



## **EUAA Expert Panel**

### **The use of safe country concepts in the jurisprudence of European and national courts and tribunals**

**28 June 2023, 14:00 – 16:00 CET**  
**online via WebEx meetings**

The next panel of the EUAA expert panel series will take place on 28 June 2023, from 14:00 to 16:00 p.m. and will focus on the use of **Safe country concepts**.

The panel will comprise the following judicial experts:

- Dóra Virág Dudás, Judge, President of Chamber, Regional Court of Budapest, Hungary
- Stergios Kofinis, Judge, Administrative Court of First Instance of Thessaloniki, Greece
- Hilikka Becker, Chairperson, International Protection Appeals Tribunal, Ireland

The experts will lead a discussion on the topic structured around questions that participants will send in advance. The discussion will be transmitted online **through the WebEx meetings platform**.

## **1. Background Information**

In the legal framework of the Common European Asylum System, four safe country concepts are laid down: **safe country of origin, safe third country, first country of asylum and European safe third country**. The current background note and the panel of 28/6 is concerned with the first **two concepts**, which are outlined below:

### **- Safe country of origin:**

According to the Annex I of the recast Asylum Procedures Directive (hereinafter APD), ‘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 2011/95/EU, 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.

The safe country of origin concept and its implications for the examination of the application for international protection are further explained in Articles 36 – 37 and Recitals 40 – 42 of the APD. When a country can be regarded in broad terms as safe, a presumption of safety is established for all applicants for international protection that are either nationals of this country



or stateless persons who were formerly habitually residing there<sup>1</sup>. The application of the safe country of origin concept has a twofold impact on the assessment of the application for international protection: firstly in terms of the procedure followed, as it can trigger the implementation of the accelerated or border procedure according to Article 31(8)(b) and 43 APD; secondly in terms of the examination of the substance of the application, which might be rejected as unfounded, unless the presumption of safety of a particular country is rebutted in the light of the applicants' individual circumstances.

#### - **Safe third country**

In the context of the European Union (EU) asylum acquis, the notion of a safe third country is based on the presumption that certain countries which are not EU Member States can be designated as safe under specific circumstances for applicants for international protection. The concept is defined in the recast APD, Article 38, which stipulates that a Member State may apply the safe third country concept only when the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country:

- i) Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- ii) There is no risk of serious harm as defined in Directive 2011/95/EU;
- iii) The principle of non-refoulement in accordance with the Geneva Convention is respected;
- iv) The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- v) The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

If these conditions are met, a Member State may consider an application for international protection to be inadmissible (recast APD, Article 33(2c)). Where the third country does not permit the applicant to enter its territory, a Member State must ensure that access to the asylum procedure is given, in accordance with the basic principles and guarantees described in the recast APD<sup>2</sup>. It is important to note that the applicant needs to be sufficiently connected to the safe third country, for their return and seeking refuge there to be considered reasonable.

## **2. Framing the topic**

Subject to the questions that will be received by participants the panel will discuss, along the lines described below:

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<sup>1</sup> EUAA, [Judicial Analysis on Asylum Procedures and the Principle of Non-refoulement](#), 2018, pp. 127 – 128.

<sup>2</sup> EUAA, [The concept of safe third countries applied in EU+ countries Situational Update - Issue No 5, 5 October 2021](#)



- when a particular country of origin/former habitual residence can no longer be considered safe in the light of the applicants' individual circumstances and what are the related evidentiary issues and the procedural guarantees for applicants coming from countries presumed as safe;
- what are the requirements for a third country to be considered safe for a specific applicant, what constitutes a sufficient link between the applicant and the third country and what are the applicable procedural guarantees for applicants for whom protection in a third country is presumed to exist.

## 2.1. Safe country of origin

Article 37 APD provides that member states may designate on the national level lists of safe countries of origin. In implementation of this article, 22 EU+ countries have introduced safe country of origin lists with EU candidate and potential candidate countries, such as Albania, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia representing the top five safe countries of origin<sup>3</sup>. Other countries often encountered in the national lists of safe countries of origin across EU+ are Kosovo, Georgia, Ghana, Senegal, India, Mongolia, Morocco and Tunisia. Ukraine was featured in many national lists of safe countries of origin, but the designation was cancelled or suspended following the change in the security situation<sup>4</sup>.

The designation of a country as a safe country of origin needs to be further confirmed or rebutted for each individual applicant before the first and second instance decision making authorities. Indicative examples of recent case law that have accepted the designation of a country as a safe country of origin for the applicant are listed below:

- **Morocco** was regarded in principle as safe for an unaccompanied minor applicant, allegedly threatened by gangs, after the [Council of State in the Netherlands](#) was satisfied that the reassessment of the security situation in the country revealed that protection needs do not arise in Morocco, save for some categories of applicants such as journalists, activists and LGBTI people, with increased focus on those facing criminal prosecution. In the same [Member state](#), Morocco was confirmed safe for an applicant allegedly targeted due to his social media activities.
- The designation of **Serbia** as a safe country of origin was confirmed by the [Administrative Tribunal in Luxembourg](#) for a Serbian applicant, allegedly targeted by drug trafficking gangs, as the Court was not convinced that the Serbian police is powerless or unwilling to offer protection.
- **Egypt** was considered safe by the [International Protection Administrative Court in Cyprus](#) for an applicant claiming religious persecution, as the Court was satisfied that there is no generalized situation of violence against Christians in Egypt.

<sup>3</sup> EUAA, [Applying the Concept of Safe Countries in the Asylum Procedure](#), 2022, pp. 6, where more information on the countries that are considered safe countries of origin can be found.

<sup>4</sup> EUAA, [Applying the Concept of Safe Countries in the Asylum Procedure](#), pp. 9-10.



- **Georgia** was confirmed safe for Georgian applicants with Ossetian or half – Ossetian ethnicity in the [Netherlands](#) and [Ireland](#) as on both occasions the courts were not convinced that the applicants would face conditions amounting to persecution due to their ethnicity.

### 2.1.1. Rebutting the presumption that the country is safe for the applicant

The assessment preceding the designation of a country of origin as safe can only consider the general legal and political situation in a country and whether there is overall sufficient protection against persecution or serious harm there. For this reason and considering the obligation to individually assess each application, it is important that, where an applicant demonstrates valid reasons as to why their country of nationality or former habitual residence is not safe in their particular circumstances, the designation of the country as safe can no longer be considered relevant for them<sup>5</sup>.

That might be particularly the case for specific profiles of vulnerable applicants in the context of the country of origin. As mentioned above, the Council of State in the Netherlands has confirmed Morocco as safe country of origin except for **applicants with diverse sexual orientation or gender identity (LGBTI applicants), journalists or activists**. In a decision by the [same court](#), Mongolia was in general confirmed as safe country of origin but the need to reassess the situation in the country with regards to LGBTI applicants was stressed.

India that was designated as a safe country of origin in Czech Republic was not regarded safe for **women** by the [Regional Court of Brno](#) in light of findings that suggested discrimination against women and impunity of perpetrators in cases of gender-based violence. Whether Armenia can be a safe country of origin for a female victim of rape in view of an alleged lack of protection from state authorities was questioned in a case before the [Court of The Hague](#).

**Ethnic minorities** are another category of applicants for whom the designation of a country as safe might not apply, while other often encountered groups include persons who are placed in **criminal detention** or face **criminal prosecution** in certain countries, **political activists** and **human rights defenders** or applicants who faced forced marriage<sup>6</sup>.

Applicants coming from countries designated as safe need to substantiate their claim for international protection against the backdrop of presumed safety, by showing a lack of protection owing to their individual circumstances. The question remains on the **evidentiary threshold** that the applicant needs to reach to rebut this presumption and whether there is scope for **a shared burden of proof** among the applicant and the authorities. That is especially important with regard to vulnerable applicants who might not identify the relevance of their

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<sup>5</sup> EUAA, [Judicial Analysis on Evidence and Credibility Assessment in the context of the Common European Asylum System](#), 2023, pp. 243 – 245; EUAA, [Judicial Analysis on Asylum Procedures and the Principle of Non-refoulement](#), p. 128.

<sup>6</sup> A more detailed account of the profiles can be found at EUAA, [Applying the Concept of Safe Countries in the Asylum Procedure](#), p. 8.



personal situation and characteristics to the assessment of whether their country of origin is safe for them and thus not be in a position to adduce the necessary elements to the procedure.

On the other hand, national lists that classify countries of origin as safe need to be regularly reviewed and can be challenged before courts and tribunals when the legal and political situation in a country does not or does not any longer support a presumption of safety for all or some of their nationals. Article 37(2) APD requires Member States to regularly review the situation in the countries that are designated as safe countries of origin, taking into account a range of sources of information, including the EUAA COI products. The [Czech Supreme Administrative Court](#) has ruled that the state authorities should review the country's safety at least once a year, monitor the situation in the safe country of origin, and consider re-evaluating the country's safety if urgent or sudden significant change in the country's situation arise. The [French Council of State](#) has annulled the designation of Ghana and Senegal as safe countries of origin since despite operating democratic systems, both countries still criminalise diverse sexual orientation. On the European level, a [request for a preliminary ruling](#) is currently pending before the CJEU and concerns the application of the safe country of origin concept to countries that have temporarily suspended their obligations under the ECHR.

### **2.1.2. Procedural guarantees for applicants coming from safe countries of origin**

According to Article 31(8)(b) APD the application of the safe country of origin concept can lead to the examination of the application through the accelerated or border procedure, in which applicants might find themselves in a disadvantaged position with shorter deadlines and fewer procedural guarantees. In the [HID and BA case](#), the CJEU ruled that for the sake of non – discrimination between applicants for whom different types of procedures apply, **the accelerated procedure must not deprive applicants of the basic principles and guarantees set out in the APD**<sup>7</sup>. In particular, applicants for international protection in these procedures *'must enjoy a sufficient period of time within which to gather and present the necessary material in support of their application, thus allowing the determining authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin'*.

Furthermore, when an applicant fails to submit overriding reasons as to why their country of origin or former habitual residence is not safe for them, the application may be rejected as manifestly unfounded, according to the combined provisions of Article 31(8)(b) and Article 32(2) of the APD<sup>8</sup>. That further impacts the applicant's right to remain pending the outcome of their appeal against the decision that rejected their application as manifestly unfounded. In the case [A. v Migrationsverket](#), the CJEU ruled that when a member state has not implemented the concept of the safe country of origin in their domestic legal order, the application cannot be

<sup>7</sup> See also EUAA, [Judicial Analysis on Asylum Procedures and the Principle of Non-refoulement](#), p. 128.

<sup>8</sup> In cases of unfounded applications in which any of the circumstances listed in Article 31(8) apply, Member States may also consider an application to be manifestly unfounded, where it is defined as such in the national legislation.



rejected as manifestly unfounded on the grounds that the applicant is from a safe country of origin.

National courts have been concerned with the question on whether it is necessary to **hear the applicant** that comes from a presumably safe country of origin, especially when national procedural rules preclude the obligation for an oral hearing for such categories of applicants. In this respect the [High Court of Ireland](#) has quashed a decision of the International Protection Appeals Tribunal due to failure to adequately consider the need for an oral hearing of a Georgian female applicant who alleged fear of persecution as a victim of domestic violence in her country<sup>9</sup>.

Procedural guarantees for applicants coming from presumably safe countries of origin that are usually subject to faster asylum procedures remain at stake. European and national jurisprudence has outlined some principles in this respect. How to safeguard **the right to be heard and the rights to an effective remedy as well as equality of arms** for applicants to whom the concept of safe country of origin and accelerated procedures apply remains open to discussion.

## 2.2 Safe third country

### 2.2.1 Article 38 APD and its implementation in practice

The safe third country concept is not applied uniformly in all EU+ countries. Depending on whether the concept has been transposed into national law and to what degree implementing legislation has been adopted, the safe third country concept is either inapplicable or applicable on a case-by-case basis or being implemented systematically on the basis of national lists of safe third countries<sup>10</sup>.

The six countries that have so far introduced national lists of safe third countries are Estonia, Germany, Greece, Hungary, Ireland and Switzerland. Since the implementation of Article 38 APD remains relatively limited for the time being, so is the possibility to draw comparative conclusions.

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<sup>9</sup> See however the decision by the same court [I.M. v International Protection Appeals Tribunal & Anor](#), where an oral hearing was not deemed necessary.

<sup>10</sup> For further information on the application of the safe third country concept, please refer to EUAA, [Applying the Concept of Safe Countries in the Asylum Procedure](#), p.13



Some countries implementing the safe third country concept consider that certain geographical areas within the third country should be excluded from the presumption of safety<sup>11</sup>, while Greece applies the safe third country concept only to specific profiles of applicants<sup>12</sup>.

## 2.2.2 Requisite level of protection

Based on the wording of Article 38 APD (recast), the requirements stipulated for a third country to be considered safe do not refer solely to the general conditions in the country concerned, but also to the specific circumstances of persons seeking international protection<sup>13</sup>. Thus, the importance of thoroughly examining the personal circumstances of the applicant and identifying any vulnerability, in particular, when deciding the admissibility of their case becomes all the more apparent.

The question whether the third country has formally ratified or acceded to the Refugee Convention, or whether it suffices that applicants will be recognised as refugees and treated in accordance with the standards provided for by the Refugee Convention, even if these standards are guaranteed by national law or practice only, has not been tackled by the CJEU so far. However, in its landmark judgments from 2017, the [Greek Council of State](#), has decided that as long as a certain level of protection is guaranteed either by law or practice within the third country, ratification of the Geneva Convention is not a *sine qua non*<sup>14</sup> for a third country to be designated as safe. Specifically, according to the Greek Council of State for art.38 (1) (e) to be satisfied, there needs to be adequate protection of certain fundamental rights of refugees, like, inter alia the right of access to healthcare and to the labour market.

Unlike the Greek Council of State, the Federal Administrative Court (FAC) of Switzerland, in [establishing criteria](#) to apply the concept of a safe third country, stated that the third country *must* be a signatory of the Geneva Convention and abide by the principle of non-refoulement, it has to be on the list of safe third countries and has to accept the readmission of the applicant. In a case concerning a Turkish journalist of Kurdish ethnicity, the [FAC has found](#) that Swiss authorities insufficiently investigated whether Brazil is a safe third country with protection for the applicant. Brazil is not on the Swiss list of safe third countries, and no consideration was

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<sup>11</sup> For example, Estonia considers Armenia a safe third country except for Nagorno-Karabakh, Bosnia and Herzegovina except for Republika Srpska and Georgia except for Abkhazia and South Ossetia. Hungary considers the United States of America a safe third country except for the States applying the death penalty.

<sup>12</sup> Accordingly, Albania and North Macedonia are designated as safe third countries for asylum applicants entering the Greek territory illegally through the respective borders and Türkiye is designated as a safe third country only for applicants of international protection from Afghanistan, Bangladesh, Pakistan, Somalia and Syria.

<sup>13</sup> EUAA, [Judicial Analysis on Asylum Procedures and the Principle of Non-refoulement](#), 2018, p.118.

<sup>14</sup> See Greece, Council of State, [judgments No 2347/2017](#) (Plenary) and No 2348/2017 (Plenary), paras 54-56, and the dissenting opinions at para. 60. For a commentary on said judgments, please see S. Kofinis, The Concept of Safe Third Country in Refugee Law: a Contribution to the Interpretational Approach of CoS (Plenary) 2347 and 2348/2017, *Migration Law Review*, Issue n. 2/2017, available in Greek (Σ.Κοφίνης, Η έννοια της ασφαλούς τρίτης χώρας στο προσφυγικό δίκαιο: Μια συμβολή στην ερμηνευτική προσέγγιση των ΣτΕ Ολ 2347 και 2348/2017, *Επιθεώρηση Μεταναστευτικού Δικαίου*, Τ. 2/2017) p. 130.





given to the agreement between Brazil and Türkiye which provides for the latter to request information on persons considered to be terrorists.

Recently, the FAC has ruled mainly on cases related to secondary movements of beneficiaries of international protection. While the asylum applications were rejected as inadmissible because Greece is considered to be a safe third country, the FAC analysed whether a sufficient examination of the living conditions in Greece had been conducted prior to the removal<sup>15</sup>.

Furthermore, based on the principles reiterated in ECtHR case law<sup>16</sup>, the Croatian Constitutional Court made [a thorough assessment](#) of the nature and content of the duty to ensure that the third country is safe. This includes a thorough examination of the risk that the applicant would be deprived of access to an adequate asylum procedure in the receiving third country and protecting the applicant from refoulement.

The Dutch Council of State [established three cumulative criteria](#) that must be fulfilled when applying the safe third country concept for Syrian applicants who lived and worked in the United Arab Emirates and Kuwait. The cumulative criteria include access to the asylum procedure, protection according to the Refugee Convention, respect for the principle of non-refoulement and access to basic facilities for asylum applicants and beneficiaries of international protection.

As has become apparent, the discussion on the actual content of protection offered and the standards of said protection which need to be met for a country to be considered safe is ongoing, even more so as legislation, policies and practical limitations evolve with the passage of time within any given country. In the same vein, a country previously designated as safe may for its own reasons decide to refuse readmission of asylum seekers who had moved on to apply for international protection in an EU Member State. Would that mean that according to art.38 APD, interpreted in conjunction with art.18 of the EU Charter, the safe third country should cease to be classified as such by national legislation?<sup>17</sup>

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<sup>15</sup> Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], A. (Eritrea) v State Secretariat for Migration (Staatssekretariat für Migration – SEM), Case E4639/2017, 25 September 2019; Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], A. v State Secretariat for Migration (Staatssekretariat für Migration– SEM), Case D-559/2020, 13 February 2020; Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], A. v State Secretariat for Migration (Staatssekretariat für Migration – SEM), Case D-1333/2021, 31 March 2021; Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], A. v State Secretariat for Migration (Staatssekretariat für Migration – SEM), Case E-1413/2021, 8 April 2021; Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], A. v State Secretariat for Migration (Staatssekretariat für Migration – SEM), Case E-1018/2019, 8 April 2021; Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], A, B, C, D v State Secretariat for Migration (Staatssekretariat für Migration – SEM), E-1332/2021, 9 April 2021.

<sup>16</sup> Namely in the cases of Ilias and Ahmed v Hungary and M.K. and Others.

<sup>17</sup> See [Case C-134/23](#) - The Greek Council of State has recently referred questions for preliminary ruling to the CJEU asking whether Article 38 of the recast Asylum Procedures Directive, interpreted in conjunction with Article 18 of the EU Charter precludes national legislation classifying as generally safe,





To be noted that the ECtHR has so far analysed the safe third country concept mainly by verifying that Member States comply with the principle of non-refoulement.

In particular, in the case of [Ilias and Ahmed](#) the ECtHR set the general principles of protection against refoulement and inhuman or degrading treatment of asylum applicants prior to applying the safe third country concept. A thorough examination must be conducted to confirm that there is no risk that the asylum applicant would be deprived of accessing the asylum procedure in the third country, the applicant is not at risk of expulsion or refoulement in the third country, even if the third country is an EU Member State or party to the Convention. According to the ECtHR, the asylum applicant is not to be removed to a third country if there are insufficient guarantees against refoulement.

The same guiding principles and safeguards prior to a removal were also reiterated in the judgment, [M.K. and Others v. Poland](#), as well as in [D.A. and others](#). The ECtHR found a violation of the ECHR, Article 3, due to the expeditive removal of a third-country national to Belarus without due consideration to the risk of chain refoulement and without effective guarantees against a real risk of being exposed to inhuman and degrading treatment or torture. Similarly, in [M.A. and Others v Lithuania](#), the ECtHR found that the authorities failed to assess if the applicants can be safely returned to Belarus, which is not party to the European Convention, and it should not be presumed to be a safe third country.

### 2.2.3 Where is the link?

According to Article 38(2) of the recast APD, rules laid down in national law need to define the connection between the applicant and the third country which would make their seeking refuge there reasonable<sup>18</sup>.

In 2020, the CJEU ruled in [LH v Bevándorlási és Menekültügyi Hivatal](#)<sup>19</sup> that the fact that an applicant for international protection has transited through the territory of a third country cannot alone constitute a valid reason for considering that that applicant could reasonably return to that country. Similarly, in [FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-](#)

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for certain categories of applicants for international protection, a third country which has undertaken a legal obligation to allow those categories of applicants for international protection to be readmitted to its territory, but for a long period of time (which in this case exceeds 20 months) that country refuses readmissions and a change in the country's attitude is not plausible in the near future.

The Council of State also asked whether Article 38 of the recast Asylum procedures Directive is to be interpreted as meaning that readmission to the third country is not a cumulative condition for the adoption of the national law declaring a third country as safe for certain categories of applicants for international protection, but is a cumulative condition for the adoption of the individual act rejecting a specific application for international protection as inadmissible on the ground of the 'safe third country'; or whether readmission to the 'safe third country' must be verified only at the time of the execution of the decision.

<sup>18</sup> For an analysis of criteria often considered relevant to the existence of a connection with the safe third country - with a specific focus on Türkiye as a designated by Greece safe third country, see S. Kofinis, *The Concept of the Safe Third Country in Refugee Law, Intervention before the Hellenic National School of the Judiciary* (Σ.Κοφίνης, Η έννοια της ασφαλούς τρίτης χώρας στο προσφυγικό δίκαιο), available [in Greek](#), p.12-15.

<sup>19</sup> See paras. 47-48.



[alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság](#), automatic rejection of an asylum application based on transit through a safe third country, as provided by Hungarian legislation, was considered contrary to EU law.

In the past years, the criteria by which a sufficient and demonstrated connection with the safe third country can be demonstrated have often been tackled by national courts. It has been observed, that in some national case-law, a previous residence, stay or presence, or even an opportunity to make contact with the authorities in order to seek protection has been deemed sufficient. Some Member States also refer to rather personal ties such as the applicant's origin, his/her native language, family relations or other social bonds to the safe third country<sup>20</sup>.

The Administrative Tribunal in Luxembourg [confirmed](#) that an Azerbaijani applicant had a sufficient connection established with Georgia since he was born there, lived there for 11 years and had a Georgian spouse.

In contrast, the Administrative Tribunal analysed the situation of Morocco as a safe third country based on individual circumstances and the connection criteria and [found](#) that a Syrian applicant, married to a Moroccan national and parent of a Moroccan child, could obtain a residence permit according to national legislation but [concluded](#) that Morocco could **not** reasonably be considered to constitute a safe third country for the applicant in the absence of a sufficient connection, since his attempts to obtain a visa in Morocco were unsuccessful, despite his wife having Moroccan nationality.

In another case, the same tribunal [found no link](#) between the Syrian applicant and Moldova because the facts of being born there, allegedly knowing the language and having visited his grandparents twice were assessed as not sufficient proof to consider it reasonable for the applicant to return.

The Dutch Council of State [decided](#) that all individual circumstances that would prove a connection to the safe third country have to be considered by the determining authority. In particular, the right to family life constitutes a circumstance deemed to be included in the context of the reasonableness test.

## 2.2.4 Other criteria

When considering the application of the safe third country concept, the existence of legal access to the country in question, the right to family life and even the best interest of the child (when the applicant is a minor) are also of particular relevance and here are some examples from recent case law:

The Grand Committee of the Norwegian Immigration Appeals Committee [ruled](#) that a determining authority can reject an application for international protection as inadmissible

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<sup>20</sup> EUAA Judicial Analysis on Asylum Procedures and the Principle of Non-refoulement, 2018, p. 119.



based on the safe third country concept if it is established that the applicant has legal access to that country. However, the processing of an application should not be refused solely on the fact that some years ago the applicant had a residence, or a residence permit in a safe third country.

The Icelandic Immigration Appeals Board had a similar approach when applying the safe third country concept and [considered](#) that the determining authority failed to properly and duly determine if the Venezuelan applicant would have real access and legal authorisation to stay in Ukraine.

Although in theory an applicant could be admitted to a safe third country based on applicable legislation, the Dutch Court of the Hague [ruled](#) that Georgia cannot be a safe third country for an Egyptian applicant who had unsuccessfully applied for a residence permit. The applicant was married to a Georgian national with whom he had a child of Georgian nationality, but he was not granted legal access to Georgia, thus the inadmissibility decision was overturned by the court.

Also in the Netherlands, the Council of State [clarified](#) in a judgment of 20 January 2021 that the right to family life must be taken into consideration when assessing the possibility of applying the concept of a safe third country.

The Belgian Constitutional Court [ruled](#) that the safe third country concept may be applied to applicants for international protection who are unaccompanied minors when the principle of best interests of the child is respected.

## 2.2.5 Procedural guarantees for applicants

Article 38(2)(b) APD (recast) stipulates that the concept of safe third country cannot be applied unless the Member State has laid down rules in national legislation regarding the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied either generally to the situation of refugees in a particular country or at least to a particular applicant<sup>21</sup>. It follows from recital (46) APD (recast) that where Member States designate third countries as safe either by adopting lists to that effect or on a case-by-case basis, they should take into account, inter alia, the guidelines and operating manuals and the information on countries of origin and activities<sup>22</sup>. This would include EUAA country of origin information reports and methodology, as well as relevant UNHCR guidelines.

National case-law also shows that some national jurisdictions consider that is not sufficient for Member States to rely solely on the fact that a third state has undertaken to comply with the standards guaranteed by Article 38(1) APD (recast). It is required that Member States properly

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<sup>21</sup> See also Sweden, [Migration Court of Appeal, judgment of 11 June 2012, UM 9681-10, MIG 2012:9](#)

<sup>22</sup> EUAA, [Judicial Analysis on Asylum Procedures and the Principle of Non-refoulement](#), 2018, p. 119



investigate whether or not the third state concerned actually complies with its international obligations<sup>23</sup>.

Furthermore, according to art. 38 (2) (c) APD (recast) the applicant shall, as a minimum, be allowed to challenge both the application of the safe-third-country concept on the grounds that the third country is not safe in their particular circumstances and the existence of a connection between them and the third-country concerned. Thus, even though Member States may designate third countries as generally safe for applicants for international protection, an applicant shall have the opportunity to rebut the presumption of safety in their individual circumstances<sup>24</sup>.

In the same vein, in [Mikyias Addis](#), the CJEU underlined that a personal interview must be conducted prior to adopting an inadmissibility decision, as prescribed by art. 34(1) APD. In addition to the procedural safeguards in the recast APD, Article 15 must be ensured when applying the safe third country concept.

In [Alheto](#), the CJEU clarified that a full and ex nunc (for the future) examination of the facts and points of law may also concern the grounds of inadmissibility based on the safe country concept. Precisely, when permitted under national law and when deciding in an appeal, if a court considers examining a ground of inadmissibility which has not been assessed by the determining authority, it must conduct a hearing of the applicant to allow the applicant to express his/her views in person on its applicability.

Additionally, it should be noted that horizontal procedural safeguards must be respected, such as the right to an effective remedy before a court or a tribunal, pursuant to Article 46 (1)(a)(ii) APD, with automatic suspensive effect (Article 46(5) APD) and even the right to consult in an effective manner a legal adviser or other counsellor (Article 22(1) APD). To that effect, advisers/counsellors must have access to the applicant for the purpose of consultation, including in closed areas such as detention facilities (Article 23(2) APD). On appeal, the state must ensure free legal assistance and representation on the request of the applicant (Article 20(1) APD)<sup>25</sup>.

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**The suggested topics and directions outlined above are indicative only and are further to be specified by the experts sitting on this panel, according to the input that will be received from participants.** For this purpose, annexed to this note can be found:

- a table that outlines relevant provisions from the APD:
- a list with relevant case law.

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<sup>23</sup> See Netherlands, [Court of The Hague, judgment of 13 June 2016, AWB 16/10406, ECLI:NL:RBDHA:2016:6624](#)

<sup>24</sup> See Slovenia, [Supreme Court, judgment 16 December 2009, I Up 63/2011](#).

<sup>25</sup> UN High Commissioner for Refugees (UNHCR), [Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept](#), 23 March 2016.



### 3. Overview of the relevant legal provisions

Asylum Procedures Directive	
<b>Recital 32</b>	The complexity of gender-related claims should be properly taken into account in procedures based on the concept of safe third country, the concept of safe country of origin or the notion of subsequent applications.
<b>Recital 40</b>	A key consideration for the well-foundedness of an application for international protection is the safety of the applicant in his or 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 or she presents counter-indications.
<b>Recital 41</b>	Given the level of harmonisation achieved on the qualification of third-country nationals and stateless persons as beneficiaries of international protection, common criteria should be established for designating third countries as safe countries of origin.
<b>Recital 42</b>	The designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation 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 that country. For this reason, it is important that, where an applicant shows that there are valid reasons to consider the country not to be safe in his or her particular circumstances, the designation of the country as safe can no longer be considered relevant for him or her.
<b>Recital 44</b>	Member States should not be obliged to assess the substance of an application for international protection where the applicant, due to a sufficient connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country, and there are grounds for considering that the applicant will be admitted or readmitted to that country. Member States should only proceed on that basis where that particular applicant would be safe in the third country concerned. In order to avoid secondary movements of applicants, common



<b>Asylum Procedures Directive</b>	
	principles should be established for the consideration or designation by Member States of third countries as safe.
<b>Recital 46</b>	Where Member States apply safe country concepts on a case-by-case basis or designate countries as safe by adopting lists to that effect, they should take into account, inter alia, the guidelines and operating manuals and the information on countries of origin and activities, including EASO Country of Origin Information report methodology, referred to in Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office ( 1 ), as well as relevant UNHCR guidelines.
<b>Recital 47</b>	In order to facilitate the regular exchange of information about the national application of the concepts of safe country of origin, safe third country and European safe third country as well as a regular review by the Commission of the use of those concepts by Member States, and to prepare for a potential further harmonisation in the future, Member States should notify or periodically inform the Commission about the third countries to which the concepts are applied. The Commission should regularly inform the European Parliament on the result of its reviews.
<b>Recital 48</b>	In order to ensure the correct application of the safe country concepts based on up-to-date information, Member States should conduct regular reviews of the situation in those countries based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations. When Member States become aware of a significant change in the human rights situation in a country designated by them as safe, they should ensure that a review of that situation is conducted as soon as possible and, where necessary, review the designation of that country as safe.
<b>Article 31(3)(b)</b>	Member States may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated and/or conducted at the border or in transit zones in accordance with Article 43 if:  (b) the applicant is from a safe country of origin within the meaning of this Directive



## Asylum Procedures Directive

### Article 33(2)(c)

Member States may consider an application for international protection as inadmissible only if:

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

### Article 36

A third country designated as a safe country of origin in accordance with this Directive may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if:

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

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

and he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with Directive 2011/95/EU.

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

### Article 37

1. Member States may retain or introduce legislation that allows, in accordance with Annex I, for the national designation of safe countries of origin for the purposes of examining applications for international protection.

2. Member States shall regularly review the situation in third countries designated as safe countries of origin in accordance with this Article.

3. 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, EASO, UNHCR, the Council of Europe and other relevant international organisations.

4. Member States shall notify to the Commission the countries that are designated as safe countries of origin in accordance with this Article.

### Article 38

Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international





## Asylum Procedures Directive

protection will be treated in accordance with the following principles in the third country concerned:

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

(b) there is no risk of serious harm as defined in Directive 2011/95/EU;

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

(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

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

2. The application of the safe third country concept shall be subject to rules laid down in national law, including:

(a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a). EN L 180/80 Official Journal of the European Union 29.6.2013

3. When implementing a decision solely based on this Article, Member States shall:

(a) inform the applicant accordingly; and



## Asylum Procedures Directive

(b) provide him or her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

4. Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article.

## ANNEX I

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 2011/95/EU, 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.

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 United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;

(c) respect for the non-refoulement principle in accordance with the Geneva Convention;

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



## 4. List of relevant case law

### CJEU

- Court of Justice of the European Union [CJEU], [HID and BA v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General](#), Case C-175/11, EU:C:2013:45, Judgment of 31 January 2013
- Court of Justice of the European Union [CJEU], [A. \(Serbia\) v Migrationsverket \(Migration Board, Sweden\)](#), Case C-404/17, ECLI:EU:C:2018:588, Judgment of 25 July 2018
- Court of Justice of the European Union [CJEU], [Serin Alheto \(Palestine\) v Deputy Chairman of the State Agency for Refugees \(BG, Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite\)](#), C-585/16, ECLI:EU:C:2018:584, 25 July 2018
- Court of Justice of the European Union [CJEU], [LH v Bevándorlási és Menekültügyi Hivatal \(Hungary\)](#), C-564/18, EU:C:2020:218, 19 March 2020
- Court of Justice of the European Union [CJEU], [FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság](#), C-924/19 C-925/19, ECLI:EU:C:2020:367, 14 May 2020
- Court of Justice of the European Union [CJEU], [Milkiyas Addis v Bundesrepublik Deutschland \(Federal Republic of Germany\)](#), C-517/17, ECLI:EU:C:2020:579, 16 July 2020
- Court of Justice of the European Union [CJEU], [CD v Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky](#), C-257/22 – pending
- Court of Justice of the European Union [CJEU], [Elliniko Symvoulío gia tous Prosfyges](#), Case [C-134/23](#) – pending

### ECtHR

- European Court of Human Rights [ECtHR], [M.A. & Others \(Russia\) v Lithuania](#), Application no. 59793/17, ECLI:CE:ECHR:2018:1211JUD005979317, 11 December 2018
- European Court of Human Rights [ECtHR], [Ilias and Ahmed \(Bangladesh\) v Hungary](#), Application no. 47287/15, ECLI:CE:ECHR:2019:1121JUD004728715, 21 November 2019
- European Court of Human Rights [ECtHR], [M.K. and Others v Poland](#), Applications nos. 40503/17, 42902/17 and 43643/17, 23 July 2020
- European Court of Human Rights [ECtHR], [D.A. and others v Poland](#), No 51246/17, 08 July 2021

### National courts and tribunals

#### BE

Belgium, Constitutional Court [Cour constitutionnelle], [Group of NGOs and Lawyers](#), 7008 and 7009, 25 February 2021

#### HR

Croatia, Constitutional Court [Ustavni Sud], [Applicants \(Afghanistan\) v Ministry of the Interior](#), U-I 11-4865/2018; U-III-837/2019; U-III-926/2019, 04 March 2021

#### CY

Cyprus, Administrative Court for International Protection [Διοικητικό Δικαστήριο Διεθνούς Προστασίας], [A.S.A.A. A. v Republic of Cyprus, through the Asylum Service](#), 2652/21, ECLI:CY:DDDP:2022:183, 08 March 2022

#### CZ

Czech Republic, Regional Court [Krajský soud], [B.P.S. v Czech Ministry of the Interior \(Ministerstvo vnitra\)](#), 41 Az 58/2020-52, 20 October 2021



Czech Republic, Supreme Administrative Court [Nejvyšší správní soud], [M.T. v Ministry of the Interior \(Ministerstvo vnitra\)](#), 10 Azs 161/2022-56, 12 October 2022

#### EL

Greece, Council of State, judgments No [2347/2017 \(Plenary\)](#) and No 2348/2017 (Plenary)

#### FR

France, Council of State [Conseil d'État], [Associations des avocats ELENA and others](#), No 437141, 437142 and 437365, ECLI:FR:CECHR:2021:437141.20210702, 02 July

#### IE

- Ireland, High Court, [T.B. v International Protection Appeals Tribunal & Anor](#), [2022] IEHC 275, 13 May 2022
- Ireland, High Court, [I.M. v International Protection Appeals Tribunal & Anor](#), [2022] IEHC 164, 28 February 2022. Link redirects to the English summary in the EUAA Case Law Database.

#### IS

Iceland, Immigration Appeals Board (Kæruneftnd útlendingamála), [Applicant v Directorate of Immigration](#), KNU20120055, judgment No 68/2021, 18 February 2021

#### LU

- Luxembourg, Administrative Tribunal [Tribunal administratif], [Applicant v Ministry of Migration and Asylum \(Ministere de l'Immigration et de l'Asile\)](#), N° 41817, 13 December 2018
- Luxembourg, Administrative Tribunal [Tribunal administratif], [Applicant \(Serbia\) v Minister of Immigration and Asylum \(Ministre de l'Immigration et de l'Asile\)](#), no. 45804, 19 April 2021.
- Luxembourg, Administrative Tribunal [Tribunal administratif], [Applicant \(Syria\) v Ministry of Migration and Asylum \(Ministere de l'Immigration et de l'Asile\)](#), N° 45916, 01 June 2021
- Luxembourg, Administrative Tribunal [Tribunal administratif], [Applicant \(Syria\) v Ministry of Immigration and Asylum \(Ministere de l'Immigration et de l'Asile\)](#), No 45865, 07 June 2021
- Luxembourg, Administrative Tribunal [Tribunal administratif], [Applicant \(Syria\) v Ministry of Immigration and Asylum \(Ministere de l'Immigration et de l'Asile\)](#), N° 46189, 28 July 2021

#### NL

- Netherlands, [Court of The Hague](#), judgment of 13 June 2016, AWB 16/10406, ECLI:NL:RBDHA:2016:6624
- Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], [Applicant v State Secretary for Justice and Security \(Staatssecretaris van Justitie en Veiligheid\)](#), 201704433/1/V1, ECLI:NL:RVS:2017:3381, 13 December 2017
- Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], [Applicant \(Nicaragua\) v State Secretary for Justice and Security \(Staatssecretaris van Justitie en Veiligheid\)](#), 202003698/1/V2, ECLI:NL:RVS:2021:122, 20 January 2021
- Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], [Applicant \(Mongolia\) v State Secretary for Justice and Security \(Staatssecretaris van Justitie en Veiligheid\)](#), 202002809/1/V2, ECLI:NL:RVS:2021:738, 07 April 2021
- Netherlands, Court of The Hague [Rechtbank Den Haag], [Applicant v State Secretary for Justice and Security \(Staatssecretaris van Justitie en Veiligheid\)](#), NL22.1958, ECLI:NL:RBDHA:2022:3684, 15 April 2022; Ireland, High Court, [I.M. v International Protection Appeals Tribunal & Anor](#), [2022] IEHC 164, 28 February 2022
- Netherlands, Court of The Hague [Rechtbank Den Haag], [Applicant v State Secretary for Security and Justice Netherlands \(Staatssecretaris Van Veiligheid en Justitie\)](#), NL22.1358, ECLI:NL:RBDHA:2022:2079, 08 March 2022.
- Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], [State Secretary for Justice and Security \(Staatssecretaris van Justitie en Veiligheid\) v Applicant 2](#), 202103934/1, ECLI:NL:RVS:2022:1531, 08 June 2022



- Netherlands, Court of The Hague [Rechtbank Den Haag], [Applicant v State Secretary for Justice and Security \(Staatssecretaris van Justitie en Veiligheid\)](#), NL22.8141, ECLI:NL:RBDHA:2022:8351, 09 August 2022
- Netherlands, Court of The Hague [Rechtbank Den Haag], [Applicant v State Secretary for Justice and Security \(Staatssecretaris van Justitie en Veiligheid\)](#), NL22.15067, ECLI:NL:RBDHA:2022:11899, 09 November 2022

#### NO

Norway, Immigration Appeals Board [Utlendingsnemnda (UNE)], [Applicant \(Syria\) v Directorate of Immigration \(UDI\)](#), N2002291030, 30 October 2020

#### SI

Slovenia, [Supreme Court, judgment 16 December 2009, I Up 63/2011](#)

#### SE

Sweden, [Migration Court of Appeal, judgment of 11 June 2012, UM 9681-10, MIG 2012:9](#)

#### CH

- Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], [A. v Federal Office for Migration](#), 2010/56, 14 December 2010
- Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], [A. \(Turkey\) v State Secretariat for Migration](#), D-635/2018, 08 February 2018
- Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], [A. \(Eritrea\) v State Secretariat for Migration \(Staatssekretariat für Migration – SEM\)](#), Case E4639/2017, 25 September 2019;
- Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], [A. v State Secretariat for Migration \(Staatssekretariat für Migration – SEM\)](#), Case D-559/2020, 13 February 2020;
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- Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], [A. v State Secretariat for Migration \(Staatssekretariat für Migration – SEM\)](#), Case E-1413/2021, 8 April 2021;
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- Switzerland, Federal Administrative Court [Bundesverwaltungsgericht - Tribunal administratif fédéral - FAC], [A, B, C, D v State Secretariat for Migration \(Staatssekretariat für Migration – SEM\)](#), E-1332/2021, 9 April 2021.