the French authorities, but considers that it would be preferable if reference to Annex II requirements were formally incorporated in binding legislation.

As mentioned above, of the Member States surveyed for this research, only Greece and the UK allow, by law, for the designation of part of a country as safe. UNHCR considers that in principle a country cannot be considered 'safe' if it is so only for part of its territory. In this regard, UNHCR considers that Articles 7 and 8 of the Qualification Directive on actors of protection and the internal protection alternative are relevant to an assessment of whether part of a country is safe for an applicant.⁸⁵ Article 8 of the Qualification Directive requires that in the purported safe part of the country:

*"there is no well-founded fear of being persecuted or no real risk of suffering serious harm **and** the applicant can reasonably be expected to stay in that part of the country."* [Emphasis added].

Moreover, in conducting this assessment *"Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country **and** to the personal circumstances of the applicant."* [Emphasis added].

⁸² Interview, 26 March 2009.

⁸³ The Board of OFPRA is a political body whose members are representatives of the state (several ministries), of the staff of the determining authority OFPRA, Members of the Parliament and three "qualified personalities".

⁸⁴ The 2007 OFPRA Activity Report recalls that when the first list was adopted, the Board of OFPRA, in its 30 June 2005 session, did not exclude the possibility that, in spite of a number of guarantees provided by these countries, human rights violations might be committed, since even institutions which respect human rights cannot prevent all inhuman treatment. In the specific case of Mali, the OFPRA Board noted that female genital mutilation remained widespread within society, in spite of the clear will of the authorities to eradicate this practice. It was therefore important to examine carefully and on a case-by-case basis the effective protection likely to be provided by the authorities.

⁸⁵ Article 7 of the Qualification Directive sets out the criteria for considering that an actor provides protection. Article 7 (2) QD states that *"Protection is generally provided when the actors [of protection] take reasonable steps to prevent the persecution or suffering of reasonable harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection."*

It must be underlined that the designation of a safe part of a country does not necessarily establish a relevant or reasonable internal protection alternative. The existence of a 'safe' part of a country may be but one element in an examination of whether a particular applicant has such an alternative. Moreover, the complex questions which arise in the application of the internal protection alternative require a careful examination of the individual case in the regular procedure and should not be dealt with in an accelerated procedure.⁸⁶ Therefore, UNHCR is concerned that Article 30 APD in conjunction with Article 23 (4) (c) (i) APD permits the accelerated examination of applications raising such complex issues.

UNHCR takes the view that the criteria under Annex II APD for designating a third country as a safe country of origin are broadly adequate. It is of serious concern that so few of the Member States surveyed have fully incorporated these criteria in their national legislation. This not only risks the inappropriate designation of some countries as safe, but also undermines efforts to harmonise national procedures as part of the process of developing a Common European Asylum System. A consistent application among Member States is essential if the concept of safe country of origin is to provide any added value. Pending revision of the APD, UNHCR encourages all Member States to adopt good practice by incorporating and abiding by the criteria under Annex II in their entirety, even if not expressly obliged to do so. Notwithstanding this recommendation, those states permitted to derogate should, as a minimum, ensure that their national provisions are in line with Articles 30 (2) and (4) APD.

Recommendation

UNHCR recommends the deletion of the standstill clause under Article 30 (2 – 4) APD allowing Member States to derogate from the material requirements under Annex II for designating a country or part thereof as safe, or to apply the notion to a specified group of persons.⁸⁷

All Member States which have national legislation providing for the designation of safe countries of origin should incorporate in their national legislation, and adhere to, the material criteria under Annex II when designating a third country as a safe country of origin, even if not expressly required to do so under the current terms of the APD.

All Member States should review their current national designation criteria with reference to Annex II APD.

⁸⁶ Page 8, UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at: <http://www.unhcr.org/refworld/docid/3f2791a4.html>

⁸⁷ This is suggested in proposed recast Article 33: APD Recast Proposal 2009

The process for and consequences of designating a third country as a safe country of origin

Article 30 (5) APD requires that *“the assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organizations”*.

UNHCR’s research revealed that there are significant differences and divergences in the type of information used to designate a country as safe across the Member States of focus. Furthermore, there are variations with regard to which authority is responsible for making designations, as well as whether this is done through the creation of safe country of origin lists, or exclusively on a case by case basis. Furthermore, there is evidence of inconsistent state practice in relation to arrangements for periodically reviewing the safety of designated safe countries of origin. Finally, there are significantly different procedural consequences that follow from designation as a safe country of origin. The information below provides a snapshot of the process in the respective states examined, looking first at those states which either do not apply the concept in practice or do so only rarely or on a case by case basis. States are then examined which apply the concept more extensively on the basis of national lists.

Bulgaria has literally transposed the requirements of Article 30 (5) APD concerning the sources of information which should be referenced in designating a country as a safe country of origin.⁸⁸ A prescribed process exists whereby a draft list is submitted by the Chairperson of the determining authority SAR,⁸⁹ in coordination with the Minister of Foreign Affairs, to the Council of Ministers for final approval and adoption.⁹⁰ Review of the list is stipulated to occur annually and follows the same procedure as for its initial adoption. However, at the time of UNHCR’s research, there was no list of safe countries of origin, the last one having been adopted back in 2005 under previous legislation and now considered obsolete.⁹¹ Given that reference to a list is a statutory requirement for its application to declare a claim as manifestly unfounded⁹², the current absence of a

⁸⁸ Article 98 (2) 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...”*

⁸⁹ Article 21, item 11 of the Statute of SAR provides that within SAR, the function of preparing and updating the draft list is delegated to the International Affairs and European Refugee Fund Directorate.

⁹⁰ Article 98 LAR (New SG No. 52/2007) *“(1) By November 30 every year the Chairperson of the State Agency for Refugees in coordination with the Minister of Foreign Affairs shall submit national lists of safe countries of origin and safe third countries to the Council of Ministers for their adoption.”*

⁹¹ Confirmed during interviews with stakeholders, interviewees and the Methodology Directorate. However, the list was accepted and taken into consideration as written evidence in a recent case before the Administrative Court of Pazardzhik (for example, Decision 282/22.07.2008). The list of 3 May 2005 contains: Albania, Armenia, Bosnia and Herzegovina, Georgia, Republic of Macedonia, Serbia and Montenegro, Turkey, Ukraine, Bangladesh, India, China, Algeria, Ghana, Ethiopia, Nigeria and Tanzania.

⁹² Articles 13 (1) item 13 and 13 (3) LAR.

national list precludes application of the safe country of origin concept in practice. If it were to be applied on a case-by-case basis, the claim would be assessed in the same way as any other application under the regular procedure.⁹³

Slovenian legislation, which entered into force on 4 January 2008, had foreseen the possibility of applying a common EU list of safe countries of origin.⁹⁴ Given the absence of such a list, Slovenia has not yet applied the safe country of origin concept in practice. The power to designate countries as safe countries of origin nevertheless rests with the government,⁹⁵ and would be exercised only on a case by case basis rather than through the creation of a national list of safe countries of origin.⁹⁶ There are no specific legislative provisions specifying what information should be relied on in designating a country of origin as safe. However, Article 55 indent 13 IPA provides that the “*competent authority shall reject an application in an accelerated procedure as unfounded if: the applicant is from a safe country of origin*”. As mentioned in section 9 on accelerated procedures, according to national law, the determining authority does not have to refer to specific detailed country of origin information as it would in the regular procedure, but should establish the situation based on, *inter alia*, “*general information on the country of origin, in particular on the social political situation and the adopted legislation*”.

Similarly, the Czech Republic does not apply the safe country of origin concept in practice and there have been no reported cases since 1 December 2007. Although there is a list of designated safe countries (last updated in May 2007), the list is short and there have not been any applications by nationals of those countries. The list is drawn up by the DAMP Country Information Unit but is not made public. It was introduced by an internal regulation which provides for a review once a year or when the need arises. There are no legislative provisions governing the sources of information that should be relied upon in designating a country as safe. The current lack of transparency and regulation is of concern, particularly if in future the scope of the list were to be broadened.

In the Netherlands, the determining authority is responsible for determining that a third country is a safe country of origin, and relies on information collected by the Ministry of Foreign Affairs and from various other sources, including Member States, UNHCR and the Council of Europe, in order to provide relevant information in its country reports. There is, at present, no list of designated safe countries of origin, and the concept is presumed to be applied on a case by case basis only, although stakeholders reported

⁹³ The application shall be considered under the regular procedure unless any of the other grounds for acceleration under 13 (1) LAR apply.

⁹⁴ Article 65 IPA

⁹⁵ Article 65 (3) IPA.

⁹⁶ Information provided by representatives from the Ministry of Interior. Article 65 (3) IPA states that “*the Government of the Republic of Slovenia may designate third countries other than those appearing on the minimum common list.*”

that it is rarely applied at all in practice. Previously the Netherlands did have a safe country list,⁹⁷ but with the introduction of the Aliens Act 2000 the list was abolished and broader criteria (outlined above) were introduced. A finding that a country of origin is safe may mean that the determining authority considers that a decision can be taken within 48 procedural hours and the application would then be further examined in the accelerated procedure. Such a presumption of safety would also impact on the burden of proof but, in the case of a negative decision, the application would not be certified as manifestly unfounded.

Greek legislation similarly fully incorporates the requirements of Article 30 (5) APD by requiring that in evaluating whether a country is a safe country of origin, the Aliens' Directorate of the Greek police Headquarters (ADGPH) should take into account information from other Member States, and international organizations such as UNHCR and the Council of Europe.⁹⁸ The ADGPH, as the 'Central Authority'⁹⁹ is responsible for the designation of third countries as safe countries of origin.¹⁰⁰ At present there is no designated list of safe countries of origin, and the approach claimed by the Greek authorities is that case by case consideration takes place.¹⁰¹ Following the applicant's personal interview, UNHCR was informed that the determining authority (ADGPH) "*examines the nationality and the grounds of the applicant's claim and uses precise and up-to-date information in order to assess if, in the country of the applicant, there is generally and consistently no persecution, no torture, inhuman or degrading treatment or punishment, and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.*"¹⁰² However, from UNHCR's research, it cannot be verified whether this methodology is applied in practice, in the absence of specific reasoning in any of the case files examined. According to two interviewees¹⁰³, in practice, the concept is applied indiscriminately and to the vast majority of asylum claims.

In Finland, there is similarly no list of designated safe countries of origin, and the concept is applied on a case by case basis. Indeed, it has been held on constitutional grounds that safe country lists do not comply with the Finnish legal order.¹⁰⁴ As such, case-by-case designation is done by the determining authority. Sources used in the assessment of whether a country is a safe country of origin are the same sources of

⁹⁷ Bulgaria, Ghana, Hungary, Poland, Romania, Senegal, Slovakia and the Czech Republic.

⁹⁸ Article 22 (1) (b) of PD 90/2008.

⁹⁹ Article 2 (1) of PD 90/2008.

¹⁰⁰ Article 22 (1) (b) of PD 90/2008.

¹⁰¹ In accordance with articles 22 (2) and (3) PD 90/2008.

¹⁰² Information provided by head of ARD in ADGPH.

¹⁰³ Interview with S1 and S2.

¹⁰⁴ In 1998, the *Perustuslakivaliokunta* (Constitutional Committee of the Finnish Parliament) held, in response to the *Hallituksen esitys 50/1998* (Government Bill 50/1998) that such lists do not comply with the Finnish legal order. The issue concerned lists of safe countries of asylum. However, the discussion in the Constitutional Committee was linked to the forming of lists in general in the asylum procedure. See Parliamentary Constitutional Committee Communication 23/1998.

country of origin information normally used in the regular procedure. These include reports from international organisations and governments as well as fact-finding enquiries and missions to the country in question. As of 1 December 2007, Bulgaria, Latvia, Romania, Hungary, Italy and Poland have been considered as safe countries of origin.¹⁰⁵ Designation of a safe country of origin is both a procedural measure to channel the application into an accelerated procedure, as well as a tool for the assessment of claims. In Finland, legislation stipulates that a decision shall be taken within seven calendar days of completion of the personal interview, if the applicant is considered to come from a safe country of origin.¹⁰⁶ If the time limit is exceeded, a negative decision can still be taken, but on the ground that the application is manifestly unfounded.

According to French law, the authority responsible for the national designation of the list of safe countries of origin is the Board of the OFPRA.¹⁰⁷ The sources of information used by the Board of OFPRA in compiling the list of safe countries of origin have not been made public. According to the Government, however, in order to establish and monitor the list, the Board of OFPRA relies on many sources of information including reports from embassies, UNHCR and NGOs. However, UNHCR considers it of concern that France has not transposed Article 30 (5) APD or introduced detailed provisions regulating what sources of information should be relied upon.

As of February 2008, the list compiled by the Board of the OFPRA featured 15 countries:¹⁰⁸

*Benin, Bosnia-Herzegovina, Cape Verde, Croatia, Georgia, Ghana, India, Madagascar, Mali, Macedonia (ARYM), Mauritius, Mongolia, Senegal, Tanzania, and Ukraine.*¹⁰⁹

¹⁰⁵ Information based on the official statistics of the determining authority, available at . If the determining authority has not been able to make a decision on the matter involving a safe country of origin within seven days from the filing of the record of the interview, a decision may be taken to reject the claim as manifestly unfounded. Thus, there may be decisions other than those statistically referred to as implementing grounds of safe country of origin that *de facto* use this concept.

¹⁰⁶ The applications that raise the issue of safe countries or origin are, in accordance with section 103 (2) the *Ulkomaalaislaki* (Aliens' Act 301/2004), assessed in the accelerated procedure. Section 104 of the *Ulkomaalaislaki* (Aliens' Act 301/2004) states the 7 day time limit.

¹⁰⁷ The OFPRA, as an administrative body, is the determining authority in the meaning of the APD. However, its Board is a political body whose members represent the state (several ministries), staff of OFPRA, Members of Parliament and three "qualified personalities". Cf. Article R.722-1 *Ceseda*.

¹⁰⁸ In addition to this list, Article L.741-4-2° makes reference to "*national(s) of a country to which Article 1C5 of the 1951 Geneva Convention is applicable*". Some of these countries used to be countries which are now part of the list of safe countries of origin. In practice, only Argentina and Chile would be concerned. EU Member States are also considered as safe countries of origin for other EU Member States, according to the Aznar Protocol (annexed to the Amsterdam Treaty). In practice, nationals of these countries would be likely to be channelled into the accelerated procedure.

¹⁰⁹ A decision of the Board of the OFPRA made on 13 November 2009 added three countries to the list: Armenia, Turkey and Serbia.

There is no specific legal provision for the revision of the list, or criteria to determine what would trigger a review, whether to add or remove countries. UNHCR is concerned about this lack of transparency, which risks undermining the fair and proper application of the safe country of origin concept. It is noteworthy that the content of lists to date has been challenged by NGOs in the French courts.¹¹⁰ One challenge resulted in a decision against the designation of Albania and Niger as safe countries of origin,¹¹¹ both of which have since been removed from the list.¹¹²

The response to this court decision demonstrates that the list of safe countries of origin can be modified, and indeed illustrates both the need to and importance of keeping the list under regular review. However, the Board of OFPRA has not to date taken the initiative to remove countries from the list, in spite of the unstable situation in some of them.¹¹³

In this context, it is noteworthy that recorded applications by nationals of countries designated as safe countries of origin in France doubled between 2007 and 2008. According to OFPRA's 2008 activity report, they represented 9.5% of the total number of applications.¹¹⁴ The OFPRA recognition rate for these applicants was 34.8% in 2008.¹¹⁵ UNHCR observes that according to Article 30 (2) of the APD, a safe country of origin is a country where persons "*are generally neither subject to persecution as defined in Article 9 of the Qualification Directive nor torture or inhuman or degrading treatment or punishment*". The high recognition rates both at OFPRA level and at CNDA for claimants from countries designated as safe should call into question the application of the designation criteria by the Board of OFPRA and the legality of the inclusion of certain countries on the list.¹¹⁶ It also further illustrates the need for transparent review

¹¹⁰ French NGOs are generally against this list. They consider it surprising that France is able to establish a list of safe countries of origin while EU Member States have failed to establish a common list. They also note that the French list includes unstable countries which still produce significant numbers of refugees (cf. recognition rates in Annex) and which have not abolished serious practices such as FGM (e.g. Mali). Cf. CFDA, *Bilan des 3 ans d'application de la loi, note de mars 2007*.

¹¹¹ *Conseil d'Etat statuant au contentieux N° 295443 Association Forum réfugiés, 13 février 2008*. The Council of State concluded that "*according to the evidence produced and in spite of the improvements made, the Republic of Albania and the Republic of Niger did not present, when the decision [to designate them as safe countries of origin] was made, taking into account in particular the instability of the political and social context of each of these countries, the characteristics which justified the designation as safe countries of origin on the list in the meaning of Article L. 741-4-2° Ceseda*".

¹¹² *Circulaire du 7 mars 2008 du ministère Immigration demandant aux Préfets de tirer les conséquences de cette décision*.

¹¹³ For example, the situations in Madagascar and Georgia. In this context, French NGOs from the CFDA asked the Board of the OFPRA to remove Georgia from the list of safe countries of origin. It is interesting to note that whereas Georgia was not removed from the list, instructions were given by the Ministry to the prefectures in the summer 2008 not to remove nationals of this country to Georgia.

¹¹⁴ Page 14.

¹¹⁵ Source OFPRA, Activity Report 2008.

¹¹⁶ The OFPRA Activity Report 2008 cites an OFPRA recognition rate of 34.8% with regard to all of the then designated safe countries of origin. The CNDA recognition rate on appeal was 21.7%.

procedures. Moreover, it could support an inference that the main objective of the list is to dissuade nationals of designated countries from seeking protection in France, and to curb flows of such applicants accordingly, regardless of their protection needs.

During his visit to France, the Council of Europe Commissioner for Human Rights raised concerns regarding the use of this list.¹¹⁷

The designation of a third country as a safe country of origin is a procedural tool in France in order to channel the application into an accelerated procedure.¹¹⁸ However, the initial application of the safe country of origin concept is not by the determining authority, OFPRA, but rather by the Prefectures which are responsible for decisions on whether or not to issue temporary residence permits.¹¹⁹ Before applying for international protection, all applicants must compulsorily apply for a temporary residence permit at the Prefecture of their domicile.¹²⁰ The Prefectures may refuse to issue a temporary residence permit if they consider that an applicant is from a listed safe country of origin.¹²¹ If the Prefecture refuses the application for a temporary residence permit on this ground, the application for international protection is channelled into the accelerated procedure.¹²² There is no effective opportunity for applicants to challenge the presumption of safety before the Prefecture, given that it is bound to apply the designated list according to the nationality of the applicant alone - and has no jurisdiction to examine substantive grounds for protection.¹²³ Most applications will be channelled into the accelerated procedure accordingly.¹²⁴

¹¹⁷ He expressed the “*need for equal treatment of asylum seekers irrespective of their country of origin*” and invited the French authorities “*to be as cautious as possible in their use of this list, and to ensure that it does not have an automatic effect on the processing of asylum applications, which should always be examined individually*”. Cf. CommDH(2008)34, Strasbourg, 20 November 2008, Memorandum by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008 §119.

¹¹⁸ It is accepted however that it plays a role in the credibility assessment. Nonetheless, OFPRA decisions regarding applicants from safe countries of origin do not make explicit reference to the safety or non-safety of the country of origin, and always make reference to the individual facts of the case.

¹¹⁹ See Section 9 on accelerated procedures for further information.

¹²⁰ Article L.741-2 and Article R.741-1 *Ceseda*. Since 2007, the delivery of temporary residence permits is conducted on a regional basis (one Prefecture issues for several *départements*). This was first trialled in some regions. Since 20 April 2009, it is applicable to the whole territory (except Paris and its region).

¹²¹ Article L.741-4 *Ceseda* (unofficial translation into English).

¹²² Unofficial translation of Article L.723-1 *Ceseda* « [§2] *L'office statue par priorité sur les demandes émanant de personnes auxquelles le document provisoire de séjour prévu à l'article L.742-1 a été refusé ou retiré pour l'un des motifs mentionnés aux 2^o à 4^o de l'article L.741-4, ou qui se sont vu refuser pour l'un de ces motifs le renouvellement de ce document* ».

¹²³ The assessment of the Prefectures takes place in the framework of a request for a temporary residence permit in France, and not on the substance of the protection claim. Thus information will be elicited concerning the applicant's travel, civil status, family composition and possible links with France but not related to the reasons for applying for international protection. Prefectures can in some circumstances take into account “humanitarian reasons” linked to the situation of the applicant in France (factors linked to private and family life), which are not directly linked to the reasons for fleeing the country of origin. Applicants are informed about the fact that their application will be channelled into an accelerated

Moreover, applicants who do not receive a temporary residence permit do not benefit from the same reception conditions as other applicants and this can adversely impact upon their procedural rights.¹²⁵ However, an individual substantive examination is nonetheless usually guaranteed under the accelerated procedure, at least at first instance.¹²⁶ UNHCR's audit of case files found no discernible difference in the examination of applications of applicants from nationally-designated safe countries of origin in the accelerated procedure, compared to the examination of applications in the regular procedure.¹²⁷

procedure on the safe country of origin ground when they receive the decision from the Prefecture refusing the temporary residence permit. Applicants can in theory challenge the decision of the Prefecture before the administrative court but this legal remedy has no suspensive effect and, except when the case is referred to the court under an emergency procedure ("référé"), the judgement can take several months or even years. The Administrative Court in Lyon tends to suspend Prefecture decisions refusing temporary residence permits to applicants who are nationals of safe countries of origin, and to order the Prefecture to deliver a temporary residence permit which should remain valid until any decision by the CNDA. As such, an appeal to the CNDA would have suspensive effect. In a recent decision concerning an applicant from Georgia (*Tribunal administrative de Lyon, Mme EC, Ordonnance du juge des référés, 3 avril 2009, No. 0901637*), the applicant alleged that the decision of the Prefecture was illegal because it relied on a list of safe countries of origin which does not comply with the provisions of Article 30 APD. Without assessing the substance of the application for protection, the court recognised that there was a doubt regarding the legality of the decision of the prefecture and suspended it. However, a previous decision of the Council of State (*Conseil d'Etat, 7 août 2007, No.301540*) held that a decision of the Administrative Court of Lyon suspending a decision of the Prefecture to refuse a temporary residence permit to an applicant from Albania, and ordering the delivery of a permit, was illegal. The Councils of State reaffirmed that an appeal before the CNDA had no suspensive effect for nationals of safe countries of origin. It is therefore important that the Council of State makes a ruling on the right to a suspensive right of appeal before the CNDA for these applicants (as for all applicants whose applications are processed under accelerated procedures).

¹²⁴ see Section 9 on the accelerated examination of applications for further details on the accelerated procedure in France.

¹²⁵ See section 9 on the accelerated examination of applications for further details on the impact of reception conditions on procedural rights in France.

¹²⁶ This is reaffirmed specifically under the provision regarding nationals from safe countries of origin under Article L.741-4-2° *Ceseda*.

¹²⁷ The audit examined 12 case files related to nationals of a safe country of origin (Georgia and Bosnia-Herzegovina). From the six case files from Bosnia-Herzegovina, five were processed under the accelerated procedure and one was processed under the regular procedure. All were given an opportunity for an interview the assessment conducted by protection officers seems to be the same as for other applications from non-designated countries. From the six case files from Georgia, three were processed under the accelerated procedure and three were processed under the regular procedure. Five out of six were given an opportunity for an interview, and the assessment conducted by protection officers appeared thorough, with reference to COI in three of the decisions. Out of a total of 14 interviews on the territory, three cases (case file 3 (BOS); case file 5 (GEO); case file 6 (GEO)) and they were all processed under the accelerated procedure. In practice, the way the interviews were conducted appeared the same as for other interviews. At the end of the interview, protection officers briefly explain the consequences of this specific procedure in terms of delays and remedies before the CNDA.

In Germany, Article 16a (3) 1 Basic Law allows for the designation of third countries as safe countries of origin by a federal law adopted by the Bundestag (Federal Parliament) with the consent of the *Bundesrat*. According to the standards elaborated by the Federal Constitutional Court, the German legislator needs to verify the safety of a country by taking into account all relevant, accessible and reliable sources, in particular, the reports of the Ministry of Foreign Affairs and UNHCR.¹²⁸ The asylum application of a foreigner from a State designated as a safe country of origin by the legislator shall be turned down as manifestly unfounded, unless the facts presented by the foreigner give reason to believe that s/he faces “political persecution” in his/her country of origin contrary to the general presumption of safety.¹²⁹

If the situation in a State changes in a way that the criteria for safety are no longer fulfilled, the respective State may be removed from the list of safe countries of origin by an order of the Federal Government which does not require the consent of the second Chamber of Parliament, the *Bundesrat*. Such an order will cease to apply automatically after six months. In practice, this provision for removing a State from the list has been used twice: in 1994 regarding Gambia¹³⁰ after a coup d'état by the military, and Senegal in 1996.¹³¹ Only the removal of Gambia was confirmed by a formal law,¹³² so Senegal remained on the list after the expiry of six months after the adoption of the government order.

At the time of writing, in addition to the designation of EU Member States as safe countries of origin in Section 29a (2) APA,¹³³ there are two States on the German list of safe countries of origin: Ghana and Senegal.¹³⁴

The legal consequence of an application of the concept to an individual application is that the application is rejected as manifestly unfounded.¹³⁵ This in turn triggers the denial of entry to the territory in the case of an application examined in the airport procedure;¹³⁶ shortened deadlines for an appeal both in the airport procedure and in the regular in-country procedure;¹³⁷ and – if confirmed as manifestly unfounded by the administrative court – the limitation of an appeal before administrative courts to one instance.¹³⁸

¹²⁸ Federal Constitutional Court of Germany, official collection vol. 94, p. 115 (at p. 143). For a criticism of the German situation in view of the potential influence of political considerations in a parliamentary process, see Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 29a, para. 90.

¹²⁹ Article 16a (3) 2 Basic Law.

¹³⁰ Federal Law Gazette 1994 vol. I, p. 2480.

¹³¹ Federal Law Gazette 1996 vol. I, p. 551.

¹³² Federal Law Gazette 1995 vol. I, p. 430.

¹³³ As introduced by the Transposition Act 2007, Federal Law Gazette I, p. 1970.

¹³⁴ Annex II (on Section 29a) APA.

¹³⁵ Section 29a (1) APA.

¹³⁶ Section 18a (3) 1 APA.

¹³⁷ Sections 18a (4); 74 (1), 36 (1) APA.

¹³⁸ Section 78 (1) APA.

In the United Kingdom, the Secretary of State for the Home Department has the power to add or remove a state (or part thereof) from the existing list of states designated as safe countries of origin by statute by the UK Parliament.¹³⁹ National legislation outlines the sources of information that should be relied upon.¹⁴⁰ This broadly complies with the requirements of Article 30 (1) (5) APD, although it is regrettable that there is no explicit reference to information either from UNHCR or the Council of Europe. It is unclear whether there is any independent oversight of the actual designation of countries as safe by the Secretary of State, although the remit of the recently established Advisory Group on Country Information will allow for the review of relevant country of origin information produced by the determining authority on some of the designated safe countries of origin.¹⁴¹ There is no publicly available information which determines what may trigger a review of the safety of designated countries. The Independent Chief Inspector of the UK Border Agency (the determining authority) has a statutory duty to monitor the case-by-case certification process.¹⁴² Individual applicants can challenge, by way of judicial review to the Administrative Court, the decision to certify their application as unfounded and this may include a challenge to the legality of the country of origin being designated as a 'safe country of origin'. The most recent successful challenge related to the inclusion of Bangladesh on the designated list of safe countries of origin.¹⁴³ The inclusion of Bangladesh was held to be irrational and was subsequently removed from the list by Order.

The 24 countries listed at the time of writing are:¹⁴⁴

<i>Albania</i>	<i>Mauritius</i>	<i>Ghana (men only)</i>
<i>Bolivia</i>	<i>Moldova</i>	<i>Gambia (men only)</i>
<i>Bosnia-Herzegovina</i>	<i>Mongolia</i>	<i>Kenya (men only)</i>
<i>Brazil</i>	<i>Montenegro</i>	<i>Liberia (men only)</i>
<i>Ecuador</i>	<i>Peru</i>	<i>Malawi (men only)</i>
<i>India</i>	<i>Serbia inc. Kosovo</i>	<i>Mali (men only)</i>
<i>Jamaica</i>	<i>South Africa</i>	<i>Nigeria (men only)</i>
<i>Macedonia</i>	<i>Ukraine</i>	<i>Sierra Leone (men only)</i>

Eight states have been listed as safe for men only since 1 December 2007. They are Ghana, Nigeria,¹⁴⁵ Gambia, Kenya, Liberia, Malawi, Mali and Sierra Leone.¹⁴⁶

¹³⁹ NIAA 2002 s 94 (5).

¹⁴⁰ NIAA 2002 s 94 (5) (D) (b) "...shall have regard to information from any appropriate source (including other Member States and international organisations)."

¹⁴¹ <http://www.ociukba.homeoffice.gov.uk/independent-advisory-group/Terms-of-Reference.asp>

¹⁴² Section 48 Borders Act 2007. The office of the Chief Inspector usurps the function of the 'Certification Monitor' which was established under the Nationality Immigration and Asylum Act 2002 s111.

¹⁴³ *R (Zakir Husan) v Secretary of State for the Home Department* EWHC 189 (Admin).

¹⁴⁴ API/APM of 20/11/2007 *Certification under Section 94 of the NIAA 2002*.

¹⁴⁵ Ghana and Nigeria are listed under SI 2005 No 3306 with effect from 3 December 2005.

The designation of a third country as a safe country of origin is a procedural tool, in order to channel the application into an accelerated procedure.¹⁴⁷ The law does not state that applications will be automatically rejected or declared inadmissible or unfounded. However, the consequences of a claim being channelled into an accelerated procedure can be significant. In the UK, applicants whose applications are channelled into the DNSA accelerated procedure are detained.¹⁴⁸

In the UK, the designation of a third country as a safe country of origin is not solely a procedural tool; it also creates a quasi-presumption of safety, and therefore impacts upon the burden of proof (see below). Legislation provides that an asylum claim by a national of one of the designated countries shall be certified as clearly unfounded “*unless the Secretary of State is satisfied that it is not clearly unfounded*”¹⁴⁹. The effect of certification is procedural: it prevents an in-country appeal being brought.

Notwithstanding the varied approaches taken by Member States in their national processes by which safe countries of origin are designated, there are a number of common issues of concern. Although most states have adequately transposed Article 30 (5) APD, and refer to broadly similar sources of information as part of the designation process, the generic formulation of this article permits wide divergences in the precise sources used by states. This fact, combined with major differences in the designation criteria applied, inevitably results in inconsistency in the designation of safe countries of origin. This is evident from a comparison between those states which currently have in place a national list, most significantly France, Germany and the UK.¹⁵⁰ At the time of UNHCR’s research, only eight countries appeared on the lists of both France and the UK.¹⁵¹ Only Ghana appeared on the list of all three States; however, in the UK, Ghana is only designated as a safe country of origin with regard to male applicants. UNHCR considers that the proposed European Asylum Support Office (including through the

¹⁴⁶ These six countries are listed under SI 2007 No 2221 with effect from 28 July 2007.

¹⁴⁷ See details regarding the procedural standards and the reception standards under section 9 on accelerated procedures.

¹⁴⁸ Applicants in the DFT and DNSA accelerated procedure are detained; the DFT procedure is a three day procedure. See section 9 for further information.

¹⁴⁹ NIAA 2002 s 94(3).

¹⁵⁰ At the time of UNHCR’s research, French and UK safe country of origin lists featured 15 [18 as of November 2009] and 24 countries respectively, but only had 6 countries in common (Bosnia-Herzegovina, India, Macedonia, Mauritius, Mongolia and Ukraine). Moreover, the UK recognised Ghana and Mali as being generally safe only for men; whereas these are listed as safe countries in France. It is noteworthy that France considered Georgia a safe country, but the UK did not; and that the UK considered Serbia a safe country, but France did not (although Serbia was added to the French list in November 2009). Moreover, Albania features on the UK list, but has recently been removed from the French list following a legal challenge. Germany has designated Ghana and Senegal as safe countries of origin in its national list, as well as all EU Member States, under the APA.

¹⁵¹ Bosnia-Herzegovina, India, Macedonia, Mauritius, Mongolia and Ukraine. Ghana and Mali were also designated as safe by France, whereas they were designated as safe for men only in the UK. See below for further details.

involvement of UNHCR and independent experts) could usefully play a role in helping to collate and identify common information to be relied on by Member States for the designation process.

A second concern relates to an apparent lack of regulation, transparency, and accountability in the process by which countries are designated as safe countries of origin. This includes particularly an absence of clear provisions for reviewing the safety of countries, including what criteria would trigger a decision to either add or remove a country from the list. Only Bulgaria and Germany have in place detailed legislative provisions concerning the process for adopting a list. Bulgaria also has a requirement for annual review (if a list is in existence). German law provides for the possibility of withdrawing a country from the list by an order of the Government for a preliminary period of six months, at which point the Federal Parliament must adopt a formal law if the withdrawal is to remain in force. However, there is no mechanism for a regular review of the lists. Although countries have been removed from the list in France, this resulted from a legal challenge and has never been instigated by the French authorities.

UNHCR considers that appropriate mechanisms should be in place to provide for a regular review of the safety of designated countries on national lists. Furthermore, the designation of such countries by law or regulation should be flexible enough to take account of changes, both gradual and sudden, in a given country. UNHCR supports the creation of appropriate 'benchmarks' to ensure that this is done fairly and consistently, and in order to reduce the risk of the designation process becoming politicized. UNHCR further considers that safe country of origin lists, and the information sources relied upon in making a designation, should be publicly available.

Recommendation

UNHCR recommends:

A Member State which applies the safe country of origin concept should have in place a clear, transparent and accountable process for the designation of third countries as safe countries of origin, and any lists of safe countries of origin should be publicly available, along with the sources of information used in the designation process.

The future European Asylum Support Office (EASO) should support the identification and collation of common information sources to be used by Member States for the purpose of designating safe countries of origin.

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

Applicants should not be afforded a lower standard of reception conditions and/or detained solely because they are nationals of a country designated as a safe country of origin.

Procedural guarantees in the application of the safe country of origin concept

Article 31 APD stipulates that:

1. A third country designated as a safe country of origin in accordance with either Article 29 or 30 may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if:

(a) he/she has the nationality of that country; or

(b) he/she is a stateless person and was formerly habitually resident in that country;

and he/she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee in accordance with Directive 2004/83/EC.

3. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept.

UNHCR accepts the safe country of origin concept in principle where it is used as a procedural tool for the prioritized and/or accelerated examination of applications, in carefully circumscribed situations. However, it is critical that each case be examined fully and individually on its merits, and that each applicant should be given an effective opportunity to rebut the presumption of safety of the country of origin, on the basis of his/her individual circumstances. Article 31 (1) APD explicitly confirms the need for an individual examination; albeit at the same time appearing to place the burden of proof on the applicant to demonstrate that his/her country is not a safe country of origin in his/her particular circumstances.

Article 31 is silent on whether or how applicants be given an effective opportunity to rebut a presumption of safety; although sub-section (3) does require states to lay down in national legislation further rules and modalities for application of the safe country of origin concept.

UNHCR therefore considers that in assessing the transposition and implementation of Article 31, all relevant procedural factors must be considered. These are, namely, the requirement to conduct an individual examination; availability of a personal interview; burden of proof applied; and whether the applicant is provided with an effective opportunity to rebut a presumption of safety (including the question of access to adequate advance information and legal assistance). Other relevant rules and modalities

include the certification of safe country of origin cases as ‘manifestly unfounded’. Each of these components is considered below.

Provision of an individual examination

Some states surveyed do not directly address the issue of an individual examination for safe country of origin cases in their national legislation. Bulgarian legislation does not contain any explicit provisions concerning the requirement for an individual examination. However, it does stipulate that the grounds for refugee and humanitarian status must not be present;¹⁵² and that the fact that the applicant comes from a designated safe country of origin may not be the sole reason to consider an application manifestly unfounded.¹⁵³ The possibility to rebut the presumption of safety is also explicitly stated.¹⁵⁴

Slovenia has no specific provisions concerning the assessment of applications by applicants from designated safe countries of origin. However, general provisions for accelerated procedures, in which applications by applicants considered to be from a safe country of origin would be examined,¹⁵⁵ require that the facts and circumstances are established. This requires taking into account oral and documentary evidence provided by the applicant, evidence obtained by the determining authority, documentation obtained prior to submitting the application and general country of origin information.¹⁵⁶

Greek legislation likewise contains a general provision that all asylum applications should be considered individually, comprehensively, objectively and impartially. However, this was not evidenced in the audit of case files, which indicated that a proper and individual examination is not conducted in practice for the vast majority of claims, regardless of the type of procedure.

Other states clearly prescribe the need for an individual examination of safe country of origin cases. In the UK, explicit guidance instructs decision makers to carry out an individual assessment of the merits of the claim in safe country of origin cases, since designation as such will result in removal of the in-country right of appeal.¹⁵⁷ On the gathering of information, guidance instructs decision makers to consider the relevant Operational Guidance Note (OGN), and relevant country information.¹⁵⁸

¹⁵² Article 13 (1) LAR.

¹⁵³ Article 13 (3) LAR.

¹⁵⁴ Article 99 LAR.

¹⁵⁵ Article 55 indent 13 IPA.

¹⁵⁶ Article 54 IPA with reference to Article 23 IPA, which contains a requirement to consider facts and circumstances relating to the applicant, but not specific and individual COI.

¹⁵⁷ The API/APM of 20/11/2007 Certification under Section 94 of the NIAA 2002.

¹⁵⁸ The API/APM of 20/11/2007 Certification under Section 94 of the NIAA 2002 country information.

According to French law, the individual examination of each claim on the substance by the OFPRA shall be guaranteed.¹⁵⁹ The audit of case files and the observation of personal interviews confirmed that in practice an individual examination was provided in accordance with Article 31 (1) APD, taking account of both country of origin information and the particular circumstances of the applicant. This was found to be the case regardless of whether safe country of origin cases were considered under the accelerated or the regular procedure.¹⁶⁰

In Finland, the examination of safe country of origin cases is always made on an individual basis, which requires the assessment of COI as well the individual circumstances of the applicant. Stakeholders reported that this “works well” in practice.¹⁶¹

In Germany, the safe country of origin concept foresees a qualified rejection as manifestly unfounded, but this does not relieve the authorities of any of the procedural guarantees; the case will be reviewed on its merits after a personal interview of the applicant. The presumption of safety from persecution can be rebutted on the basis of the presentation of facts or evidence by the applicant.¹⁶²

Moreover, in the Netherlands, the designation of a third country as a safe country of origin does not affect the obligation to conduct an individual examination, including the requirement that the determining authority consider COI as well as the particular circumstances of the applicant.¹⁶³

¹⁵⁹ This is reaffirmed specifically under the provision regarding nationals from safe countries of origin under Article L.741-4-2° *Ceseda*.

¹⁶⁰ The audit examined 12 case files related to nationals of a safe country of origin (Georgia and Bosnia-Herzegovina). From the six case files from Bosnia-Herzegovina, five were processed under the accelerated procedure and one was processed under the regular procedure. All were given an opportunity for an interview. The assessment conducted by protection officers seemed to be the same as for other applications from non-designated countries. From the six case files from Georgia, three were processed under the accelerated procedure, and three were processed under the regular procedure. Five out of six were given an opportunity for an interview, and the assessment conducted by protection officers appeared thorough, with reference to COI in three of the decisions. Out of a total of 14 in-country interviews, three cases (case file 3 (BOS); case file 5 (GEO); case file 6 (GEO)) related to nationals of a safe country of origin and they were all processed under the accelerated procedure. In practice, the way the interviews were conducted appeared the same as for other interviews. At the end of the interview, protection officers briefly explain the consequences of this specific procedure in terms of delays and remedies before the CNDA.

¹⁶¹ As the audited cases did not raise the concept of safe country of origin, this information is based on interviews with stakeholders.

¹⁶² This does not amount to imposing the burden of proof on the applicant. It is sufficient that facts or evidence submitted by the applicant “give reason to believe” (Section 29a APA) that the applicant is in danger of persecution, despite the general situation in the country.

¹⁶³ Aliens Circular C4/3.7.

In Spain, the definition in Article 25 (1) (d) in the New Asylum Law includes the expression “...in view of his/ her personal circumstances...” This clause is interpreted as requiring an individual examination of the case.

The burden of proof and opportunity to rebut the presumption of safety

The majority of states that apply the safe country of origin concept have legislation which increases the burden of proof on the applicant, as envisaged by Article 31 (1) APD, namely: the Czech Republic,¹⁶⁴ Greece,¹⁶⁵ Slovenia¹⁶⁶ and the United Kingdom¹⁶⁷.

For example, under UK legislation, where the applicant comes from a designated safe country of origin, there is a quasi-presumption that the case is clearly unfounded. Certification as such is mandatory unless the determining authority is satisfied that the claim is not clearly unfounded.¹⁶⁸ In practice, this means that the burden of proof rests entirely on the applicant with regards to submitting serious grounds for considering the country not to be a safe country of origin.

In Bulgaria, by law, the applicant may rebut the presumption of safety which in principle impacts on the burden of proof on the applicant.¹⁶⁹ However, national law also reflects the principle that the examiner and the applicant share responsibility in establishing the facts of the application.¹⁷⁰

In Germany, the presumption of safety from persecution can be rebutted on the basis of the presentation of facts or evidence by the applicant. This does not amount to imposing the full burden of proof on the applicant; it is sufficient that the facts or evidence submitted by the applicant “give reason to believe” that the applicant is in

¹⁶⁴ Section 16 (1) (d): “arrives from a country which the Czech Republic considers to be a safe third country or a safe country of origin unless it is proven that in his/her particular case this country cannot be deemed to be such country”.

¹⁶⁵ Greek legislation has transposed literally Article 31 (1) (b) APD with Article 22 (2) (a) PD 90/2008.

¹⁶⁶ Article 66 IPA.

¹⁶⁷ NIAA 2002 s94 (3).

¹⁶⁸ NIAA 2002 s94 (3).

¹⁶⁹ Article 99 LAR: “An alien who has applied for status may rebut the presumption of safety of the country included in the lists under Article 96 or Article 98.” Article 75 (2), (Am., SG, issue 52 of 2007) states that: “When a pronouncement is made on the application for status, all relevant facts shall be assessed that relate to the applicant’s personal circumstances, country of origin or third countries. Where the applicant’s assertions are not supported by evidence, they shall be deemed trustworthy if s/he has made efforts to substantiate his/her application and has provided a satisfactory explanation of the lack of evidence. The lack of sufficient data of persecution, due inter alia to a failure to conduct an interview, cannot operate as a ground for refusing the grant of status.”

¹⁷⁰ Article 6 (1) LAR reflects paragraph 196 of the UNHCR Handbook. Article 6 (1) LAR: “The jurisdiction under this law is realized through the officials in the SAR. They establish all facts and circumstances relative to the proceedings for granting refugee or humanitarian status and assist the aliens who have applied for protection.”

danger of persecution, despite the general situation in the country.¹⁷¹ According to information provided by the BAMF, if such facts or evidence are presented by an applicant, the review of the claim must be carried out on the basis of an individual assessment, and not by way of reference to the general situation. The BAMF emphasized that it has a particular responsibility to establish the facts in this context which means that the adjudicator must research the possibility of an exceptional case by the use of targeted questions.¹⁷² However, the presentation by the applicant must be credible, given the assessment of the country as safe by the German legislator.¹⁷³

In the Netherlands, national legislation requires that the applicant make a plausible case that the country of origin does not fulfill its international human rights treaty obligations with regard to him or her.¹⁷⁴ As such, the burden of proof on the applicant is greater, but this does not relieve the determining authority of its duty to gather evidence. Similarly, in Finland, it is for the applicant to rebut the presumption of safety and, therefore, in theory the burden of proof shifts to the applicant. However, in practice, as verified by UNHCR's audit of case files, the assessment of whether a country is safe is made in cooperation with the applicant. Responsibility for establishing the facts is shared.¹⁷⁵

In France, the presumption that the nationally designated countries of origin are safe applies to the Prefectures which are empowered to refuse a temporary residence permit to an applicant from a listed safe country of origin. As a consequence, the application for international protection is routed into the accelerated procedure. However, the concept is not applied as such by the determining authority in its examination of the application for international protection. There is no explicit provision of legislation placing the burden of proof entirely on the applicant in safe country of origin cases. However, the burden of proof on the applicant appears nevertheless be greater in practice, and it may play a role in the credibility assessment.

It is essential that the applicant is given an effective opportunity to rebut any presumption of safety, both in law and practice. In addition to requiring an individual examination, this also involves a shared duty of investigation, prior notification of the intention to designate a country as safe, and other necessary procedural safeguards.

¹⁷¹ Section 29a APA.

¹⁷² In practice, the granting of protection occurs but on a very exceptional basis. In 2009, of 193 decisions on applications by persons from Ghana, one person was granted refugee status and two were granted subsidiary protection (according to the Qualification Directive or national provisions including health related reasons); in 12 decisions on applications by persons from Senegal, one person was granted refugee status and another subsidiary protection (source: statistics provided by the BAMF).

¹⁷³ See R. Marx, *Commentary on the Asylum Procedure Act*, 7th edition (2009), Section 29a, 127.

¹⁷⁴ Article 31 (2) (g) Aliens Act: *"The alien comes from a country which is a party to the Convention on Refugees and one of the other 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/her."*

¹⁷⁵ Audited cases 98, 99, 100, 102, 106 and 107.

UNHCR's research has revealed divergence among Member States with regards to the opportunity given to applicants to rebut a presumption of safety in practice.

In France, the applicant is informed by the Prefecture that s/he is deemed to be a national of a designated safe country of origin and that the application for international protection will be channelled into the accelerated procedure when s/he receives the decision refusing the temporary residence permit. The list of safe countries of origin is also mentioned in the Information Guide which should be distributed to all applicants when they arrive at the Prefecture. Therefore, s/he is notified in advance of the examination by the determining authority of the application for international protection.

In the Netherlands, the applicant has the opportunity to rebut the presumption of safety in both law and practice. The intention to designate the applicant's country of origin as safe is notified to the applicant in advance of taking a decision under the Dutch 'intention procedure'. This allows the applicant an opportunity to submit grounds as to why a designated country would not be safe in his/her particular circumstances. It must be borne in mind, however, that if the application is examined in the accelerated procedure, the applicant will only have three procedural hours in which to submit serious grounds to rebut the presumption.

A common problem identified in several states (Bulgaria, the Czech Republic, and Slovenia) is that no provision is made for applicants to be informed that their country of origin is considered safe, until the point at which they are notified of the decision to refuse their application. Thus in effect, the only and first opportunity to challenge the presumption of safety would be at appeal.

Bulgarian legislation explicitly provides the applicant an opportunity to rebut the presumption of safety,¹⁷⁶ but interviewed stakeholders from the determining authority indicated they would not notify the applicant that they considered his/her country to be safe. This would *de facto* deny the applicant the opportunity effectively to rebut the presumption of safety during the first instance procedure, although a possibility to rebut the presumption at appeal would remain. In the Czech Republic, by of law, there is the right to rebut the presumption of safety, although it is unclear whether this right would be effective in practice.¹⁷⁷ Information about safe country of origin designations and procedures is not included in the general written information provided to applicants at the start of the procedure. Moreover, legislation does not require prior notice to applicants of an intention to apply the safe third country concept to their claims.

Similarly, although the concept of safe country of origin is yet to be applied there in practice, applicants in Slovenia would not have an opportunity to rebut the presumption

¹⁷⁶ Article 99 LAR and further guaranteed in Article 13 LAR.

¹⁷⁷ Due to the fact that the SCO concept is not currently applied in practice.

of safety during the first instance procedure. Prior to the issuing of a refusal notice, there would be no advance notification of the decision to designate a country as safe. Moreover, although by law an application may be routed into the accelerated procedure on safe country of origin grounds, the personal interview may be omitted and, in practice, is omitted in the accelerated procedure.¹⁷⁸ Therefore, there would be no effective opportunity to rebut the presumption of safety. The applicant would be entitled to appeal a negative decision on safe country grounds within three days of notification of the decision.¹⁷⁹

In Greece, there is no provision for advance notice of any decisions, and reasons for refusal are only supplied when the negative decision is issued. Moreover, the standard phraseology included in all refusal decisions does not make reference to safe country of origin considerations. Therefore in practice there is no opportunity for the applicant to rebut the presumption of safety, or seek the assistance of a lawyer in relation to this.

In Spain, the new asylum procedure establishes that the applicant will be notified about a decision to channel the application into the accelerated procedure.¹⁸⁰ However, there is no information on the specific ground upon which the decision to channel the application into the accelerated procedure is taken. The applicant or the assisting NGO or lawyer would have to contact the determining authority (OAR) directly in order to obtain that information from the case file, and eventually present grounds to rebut the presumption, which would be taken into account in the individual assessment of the claim. On the other hand, UNHCR is informed of all cases that are channelled into the accelerated procedure. UNHCR has the opportunity to study them and give its opinion on the decision to channel the application into the accelerated procedure. This opinion would also be taken into account in the individual examination. Such an arrangement does not, however, effectively replace an effective opportunity for the applicant to rebut the presumption.

In the UK, there is no indication that the applicant is told in advance of a decision that the determining authority considers the country of origin is safe. In relation to the substantive interview, the applicant is not given any greater opportunity than other applicants to submit further evidence after the interview – within 48 hours in the detained processes and within five working days in the non-detained procedure.¹⁸¹ UNHCR considers this of particular concern, given that the effect of certification as clearly unfounded (and designation as a safe country of origin) under UK law is to deny the applicant an in-country appeal right.

¹⁷⁸ Article 46 (1), indent 1 IPA. See section 4 on the opportunity for a personal interview and section 9 on the accelerated examination of applications for further information.

¹⁷⁹ The application would be dismissed as manifestly unfounded, which means that according to article 74 (2) IPA, the applicant can appeal to the Administrative Court within three days.

¹⁸⁰ Article 25 (1) of the New Asylum Law.

¹⁸¹ The API/APM of 20/11/2007 Certification under Section 94 of the NIAA 2002 invitation for further evidence given during the substantive interview.

Provision for a personal interview

Article 12 (2) (c) APD together with Article 23 (4) (c) APD permits states to derogate from the requirement to afford a personal interview to an applicant whose country of origin is designated as safe.¹⁸² However, of those Member States surveyed, only Slovenia¹⁸³ and Greece¹⁸⁴ have transposed this provision.

There is no provision to omit the personal interview on the grounds that the applicant is deemed to be from a safe country of origin in Bulgaria, the Czech Republic, Finland, France,¹⁸⁵ Germany, the Netherlands, Spain or the United Kingdom. UNHCR considers that this reflects the essential nature of an interview as part of a full, fair and individual examination.

In conclusion, where states apply the safe country of origin concept, or have in place legislation that envisages this possibility, it is crucial that each case be examined individually on its merits and that each applicant should be given an effective opportunity to rebut the presumption of safety of the country of origin, on the basis of his/her individual circumstances. This should be clearly stated in relevant legislation and in guidance to decision makers. It is of concern to UNHCR that this is not currently the case in all Member States.

Moreover, applicants should be provided with information necessary for them to be able effectively to challenge the presumption of safety, including the fact that their country of origin is considered generally safe. It is neither fair nor efficient that in several states, there is at present only provision for such notification to occur after a claim has been refused. This prevents legal advice being obtained to potentially assist an applicant to rebut the presumption of safety during the first instance procedure. In this regard, applicants should be given the opportunity of a personal interview. UNHCR is also concerned that currently states may place the burden of proof entirely on the applicant, sometimes in the context of an accelerated procedure, without adequately recognizing the necessity of a shared examination of the claim.

¹⁸² Under Article 12 (2) (c) of the APD, a personal interview may be omitted where the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded because the applicant is from a safe country of origin within the meaning of Articles 30 and 31.

¹⁸³ Article 46 (1) IPA.

¹⁸⁴ Article 10 (2) (c) of PD 90/2008.

¹⁸⁵ In practice, statistics from the 2008 OFPRA Activity Report show that the percentage of applicants originating from safe countries of origin who were invited to a personal interview amounts to 71.7%.

Recommendations

All Member States should have in place provisions which explicitly provide for the full and individual examination of safe country of origin claims, and express guidance and training should be provided to decision makers accordingly.

Even where Member States have transposed Article 31 (1) APD, express guidance should be provided to decision-makers concerning the shared duty to establish the facts.

Applicants originating from a designated safe country of origin should be provided with an effective opportunity to rebut the presumption of safety, in both law and practice. This necessitates the applicant being informed in advance that his/her country is considered to be safe, and receiving the opportunity to make representations accordingly, including a personal interview.