

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME



SEMINAR

**European Convention on Human Rights and international refugee law
compliant procedures at state borders
Jurisprudence of the European Court of Human Rights and measures taken in
the context of the execution of judgments**

Presentation by Luca Perilli,
Strasbourg, 25 October 2024

Protection against Refoulement & Removal to “Safe Third Country of Origin” –
procedural obligations and legal considerations under international law

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Safe Third Country of Origin

Setting the scene of the presentation

The legal reference

Art. 14 of the ECHR **Prohibition of discrimination** “The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Art. 21 of the Charter of Fundamental Rights of European Union – **Non discrimination**

The argument

Fair access of asylum seekers to procedures in the context of Safe Country of Origin Concept is ensured if the implementation of the concept is based on objective criteria and is consistent with the aims of the legal provision.

«Fair and Fast» (UNHCR paper 25 July 2018)

ASYLUM LAW

Italian Judicial Context

- **Huge workload** → around **100.000 cases pending** before Italian Specialized Divisions for Immigration, International Protection and Free Movement of EU Citizens (Migration courts)
- **Huge influx of new cases** → **140.481** registered migrants disembarked on the Italian costs in 2023
- Since May 2023, wide recourse by the State to **accelerated** and **border procedures** → **thousands of urgent proceedings** (15-20 per week in Catania Court only)
- Border procedures might imply **detention of asylum seekers** → 48 hours for the judge to control the legality of the process and for validating or not validating the detention.
- Since October this year Italy, implementation of the "Protocol with Albania" **(externalisation) of the Italian borders**

Safe Third Country of Origin lists

- 22 EU Member States have implemented the Safe Third Country of Origin Concept
- Several Member States apply **geographic exceptions**, namely for parts of Armenia, Bosnia and Herzegovina, Georgia, Moldova, the USA and India.
- Some Member States also apply **exceptions for groups of people**, in particular LGBT applicants, minorities, political activists, journalists, human rights defenders, victims of discrimination or forced marriage, and women and girls.
- There is significant variation in which countries are listed as 'safe', with Western Balkans states being listed most frequently

Safe Country of Origin list in Italy, adopted urgently by Legislative decree of 23 October 2024 n. 158, includes *Albania, Algeria, Bangladesh, Bosnia-Herzegovina, Cape Verde, Côte d'Ivoire, Egypt, Gambia, Georgia, Ghana, Kosovo, North Macedonia, Morocco, Montenegro, Peru, Senegal, Serbia, Sri Lanka e Tunisia*, without geographical exceptions or exceptions for group of people.

Until 22 October 2024 a Governmental Decree included also Cameroon, Colombia and Nigeria.

Safe Third Country of Origin Controversy

- ✓ **The Italian Courts** of Catania, Palermo, and Rome, the latter one in connection with the «Albanian Protocol,» have not validated the detention of asylum seekers on the ground that the inclusion in the list of certain Countries of origin (Bangladesh, Egypt, Nigeria, Tunisia) did not comply with the provisions of the APD, as interpreted by the Court of Justice of the European Union (GC of 4 October 2024), with reference to geographical and groups of people exceptions.
- ✓ **Italian Government** considers the designation of a «Third Safe Country of Origin» a political decision that prevents judges from its control and revision.

Inclusion in the Safe Third Country of Origin list Consequences

With regard to asylum seekers from Safe Third Country of Origin, EU Member States may decide, in accordance with Article 31(8)(b) and 49 of the Directive 2013/32 (Procedure Directive Recast – APD)

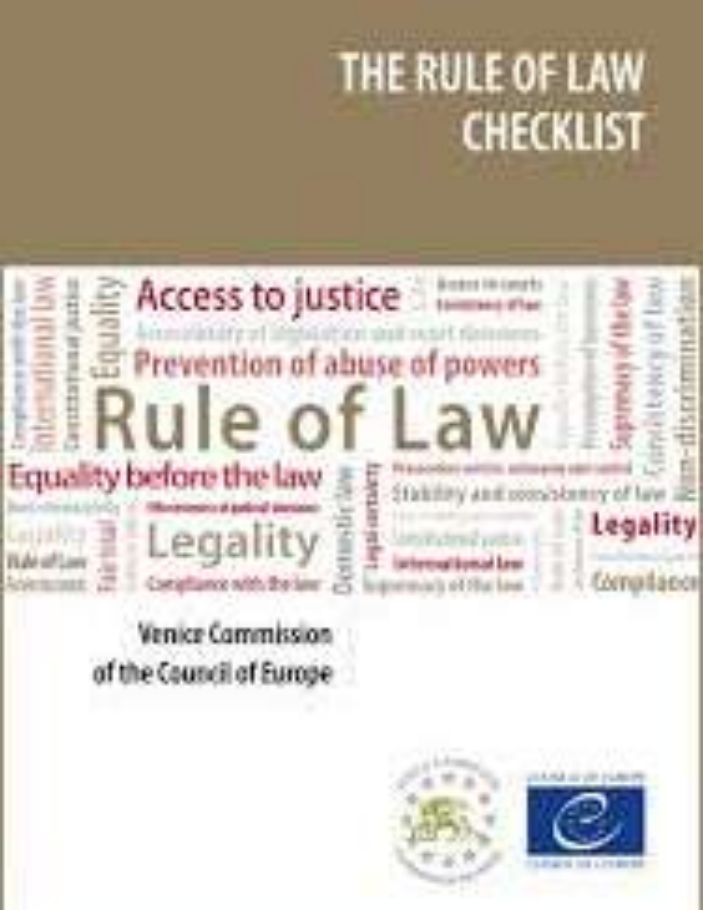
- first, to **accelerate the examination procedure** and,
- second, **to conduct it at the border** or in the transit zones

Designation of Third Safe Countries of Origin (Definition)

Art. 37 of the ADP *MS may (...) 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*

Annex to the Procedure Directive Recast

*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 [the first-phase 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.***



non-refoulement
/ˌnɒnrəˈfuːlmənt/ noun

the practice of not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution



RoL Assessment

Procedure Directive Recast

When 'making this assessment', Member States had to take account, 'inter alia, of the extent to which protection is provided against persecution or mistreatment by:

- **the relevant laws and regulations** of the country and the **manner in which they are applied**;
- **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;
- **respect of the non-refoulement principle** according to the Geneva Convention;
- **provision for a system of effective remedies** against violations of these rights and freedoms.

When applying these tests, Member States had to 'have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned', and the 'assessment of whether a country is a safe country of origin' had to '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 organisations'.

CGUE, (Grand Chamber) 4 October 2024, Case C-406/22



51. Pursuant to art. 37 of the ADP, MS may (..) 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.**

70. The designation by a Member State of third countries as safe countries of origin (...) makes it possible **special examination scheme that is exceptional in nature** (derogations must be narrowly construed)

91. The designation of a third country as a safe country of origin falls within those procedural aspects of applications for international protection in that (...) **such designation is liable to have an impact on the examination procedure relating to such applications.**

98. Where an action is brought before a court (...) by applicants from third countries designated, in accordance with Article 37 of ADP, as safe countries of origin, **that court or tribunal must**, as part of the full and ex nunc examination required by Article 46(3) of that directive, read in the light of Article 47 of the Charter, **raise (....) a failure to have regard to the material conditions for such designation, set out in Annex I to that directive, even if that failure is not expressly relied on in support of that action.**

Compression of applicants' rights

- **Rebuttable presumption of adequate protection in the country of origin**, which can be displaced by the applicant where he or she submits overriding reasons relating to his or her individual situation (CGUE, 25 July 2018, A, C-404/17)
- Member States **may also consider such an application to be manifestly unfounded** pursuant to Article 32(2) of ADP
- **Limited time and facilities for the preparation of the defense (fair trial)**
- **The person may not be allowed to remain, pending the appeal**, in the territory of the Member State in which that application was lodged (Article 46(5) and (6) of ADP), (CGUE, 25 July 2018, A, C-404/17),
- **Deprivation of liberty** in border procedures



Many asylum seekers are vulnerable persons

Article 24 APD (recast): applicants in need of special procedural guarantees

Non-discrimination → **support in accessing Justice**

- **Minors** (CRC - Art. 21 RDC - Recital 29, Arts. 7 and 15(3)(e) APD - Art. 20(3) QD)
- **Unaccompanied minors** (CRC - Art. 21 RDC - Recital 29, Art. 25 APD - Art. 20(3) QD)
- **Single parents with minor children** (CRC - Art. 21 RDC - Art. 20(3) QD)
- **Pregnant women** (International humanitarian law, Art. 21 RDC - Art. 20(3) QD)
- **Persons with serious illnesses** (CRPD - Art. 21 RDC – Recital 29 APD - Art. 20(3) QD)
- **Persons with mental disorders** (CRPD - Art. 21 RDC – Recital 29 APD - Art. 20(3) QD)
- **Disabled persons** (CRPD - Art. 21 RDC – Recital 29 APD - Art. 20(3) QD)
- **Victims of trafficking** (Palermo Protocol- Art. 21 RDC - Art. 20(3) QD)
- **Victims of torture or rape** (CAT - Art. 21 RDC – Recital and art. 24.3 29 APD - Art. 20(3) QD)
- **Victims of other serious forms of violence** (CEDAW – Art. 21 RDC – Recital and art. 24.3 29 APD - Art. 20(3) QD)
- **Gender, sexual orientation** (CEDAW - Art. 18.3 and 18.4 RDC – Recital 29 APD)

Detention of asylum seekers Last resort Measure



Detention of asylum seekers and irregular migrants in Europe (Pace Resolution 1707/2010)

Asylum seekers should not be detained solely on the basis of lodging a claim for asylum

Three main goals of the **UNHCR strategy about detention**

- End the detention of children
- Ensure that alternatives to detention are available in law and implemented in practice
- Ensure that conditions of detention where detention is necessary and unavoidable meet international standards by, inter alia, securing access to places of immigration detention for UNHCR and/or our partners and carrying out regular monitoring



The control by the judge on detention in border procedures

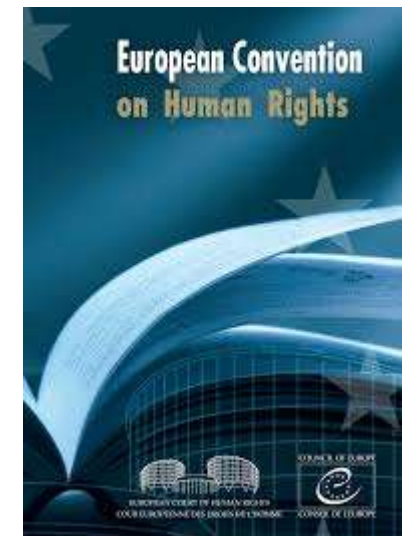
- Assessment is limited to the **necessity** and **proportionality** of the detention (?)
- No possibility to assess grounds to rebut presumption of adequate protection in the country of origin (the personal interview of the applicant has not yet taken place)
- No possibility to assess vulnerability , if not in self- evident situations.



Effective Judicial Protection

❑ CGUE, GC, 4 October 2024 Case C-406/22

86. *it should be recalled that (...)that the **characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection. **Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such.** The same must hold true for Article 46(3) of that directive, read in the light of Article 47 of the Charter (see, to that effect, judgment of 29 July 2019, Torubarov, C-556/17, EU:C:2019:626, paragraphs 55 and 56 and the case-law cited).***



Lack of Effective Judicial Protection

Refoulement/Removal

(Countries that, pursuant art. 15 of ECHR, derogate from articles 2, 3, 4 para. 1, 7 of the Convention).

CHALLENGES

COLLISIONS between national provisions implementing CEAS and EU LAW – the EU CHARTER, the ECHR and the ECtHR case law

- ☐ **Interpretation consistent with EU Law – ECHR**
 - ☐ **Preliminary reference to CGUE**
 - ☐ **Preliminary reference to the Constitutional Court on the ground that the Italian Law conflicts with ECHR-ECtHR**
 - ☐ **Direct application of EU Law - Non application of national law**
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- ☐ Technical-legal issues of high complexity
 - ☐ Detention/Urgent cases – no material time for a preliminary reference
 - to the CGUE or to the Constitutional Court
 - ☐ Merit assessment (individual story and CoI) implies time, capacity (also linguistic) and efforts
 - ☐ Vulnerable applicants are in need of immediate support.
 - ☐ Risk of refoulement especially for vulnerable asylum seekers



Conclusion

Safe Third Country of Origin, as a procedural tool, must follow a clear, transparent and accountable process (UNHCR)

otherwise, the non-discrimination of the asylum seeker and their right to access fair procedure are at high risk

Thanks for the consideration