EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

FRA Opinion – 1/2016
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Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of safe countries of origin

Contents

THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA),
Bearing in mind the Treaty on European Union (TEU), in particular Article 6 thereof,

Recalling the obligations set out in the Charter of Fundamental Rights of the European Union (the Charter),

In accordance with Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (FRA), in particular Article 2 with the objective of FRA "*to provide the relevant institutions, bodies, offices and agencies of the Community and its EU Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights*",

Having regard to Article 4 (1) (d) of Council Regulation (EC) No. 168/2007, with the task of FRA to "*formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the EU Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission*",

Having regard to Recital 13 of Council Regulation (EC) No. 168/2007, according to which "*the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned*",

Recalling the right to asylum set forth in Article 18 of the Charter and Article 78 (2) (d) of the Treaty on the Functioning of the European Union (TFEU) according to which the Union develops a common policy on asylum which "*must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties"*,

Having regard to the request of the European Parliament of 26 February 2016 to FRA for an opinion on the implications of the Commission proposal for a Regulation establishing an EU common list of safe countries of origin (COM(2015)452 final; 2015/0211 (COD)) on the fundamental rights of applicants for international protection originating from one of the countries included in the common list of safe countries of origin, in particular with regard to the right to an effective remedy, the rights of the child, the respect of the principle of *non-refoulement*, the right to be heard and effective access to legal assistance in practice as well as the viability of excluding the application of the presumption of safety with respect to certain categories of applicants for international protection originating from one of the countries included in proposed EU common list of safe countries of origin.

SUBMITS THE FOLLOWING OPINION:

Opinions

FRA's opinions highlight general fundamental rights implications to be considered when applying the safe countries of origin concept. They should be read together with the relevant safeguards the Asylum Procedures Directive establishes. These safeguards provide for minimum guarantees that must also fully apply to applicants originating from countries on the proposed EU common list of safe countries of origin.

Right to asylum, *non-refoulement* and the prohibition of collective expulsion

The principle of *non-refoulement* is the cornerstone of the international legal regime for the protection of refugees. Article 33 of the Geneva Refugee Convention prohibits to return (*refouler*) a refugee – and hence also a person seeking asylum – to a risk of persecution.

The principle of *non-refoulement* is reflected in primary EU law in Articles 18 and 19 of the Charter as well as in Article 78 of the TFEU. The European Court of Human Rights (ECtHR) has interpreted the prohibition of torture, inhuman or degrading treatment or punishment in Article 3 of the European Convention on Human Rights (ECHR) to include also a ban to return any individual to a country where there are substantial grounds for believing that he or she would be subjected to such prohibited treatment. Such prohibition of *refoulement* is absolute – it does not allow any derogation or exception.

Article 19 of the Charter also bans collective expulsion in line with Article 4 of Protocol 4 to the ECHR. Any form of removal may result in collective expulsion if it is not based on an individual assessment and if effective remedies against the decision are unavailable. Such prohibition also applies at high seas.

To comply with the right to asylum, non-refoulement and the prohibition of collective expulsion, an EU common list of safe countries of origin must be accompanied by necessary safeguards that are set in law and applied in practice.

Allowing effective rebuttal of the presumption of safety

A common list of safe countries of origin does not establish an irrefutable presumption of safety. To allow applicants coming from a safe country of origin to rebut the presumption of safety effectively, they must be given sufficient time to present their case. The language barriers, the speed and the complexity of the asylum procedure warrant provision of adequate legal assistance already during the first instance procedure.

Ensuring that every applicant is heard

The right to be heard, which is a general principle of EU law, requires that a personal eligibility interview be conducted with the applicant before taking a decision on his or her claim for asylum. Trained personnel of the authority in charge of examining asylum applications must carry out the personal interview with the applicant. In doing so, they must respect the requirements and safeguards as reflected in Articles 15 to 17 of the Asylum Procedures Directive (such as a confidential setting, safeguards relating to the use of interpreters and rules on transcripts).

Exclude unsafe countries from the list

Any EU common list of safe countries of origin would need to be carefully reviewed against the human rights situation in the country or origin. Where national asylum recognition rates, as reported by Eurostat, show that the overwhelming majority of applications are rejected, these can be used as an indicator but only if findings of European and international human rights monitoring bodies corroborate the situation of current and likely future safety in the country.

Establishing flexibility to react to relevant changes in the country of origin

To safeguard the right to asylum and the principle of* non-refoulement*, in case of relevant changes in the circumstances in a country included in the EU common list of safe countries of origin, such country must be suspended immediately from the list. Indicators to trigger a review of the safety in the third country should be well defined, considering the need to react quickly to important developments; such indicators need to be based on criteria contained in Annex I to the Asylum Procedures Directive.

Using comprehensive sources to assess safety

A wide range of sources should be used when assessing the conditions in countries of origin to be considered as safe. Such sources should expressly include, among others, non-governmental organisations with relevant country-specific as well as human rights expertise.

Preventing collective expulsions at borders and hotspots

The introduction of an EU common list of safe third countries is likely to move the emphasis towards implementing swifter procedures. It is important to avoid that such a tendency goes hand in hand with a reduction of legal safeguards for the applicants and an increased risk of collective expulsions as prohibited by Article 19 of the Charter, also when the EU common list of safe countries of origin is applied at borders or in EU hotspots. The establishment of such a list would therefore need to be accompanied by additional efforts by EU Member States in terms of trained personnel, interpreters and legal advisors.

Right to an effective remedy

The right to an effective remedy, as laid down in Article 47 of the Charter covers also administrative decisions. Regardless of the type of the procedure through which they are channelled, asylum applicants must have access to a practical and effective remedy against a refusal of asylum. Procedural safeguards thus need to be complied with, in order for individual cases to be examined effectively and speedily. Article 46 of the Asylum Procedures Directive regulates how such rights are to be applied to decisions on the granting and withdrawing of asylum. The CJEU underlined that Article 47 of the Charter constitutes a reaffirmation of the principle of effective judicial protection and that the characteristics of a remedy must be determined in a manner that is consistent with this principle.

Allowing applicants to stay during the review

Applicants rejected due to their country of origin being on the EU common list of safe countries of origin should be granted an automatic right to stay in the Member State during an appeal procedure.

Ensuring effective information and legal assistance

Access to legal assistance is a cornerstone of access to justice and must not be arbitrarily restricted. Asylum seekers originating from a country on the EU common list of safe countries of origin have an increased and crucial need for legal assistance, because for them the burden of proof is greater since there is a safety presumption against them. They must put forward strong and very specific arguments to show that in their case the situation is not safe. The current possibility to limit legal assistance when the appeal has no tangible prospect of success would compromise the right to an effective remedy enshrined in Article 47 of the Charter.

Non-discrimination

The principle of non-discrimination prohibits conduct which factually results in different treatment of people or groups of people who are in an identical situation. Both the ECHR and EU law acknowledge that discrimination may result not only from treating people in similar situations differently but also from offering the same treatment to people who are in different situations.

Providing necessary safeguards for minority groups at risk

The safe country of origin rule should not be applied in relation to minority groups, where – on the basis of country of origin information – it can be assumed that it would expose them to a disproportionately higher risk of **refoulement.** ***EU Member States could be encouraged, for instance, to view the membership of a group at risk, as identified by UNHCR or EASO, as a serious ground for considering the country of origin not to be safe, due to the particular circumstances of the applicant within the meaning of Article 36 (1) of the Asylum Procedures Directive.***

Rights of the child

According to Article 24 of the Charter, children have the right to protection and care that is necessary for their well being. In line with Article 3 of the United Nations Convention on the Rights of the Child (CRC), Article 24 of the Charter requires that a child's best interests be a primary consideration in all actions relating to children, whether taken by public authorities or private institutions. The CRC as well as Article 24 of the Charter apply to all children, regardless of their nationality or status.

Safeguarding the best interests of an unaccompanied child

Processing of asylum claims of unaccompanied children from countries on an EU common list of safe countries of origin through accelerated procedures should be expressly excluded. Such procedures do not provide sufficient time to assess the best interests of a child – a requirement that derives from the duty to give a primary consideration to the child's best interests set out in Article 24 of the Charter.

Preventing arbitrary detention of children

In light of Article 6 on the right to liberty and security of the Charter, appropriate safeguards should be envisaged to address the risk of arbitrary detention of children whose applications are processed at borders which an EU common list of safe countries of origin increases.

Introduction

On 26 February 2016, FRA received a request from the European Parliament to deliver an opinion "*on the fundamental rights implications of the Commission proposal for a Regulation establishing an EU common list of safe countries of origin (COM(2015) 452 final; 2015/0211 (COD))*". The European Parliament requested FRA to share its opinion "*on the fundamental rights of applicants for international protection originating from one of the countries included in the common list of safe countries of origin, in particular with regard to the right to an effective remedy, the rights of the child, the respect of the principle of* non-refoulement*, the right to be heard and effective access to legal assistance in practice.*" Moreover, the Parliament asked FRA's opinion "*on the viability of excluding the application of the presumption of safety with respect to certain categories of applicants for international protection originating from one of the countries included in proposed EU common list of safe countries of origin*".

On 9 September 2015, the European Commission tabled a proposal for a Regulation establishing an EU common list of safe countries of origin.[1] The regulation would amend the articles in the Asylum Procedures Directive (2013/32/EU),[2] which allow Member States to designate, at the national level, third countries as 'safe countries of origin'.

This opinion provides the European Parliament with fundamental rights expertise when developing its position in the legislative procedure. It examines the possible fundamental rights implications of establishing such an EU common list of safe countries of origin, without a claim of being exhaustive. It is neither assessing the single provisions of the legislative proposal as such, nor does it deal with the list of countries suggested to be included on the EU common list of safe countries of origin as this would require to examine the human rights situation in these third countries.

What is a safe country of origin

In simple terms 'safe country of origin' describes an asylum seeker's country of nationality (or for stateless persons the country of former habitual residence) where there is no risk of persecution or other serious harm. It is one among several tools developed at the end of the 1980s, as European states were looking for ways to deal with an increasing number of people moving primarily for economic reasons who – in the absence of other ways to obtain a residence permit – applied for asylum.[3]

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1 European Commission (2015), *Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU*, COM (2015) 452 final, Brussels, 9 September 2015.

2 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2016, OJ 2013 L 180, p. 60-95, Art. 36 and Art. 37.

3 UNHCR (1991) Background note on the safe country concept and refugee status, EC/SCP/68; van Selm, J. (2001), Access to procedures 'Safe third countries', 'Safe countries of origin' and 'Time limits'.

Safe country of origin and safe third country

Safe countries of origin are to be distinguished from 'safe third countries'. A safe third country is a country, other than the asylum seeker's country of nationality (and other than a state to which the Dublin Regulation (EU) No. 604/2013 applies) where the asylum seeker would receive effective protection and where it would be reasonable to return him or her, on the basis of a connection between the applicant and the third country concerned (see Article 38 of the Asylum Procedures Directive (2013/32/EU)). The assessment required to conclude that a country is a safe third country is different from the assessment needed to establish that a country is a safe country of origin.

Under EU law, the notion of safe country of origin has essentially a procedural function. It enables to fast track applications for international protection which are likely to be unfounded. According to Article 31 (8) of the Asylum Procedures Directive, an application submitted by an individual coming from a country listed as safe may be processed in an accelerated manner or at the border (if special border procedures exist in the Member State in question), unless the applicant can rebut the assumption of safety. Accelerated or border procedures entail reduced safeguards, for example, concerning the right to remain during the appeal stage.

The proposed regulation would complement national lists of safe third countries of origin with a common EU list. In other words, the common EU list would coexist with those lists of safe countries that EU Member States have established at national level. The annex to the proposed regulation suggests that Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia (FYROM), Kosovo, Montenegro, Serbia as well as Turkey should be considered as safe countries of origin by EU Member States. The proposal also contains a procedure to remove a third country from the common EU list in case of a sudden change of situation. However, Member States are not prevented to include in their national lists a country which is removed from the common EU list.

Diversity in national lists

According to the European Commission, the 'safe country of origin' concept features in the legislation of 22 EU Member States but only 15 of them apply the concept in practice.[4] Some of them have established lists[5] while others apply it on a case-by-case basis.[6]

The national lists differ substantially: whereas the United Kingdom has 26 third countries on its list, France has 16, Germany has five and Ireland has only one. Third countries that appear on national safe country of origin lists are different from one EU Member State to another, including countries as diverse (regarding possible justification of asylum requests) as Ethiopia and Australia. Moreover, there are differentiations between male and female asylum seekers. While the United Kingdom and Luxembourg recognise Ghana, for example, as safe for males only, Bulgaria, France, Germany, Malta and Slovakia recognise it as safe for both males and females.[7] Furthermore, there are Member States which do not use a list of safe countries of origin within the meaning of the Asylum Procedures Directive but take different administrative measures for applicants considered to have little chance to receive

4 European Commission (2015), Information note on the follow-up to the European Council Conclusions of 26 June 2015 on 'safe countries of origin'.

5 *Ibid*. These include Austria, Belgium, Czech Republic, Germany, France, Ireland, Luxembourg, Malta, Slovakia and the United Kingdom.

6 *Ibid*. These include Estonia, Finland, Hungary, Latvia and the Netherlands.

7 *Ibid*.

protection. In Greece, for example, asylum applicants from Albania, Bangladesh, Egypt, Georgia and Pakistan are issued a three-month permit as an exception to a four-month permit rule.[8] Such a differential approach towards asylum applicants from different countries is compounded by the absence of rules that would regulate in a comprehensive manner the relationship between the national and the EU common list of safe countries of origin. The European Commission acknowledges this fact by referring to the proposed regulation as a tool to address "some of the existing divergences between Member States' national lists" and conceives the possibility of fully replacing the national lists with a single EU common list will be reviewed in the future.[9]

Fundamental rights framework

The proposed EU common list of safe countries of origin is based on Article 78 of the TFEU, which envisages the creation of a common EU asylum policy, including common asylum procedures. According to it, the common EU policy "*must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*"

The 1951 United Nations (UN) Convention relating to the Status of Refugees (Geneva Refugee Convention) does not regulate asylum procedures. Apart from the case law of the Court of Justice of the EU (CJEU), it is, therefore, in the "other relevant treaties" and in the Conclusions on International Protection of the UNHCR Executive Committee – the UNHCR's governing body to which most EU Member States are party – where the relevant procedural safeguards and effective remedy standards concerning asylum procedures can be found. In light of Article 6 (3) of the TEU and Article 52 of the Charter, particular relevance must be given to the ECHR as interpreted by the ECtHR. In addition, also the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture (CAT) and the UN Convention on the Rights of the Child (CRC) provide relevant guidance.

Safe countries of origin: one possible tool to address asylum claims likely to be unfounded

The UNHCR Executive Committee noted that applications which are clearly fraudulent or not related to the criteria for granting international protection in any manner are burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting international protection.[10] In 2014, one out of six asylum applications in the EU were lodged by applicants from the Western Balkans, namely from nationals of countries with statistically little chances to receive asylum. This phenomenon, which continued in 2015 – over 200,000 applicants were from the Western Balkans, including some 28,000 repeat applications[11] – contributed to a congestion of national asylum systems manifested by longer procedures for all asylum applicants. In turn, longer processing times impact on reception capacities, limiting Member States' flexibility in finding adequate facilities to host new arrivals.

[8] Greece, Decision No. 8248/19.9.2014 by the Head of the Asylum Service, Government Gazette B 2635/3-10-2014.

[9] European Commission (2015), *Proposal for a Regulation of the European Parliament and of the Council*, COM(2015) 452 final, Brussels, 9 September 2015.

[10] See also Executive Committee of the High Commissioner's Programme (ExCom), Conclusions on International Protection, Conclusion No. 30 (XXXIV), 1983 at (c).

[11] Eurostat, Asylum and first time asylum applicants by citizenship, age and sex, annual aggregated data (rounded), migr_asyappctza, extracted on 7 March 2016.

In this context, it should be noted that the use of safe country of origin lists is only one tool to speed up the processing of applications that are likely to be unfounded. Already in 1983, states forming the UNHCR Executive Committee suggested allocating sufficient personnel and resources to refugee status determination bodies so as to enable them to accomplish their task expeditiously. They also suggested to reduce the time required for the completion of the appeals process. Both were considered as concrete measures to speed up refugee status determination procedures.[12]

Evidence from some Member States seems to indicate that the reorganisation of national asylum procedures is probably more effective in speeding up decision making for abusive or unfounded asylum applications than the use of safe country of origin lists alone. In the Netherlands, for example, where there is no formal list of safe country of origin in the law, all applications that are easy to decide upon have to be examined within eight days (this time frame can be extended by additional six days). Only if a decision cannot be taken within such a time period, the asylum applicant is transferred to the extended asylum procedure.[13] In Germany, the fact that national legislation contains a provision on safe country of origin[14] did not in itself lead to swift decisions on unfounded applications. The desired impact was only achieved through additional organisational steps, beefing up staffing and streamlining procedures as illustrated by the model elaborated in the Heidelberg branch of the Federal Office for Migration and Refugees (BAMF) and now followed by other BAMF branches.[15]

This confirms that the added value of a possible EU common list of safe countries of origin cannot be judged in isolation. It is going to depend on how it is framed in the wider asylum management context and whether it is combined with efforts to bolster the asylum processing capacities. An isolated, ineffective measure that interferes with fundamental rights without being in fact suitable to achieve the intended purpose would raise questions of proportionality under Article 52 (1) of the Charter.

Fundamental rights potentially affected

The establishment of safe country of origin lists is *per se* not incompatible with the right to asylum enshrined in Article 18 of the Charter, provided all relevant safeguards are in place to enable applicants to rebut the presumption of safety not only in law but also in practice.[16] This requires that each asylum applicant is properly heard. In light of the continuing human rights violations of individuals or specific groups, such as those targeted for their sexual orientation or gender identity or members of national minorities in parts of the Western Balkans, measures are needed to ensure that the application of the EU common list does not result in their *refoulement*. The establishment of an EU common list would naturally entail an increased responsibility of the EU not only for the assessment of the countries selected for such list but also for ensuring that safeguards currently provided in the Asylum Procedures Directive are sufficient and reflect this important shift in responsibility.

[12] Executive Committee of the High Commissioner's Programme (ExCom) (1983), Conclusions on International Protection, Conclusion No. 30 (XXXIV), 1983 at (f).
[13] Netherlands, Aliens Decree 2000 *(Vreemdelingenbesluit 2000)* (as amended), Section 3.110.
[14] Germany, Basic Law *(Grundgesetz)*, Section 16 a (2) and Asylum Law (*Asylgesetz*), Section 29 a (2).
[15] Germany, Bundesamt für Migration und Flüchtlinge (2015), 'Optimiertes Asylverfahren wird in Heidelberg erprobt' (online), 18 December 2015.
[16] In this sense, see CJEU, C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013.

If not adequately framed and applied, the concept of safe country of origin may affect different Charter rights, including absolute rights which do not allow for exceptions or derogations. Among these are:

- the right to liberty and security (Article 6);
- *non-refoulement* (Article 19);
- non-discrimination (Article 21);
- the rights of the child (Article 24);
- the right to good administration, in particular the right to be heard (Article 41);
- the right to an effective remedy and to a fair trial (Article 47).

1. Right to asylum, *non-refoulement* and the prohibition of collective expulsion

The principle of *non-refoulement* is the cornerstone of the international legal regime for the protection of refugees. Article 33 of the Geneva Refugee Convention prohibits to return (*refouler*) a refugee – and hence also a person seeking asylum – to a risk of persecution.

The principle of *non-refoulement* is reflected in primary EU law in Articles 18 and 19 of the Charter as well as in Article 78 of the TFEU. The ECtHR has interpreted the prohibition of torture, inhuman or degrading treatment or punishment in Article 3 of the ECHR to include also a ban to return any individual to a country where there are substantial grounds for believing that he or she would be subjected to such prohibited treatment.[17] Such prohibition of *refoulement* is absolute – it does not allow any derogation or exception.

Article 19 of the Charter also bans collective expulsion in line with Article 4 of Protocol 4 to the ECHR. Any form of removal may result in collective expulsion if it is not based on an individual assessment and if effective remedies against the decision are unavailable. The ECtHR made clear that such prohibition also applies at high seas.[18]

Allowing effective rebuttal of the presumption of safety

It is not lawful to exclude certain nationalities from international protection. This would amount to a non-admissible *de facto* reservation to Article 1 of the Geneva Refugee Convention[19] and a violation of its Article 3 which prohibits discrimination on the basis of the refugees' country of origin. Given the different scenarios in which international protection needs arise, countries with functioning democratic institutions may also in some situations be unwilling or unable to provide protection to some of their nationals. Indeed, in 2015 nationals of all the states included in the proposed EU common list of safe country of origin were granted international protection in some Member States of the EU.[20]

For this reason, the current EU asylum *acquis* allows the use of safe country of origin only as a rebuttable presumption: Article 36 of the Asylum Procedures Directive considers a country of origin only to be safe if the applicant "*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*". Recital 32 of the directive furthermore calls on Member States to take into account the complexity of gender-related claims when using the concept of safe country of origin. In the United Kingdom, the Supreme Court removed Jamaica from the list of safe countries due to risk of persecution based on sexual orientation.[21]

The CJEU underlined that applicants from safe countries of origin whose claims are processed in accelerated procedures must be allowed in full the exercise of the rights that that Asylum

[17] ECtHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989 para. 91; *Vilvarajah and Others v. United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991, paras. 107 ff.

[18] ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, 23 February 2012, para. 180; see also ECtHR, *Sharifi and Others v. Italy and Greece*, No. 16643/09, 21 October 2014, paras. 210-213.

[19] Article 42 of the Geneva Refugee Convention prohibits reservations to several articles, including Articles 1 and 3.

[20] Eurostat, First instance decisions on applications by citizenship, age and sex, quarterly data (rounded), migr_asydcfstq, extracted on 17 March 2016.

[21] United Kingdom Supreme Court, *R (on the application of Jamar Brown (Jamaica)) (Respondent) v. The Secretary of State for the Home Department (Appellant)*, [2015] UKSC 8, 4 March 2015.

Procedures Directive confers to them. Moreover, applicants must have "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 [the application] and to ensure that the applicants are not exposed to any dangers in their country of origin".[22]

The presumption of safety can be particularly difficult to challenge in the absence of legal advice. There is currently no obligation under the Asylum Procedures Directive to provide free legal assistance to applicants during the first instance asylum procedure. This safeguard is particularly important in light of the envisaged quick processing of applications submitted by asylum seekers from countries on the EU common list of safe countries of origin.

FRA opinion

A common list of safe countries of origin does not establish an irrefutable presumption of safety. To allow applicants coming from a safe country of origin to rebut the presumption of safety effectively, they must be given sufficient time to present their case. The language barriers, the speed and the complexity of the asylum procedure warrant provision of adequate legal assistance already during the first instance procedure.

Ensuring that every applicant is heard

The presumption of safety can only be rebutted if the applicant is given an effective opportunity to do so. The main piece of evidence in asylum cases is normally the personal interview carried out by an especially trained officer, as described in Article 14 (1) of the Asylum Procedures Directive. To ensure that the personal interview respects minimum quality requirements, the directive requires that it be normally carried out by personnel of the authority established to examine asylum claims. Articles 14 (2) and 42 (2) (b) of the directive allow the personal interview only to be waived in very exceptional situations, such as in case of people who are unfit to be interviewed or in case of preliminary assessments of repeat applications.

The protective provisions included in Articles 15 to 17 of the Asylum Procedures Directive must also fully apply to applicants coming from a country on the EU common list of safe countries of origin. In light of the higher burden of proof needed to rebut the presumption of safety, the rules on establishing a confidential setting for the personal interview, the safeguards relating to the use of interpreters and the provisions on how to handle transcripts are essential safeguards to ensure that the right to be heard exists not only in theory but also in practice.

The right to good administration, as mirrored in Article 41 of the Charter, is a fundamental right forming an integral part of the EU legal order. As a general principle of EU law, it also binds Member States when they are acting within the scope of EU law. The CJEU clarified that it includes "the right of every person to be heard, [...] the right of every person to have access to his or her file, [...] and the obligation of the administration to give reasons for its decisions"[23] and that *"observance of those rights is required even where the applicable legislation does not expressly provide for such a procedural requirement."*[24] During an

[22] CJEU, C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013, para. 75.

[23] CJEU, C-277/11, *M. M. v. Minister for Justice, Ireland, Attorney General,* 22 November 2012, para. 83.

[24] CJEU, C-349/07, *Sopropé v. Fazenda Pública*, 18 December 2008, para. 38; CJEU, C-277/11, *M. M. v. Minister for Justice, Ireland, Attorney General,* 22 November 2012, para. 86 ; CJEU, C-383/13, *G & R v. Staatssecretaris*

administrative procedure, every person must have the opportunity to make his or her views effectively known "*before the adoption of any decision*" that may adversely affect his or her interests.[25] This requirement applies also to asylum applicants whose claims are to be rejected as they come from a safe country of origin.[26]

FRA opinion

The right to be heard, which is a general principle of EU law, requires that a personal eligibility interview be conducted with the applicant before taking a decision on his or her claim for asylum. Trained personnel of the authority in charge of examining asylum applications must carry out the personal interview with the applicant. In doing so, they must respect the requirements and safeguards as reflected in Articles 15 to 17 of the Asylum Procedures Directive (such as a confidential setting, safeguards relating to the use of interpreters and rules on transcripts).

Exclude unsafe countries from the list

The criteria for determining if a country of origin is safe are laid down in the annex to the Asylum Procedures Directive as follows:

> *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 annex also contains a non-exhaustive list of indicators which help assessing whether protection is provided against persecution or mistreatment, including:

- the legal framework in the country of origin and the manner in which it is applied;
- observance of the rights and freedoms laid down in the ECHR, the ICCPR and the CAT;
- respect for the principle of *non-refoulement*;
- effective remedies against violations of those rights and freedoms.

To be included in a list of safe countries of origin, safety from persecution and other serious harm must exist not only in theory but also in practice. The presumption of safety must be based on the human rights situation in the country of origin, as reflected in reliable, objective, impartial, precise and up-to date information. When examining cases of extradition or removal under Article 3 of the ECHR, the ECtHR looks at the general human rights situation in the country of return, in addition to reviewing the individual circumstances of the applicant.[27] As part of assessing the risk of ill-treatment upon return, the ECtHR also

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van Veiligheid en Justitie, 10 September 2013, para. 32 and CJEU C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, para. 39.

[25] CJEU C-141/08, *Foshan Shunde Yongjian Housewares & Hardware v. Council*, 1 October 2009, para. 83; C-27/09, *France v People's Mojahedin Organization of Iran*, 21 December 2011, paras. 65; CJEU C-277/11, *M. M. v. Minister for Justice, Ireland, Attorney General,* 22 November 2012, para. 87; CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014, para. 46 and CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, para 36.

[26] CJEU, C-277/11, C *M. M. v. Minister for Justice, Equality and Law Reform, Ireland*, 22 November 2012, paras. 82-95.

[27] See, among many others, ECtHR, *Vilvarajah and Others v. the United Kingdom*, A-215, 30 October 1991, para. 108; ECtHR, *Sufi and Elmi v. the United Kingdom,* Nos. 8319/07 and 11449/07, 28 June 2011, para. 216;

examines whether the receiving country is effectively and practically able and willing to protect the individual against the ill-treatment.[28] National courts having to pronounce themselves on whether a particular country could be listed as a safe country of origin also based their assessments on the general human rights situation in that country.[29]

Utmost caution is called for when using other indicators of safety. The results of past asylum applications submitted in EU Member States can be used as one of the indicators to assess the degree of safety in a third country, provided due attention is paid to possible differences among Member States. A country can only be considered safe for which Member States have rejected the overwhelming majority of asylum applications from that country of origin in recent years. However, recognition rates remain only an indicator and should only be used if European and international human rights monitoring bodies – such as the UN Human Rights Committee, the UN Committee on the Rights of the Child, the Sub-Committee for the Prevention of Torture, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), or the European Committee against Racism and Intolerance (ECRI) – have not expressed relevant criticism to the current situation and the longer term trends in the country of origin.

FRA opinion

Any EU common list of safe countries of origin would need to be carefully reviewed against the human rights situation in the country or origin. Where national asylum recognition rates, as reported by Eurostat, show that the overwhelming majority of applications are rejected, these can be used as an indicator but only if findings of European and international human rights monitoring bodies corroborate the situation of current and likely future safety in the country.

Establishing flexibility to react to relevant changes in the country of origin

As the human rights situation in individual countries can change quickly, an EU common list of safe countries of origin needs to be sufficiently flexible to react to changing circumstances. The proposed regulation envisages a regular review of the list (see the following section), as well as a mechanism to suspend the presumption of safety of a country included in the EU common list in case of sudden changes in the situation.[30]

Such suspension mechanism needs to be swift, else it exposes applicants to an unacceptable risk of *refoulement*. There should be a set of criteria to indicate how it would be triggered and carried out so as to react immediately to developments in third countries which increase the risk of persecution and serious harm for asylum applicants, ensuring an immediate removal of a country from the list, when, for example, an armed conflict breaks out or certain groups of the population become subject to violence.

ECtHR, *Mo.M. v. France*, No. 18372/10, 18 April 2013, para. 36; ECtHR, *M.G. v. Bulgaria*, No. 59297/12, 25 March 2014, para. 79; ECtHR, *Ouabour v. Belgium*, No. 26417/10, 2 June 2015, para. 65.

28 ECtHR, *Saadi v. Italy*, No. 37201/06, 28 February 2008, paras. 147-148.

29 See France, Conseil d'Etat, Decision Nos. 375474 and 375920, 10 October 2014, paras.14-18; Belgium, Conseil d'Etat, Decision No. 228.901, 23 October 2014, 1st branch; UK Supreme Court, *R (on the application of Jamar Brown (Jamaica)) (Respondent) v. The Secretary of State for the Home Department (Appellant)*, [2015] UKSC 8, 4 March 2015, paras. 19 and 36.

30 Article 2 of the proposed regulation includes a duty by the European Commission to review regularly the situation in the countries on the list, whereas Article 3 regulates the procedure to suspend the presumption of safety in case of "sudden change of situation".

FRA opinion

To safeguard the right to asylum and the principle of* non-refoulement*, in case of relevant changes in the circumstances in a country included in the EU common list of safe countries of origin, such country must be suspended immediately from the list. Indicators to trigger a review of the safety in the third country should be well defined, considering the need to react quickly to important developments; such indicators need to be based on criteria contained in Annex I to the Asylum Procedures Directive.

Using comprehensive sources to assess safety

An EU common list of safe countries of origin would need to be reviewed at regular intervals. Such review must be carried out on the basis of a range of available sources, including the European External Action Service (EEAS), information from Member States, the European Asylum Support Office (EASO), UNHCR, the Council of Europe and other relevant international bodies. Non-governmental organisations should also be involved in this mechanism.[31]

When assessing the weight to be attributed to country material for claims under Article 3 of the ECHR, the ECtHR holds that consideration must be given to the independence, reliability and objectivity of the sources used,[32] treating assessments by states and non-governmental organisations on equal footing.[33] Similarly, Article 4 (a) of the EASO Founding Regulation (EU) No. 439/2010 (which describes the methodology for compiling information on countries of origin) requires EASO to make use of "all relevant sources of information, including information gathered from governmental, non-governmental and international organisations and the institutions and bodies of the Union".[34] The UNHCR Executive Committee meeting on Asylum Procedures also concluded that the assessment of safety must be "based on reliable, objective and up-to-date information from a range of sources."[35]

FRA opinion

A wide range of sources should be used when assessing the conditions in countries of origin to be considered as safe. Such sources should expressly include, among others, non-governmental organisations with relevant country-specific as well as human rights expertise.

Preventing collective expulsions at borders and hotspots

In recent months, FRA has observed an emerging pattern which consisted in profiling new arrivals by nationality, allowing admission to the territory or access to the asylum procedure

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[31] In this regard, the proposed regulation includes in Article 2 (2) a reference to EEAS, Member States, EASO, UNHCR the Council of Europe and other relevant international organisations. Non-governmental organisations are, however, not expressly included.

[32] ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, para. 230; ECtHR, *Saadi v. Italy*, No. 37201/06, 28 February 2008, paras 131 and 143, ECtHR, *N.A. v. the United Kingdom*, No. 25904/07, 17 July 2008, para. 120.

[33] ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, paras. 231- 232.

[34] Regulation (EU) No. 439/2010 of the European Parliament and the Council of 19 May 2010 establishing a European Asylum Support Office, OJ 2010 L 132, p. 11-28.

[35] Global Consultations on International Protection, 2nd meeting, Asylum procedures (Fair and efficient asylum procedures) EC/GC/01/12, 31 May 2001, para.39.

to applicants originating from some countries of origin only.[36] Respect for the principle of *non-refoulement* and the prohibition of collective expulsion as set out in Article 19 of the Charter, however, requires a reasonable and objective examination of the particular case of each individual before a decision of deportation is taken and enforced.[37]

EU Member States will also apply the concept of safe country of origin for people who submit an application for international protection at the border or in EU hotspots – situations where procedures may be carried out under special conditions prone to increased vulnerability of asylum seekers. The pressure to ensure swift decision making in such procedures must not result in a reduction of legal safeguards for the applicant. In *Hirsi*, the ECtHR pointed to the presence of trained personnel, interpreters and legal advisors as minimum conditions for a reasonable and objective examination of each individual claim.[38]

A decision taken on the asylum claim of an applicant originating from a country on the EU common list of safe countries of origin is a decision on the substance of the claim – meaning that it concludes whether the applicant is or is not in need of international protection. As highlighted above with respect to the right to be heard, the personal interview with the applicant constitutes the most important evidence for such decision. Inevitably, such interviews require the presence of a professional interpreter in line with Article 12 (1) b of the directive. Effective access to legal assistance is another important safeguard, particularly in light of the complexity of asylum procedures, existing language barriers and the fact that applicants whose applications are processed at the border or in transit zones are often detained.

FRA opinion

The introduction of an EU common list of safe third countries is likely to move the emphasis towards implementing swifter procedures. It is important to avoid that such a tendency goes hand in hand with a reduction of legal safeguards for the applicants and an increased risk of collective expulsions as prohibited by Article 19 of the Charter, also when the EU common list of safe countries of origin is applied at borders or in EU hotspots. The establishment of such a list would therefore need to be accompanied by additional efforts by EU Member States in terms of trained personnel, interpreters and legal advisors.

[36] See FRA's regular overviews of migration-related fundamental rights concerns, http://fra.europa.eu/en/theme/asylum-migration-borders/overviews. See also UNHCR 92016), 'UNHCR concerned by build up along borders and additional hardships for refugees and asylum seekers', Press release, 23 February 2016.

[37] ECtHR, *Sharifi and Others v. Italy and Greece*, No. 16643/09, 21 October 2014, paras. 214-225; ECtHR, *Georgia v. Russia (I)* [GC], No. 13255/07, 3 July 2014, paras. 170-178; ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, paras. 183-186

[38] ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09), 23 February 2012, paras. 185-186.

2. Right to an effective remedy

The right to an effective remedy, as laid down in Article 47 of the Charter covers also administrative decisions. Regardless of the type of the procedure through which they are channelled, asylum applicants must have access to a practical and effective remedy against a refusal of asylum. Procedural safeguards thus need to be complied with in order for individual cases to be examined effectively and speedily. Article 46 of the Asylum Procedures Directive regulates how such rights are to be applied to decisions on the granting and withdrawing asylum.

The CJEU underlined that Article 47 of the Charter constitutes a reaffirmation of the principle of effective judicial protection and that the characteristics of a remedy must be determined in a manner that is consistent with this principle.[39]

Allowing applicants to stay during the review

One important procedural safeguard concerns the right of applicants to stay in the host country while they await the response of the appeals procedure. Under Article 46 of the Asylum Procedures Directive such right to stay is normally granted automatically, in line with the ECtHR case law relating to arguable claims under Article 3 of the ECHR. Given the irreversible nature of the harm caused by torture or ill-treatment, the ECtHR requires that the person concerned must have access to a remedy with automatic suspensive effect towards the implementation of the return or expulsion decision.[40]

In a number of circumstances, the Asylum Procedures Directive allows Member States to depart from granting *automatic* suspensive effect. In such cases, Article 46 (6) of the Asylum Procedure Directive requires a court or tribunal to "*have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant's request or acting* ex officio". This is also the case for applicants who are rejected as they come from a safe country of origin, which places them legally on par, for example, with persons obstructing the proceedings with false information and documents or even those considered a danger to national security, to whom automatic suspensive effect is also not granted.

The arrangement in the Asylum Procedures Directive departs from the automatic suspensive effect, which the ECtHR requires in cases involving an arguable claim under Article 3 of the ECHR. Claims under Article 3 of the ECHR submitted by individuals or members of groups at risk in a safe country of origin constitute "arguable claims". The ECtHR noted that "*it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly*".[41] To avoid abuse of this important safeguard, EU Member States could take other measures, for example, prioritising appeal decisions or increasing the capacity of appeal bodies to examine applications swiftly.

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[39] CJEU, C-432/05, *Unibet (London) Ltd, Unibet (International) Ltd v. Justitiekanslern*, 13 March 2007, para. 37; CJEU, C-93/12, *ET Agrokonsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond 'Zemedelie' – Razplashtatelna agentsia*, 27 June 2013, para. 59; CJEU, C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, 18 December 2014, para. 45.

[40] ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, 26 April 2007, para. 66; *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011, para. 293.

[41] ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002, para. 82 on remedies against violations of the prohibition of collective expulsion in Article 4 of Protocol 4 of the ECHR.

In view of the seriousness and irreparable nature of the harm that may be caused, the CJEU requires that an appeal must have suspensory effect when it concerns a decision whose enforcement may expose a third-country national to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.[42]

FRA opinion

Applicants rejected due to their country of origin being on the EU common list of safe countries of origin should be granted an automatic right to stay in the Member State during an appeal procedure.

Ensuring effective information and legal assistance

A remedy has to be effective in practice as well as in law.[43] This requires, for example, that asylum seekers are properly notified of the rejection of their asylum claim: stating sufficiently specific and concrete reasons for the decision; are given access to their files; are afforded sufficient time to lodge an appeal; and are, in some circumstances, granted legal assistance.[44]

In light of language barriers and of complex and rapidly implemented procedures, access to legal assistance is a cornerstone of access to justice. Articles 20 to 23 of the Asylum Procedures Directive regulate the right to legal assistance. It requires Member States to ensure that free legal assistance and representation be granted to applicants to lodge an appeal, as well as for their appeal hearing (Article 20). Article 20 (3) allows Member States to refrain from providing free legal assistance and representation where the appeal has no tangible prospects of success. Applicants coming from a safe country of origin would, per definition, have a low likelihood of success. Depending how EU Member States implement Article 20 (3), it may result in depriving applicants originating from a country on the EU common list of safe countries of origin of the right to an effective remedy.

This risk is even higher when asylum applications submitted by nationals from the EU common list are handled by holding the applicant in a closed facility, where access to legal advisors and representatives is by definition more difficult to organise and obtain.[45] In light of the typically short deadlines to appeal a claim rejected through an accelerated or border procedure, it would be difficult to imagine how the remedy in place could still fulfil the requirement of effectiveness – unless EU Member States have set up an effective system to provide individual legal counselling and support to draft the appeal to all those applicants who wish to have their asylum claim reviewed.

FRA opinion

Access to legal assistance is a cornerstone of access to justice and must not be arbitrarily restricted. Asylum seekers originating from a country on the EU common list of safe countries of origin have an increased and crucial need for legal assistance, because for them the burden of proof is greater since there is a safety presumption against them. They

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42 CJEU, C-239/14, *Abdoulaye Amadou Tall v. Centre public d'action sociale de Huy*, 17 December 2015, para. 58; CJEU, C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, 18 December 2014, paras. 52 and 53.

43 ECtHR, *Hirsi Jamaa and Others v. Italy,* No. 27765/09, 23 February 2012, para. 197; ECtHR, *Abdolkhani and Karimnia v. Turkey,* No. 30471/08, 22 September 2009, para. 115.

44 *ECtHR, Abdolkhani and Karimnia v. Turkey, No. 30471/08, 22 September 2009*, paras. 111-117. See also CJEU, C-146/14, *Bashir Mohamed Ali Mahdi*, 5 June 2014, paras. 44-45; CJEU, C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, 5 November 2014, para. 48; CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, para. 64; CJEU, C-349/07, Sopropés v. Fazenda Pública, 18 December 2008, paras. 37 and 50.

45 ECtHR, *Aden Ahmed v. Malta*, No. 55352/12, 23 July 2013, para. 66.

must put forward strong and very specific arguments to show that in their case the situation is not safe. The current possibility to limit legal assistance when the appeal has no tangible prospect of success would compromise the right to an effective remedy enshrined in Article 47 of the Charter.

3. Non-discrimination

The principle of non-discrimination prohibits conduct that factually results in different treatment of people or groups of people who are in an identical situation.[46] Both the ECHR and EU law acknowledge that discrimination may result not only from treating people in similar situations differently (direct discrimination), but also from offering the same treatment to people who are in different situations (indirect discrimination).[47] According to the ECtHR case law, "a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised".[48]

Article 21 of the Charter prohibits any discrimination based on grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. In addition, Article 3 of the Geneva Refugee Convention prohibits any discrimination of refugees based on, among others, their country of origin.

Although the introduction of a list of safe countries of origin is in principle a neutral measure, it may indirectly affect certain individuals or groups much more than others, exposing them to a higher risk of *refoulement*. Thus, it would have significantly more negative effects on them compared with other nationals, unless compensated by sufficient procedural safeguards to allow a rebuttal of the presumption of safety in practice.

Introducing a different treatment of asylum applicants based on their country of origin therefore requires objective justification as per Article 52 (1) of the Charter. As the country of origin of the applicant plays a critical role in assessing international protection needs, the CJEU clarified that examining applications from international protection submitted by nationals from specific countries of origin in an accelerated manner does not infringe upon the right to non-discrimination, provided applicants are not deprived of the necessary procedural guarantees.[49]

Providing necessary safeguards for minority groups at risk

Even if a country can be considered as safe for most of its nationals and habitual residents, it may not be so for specific groups. As indicated in the Explanatory Memorandum to the proposed regulation, minority groups experience discrimination and ill-treatment on grounds such as gender, age, disability, ethnicity or sexual orientation in a number of countries suggested for an EU common list of safe countries of origin. According to EASO, applicants from the Western Balkans often cite being a member of a minority group as a reason for seeking international protection.[50] The 2015 ECRI report on Albania, for example, highlights that lesbian, gay, bisexual and trans (LGBT) persons and Roma are target of hate

[46] FRA and ECtHR (2011), *Handbook on European non-discrimination law*, Luxembourg, Publications Office, p. 22.

[47] Directive 2000/43/EC, OJ 2000 L 180/22, Art. 2 (2) b; CJEU, *Hilde Schönheit v. Stadt Frankfurt am Main* and *Silvia Becker v. Land Hessen*, Joined Cases C-4/02 and C-5/02, 23 October 2003; ECtHR, *D.H. and Others v. the Czech Republic,* No. 57325/00, 13 November 2007, para. 184; ECtHR, *Opuz v. Turkey,* No. 33401/02, 9 June 2009, para. 183; ECtHR, *Zarb Adami v. Malta,* No. 17209/02, 20 June 2006, para. 80.

[48] ECtHR, *Vallianatos and Others v. Greece* [GC], Nos. 29381/09 and 32684/09, 7 November 2013, para. 76.

[49] CJEU, C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, 31 January 2013, para. 74.

[50] European Asylum Support Office (2015), *Asylum applicants from the Western Balkans: comparative analysis of trends, push-pull factors and responses – Update*, May 2015, pp. 19-20.

speech, bullying and discrimination.[51] As highlighted by various UNHCR reports, the adverse situation of some ethnic minorities particularly in the successor states of former Yugoslavia is further affected by cases of forcible displacement and statelessness.[52]

In light of the situation in the countries that may be considered for an EU common list of safe countries of origin, measures should be taken to avoid the risk of indirect discrimination of members of ethnic minorities, LGBT and intersex persons or other identified groups at risk. These measures should complement the safeguards suggested in Section 1 of this opinion, which aim to ensure that any applicant is put in a position to rebut in practice the presumption of safety.

FRA opinion

The safe country of origin rule should not be applied in relation to minority groups, where – on the basis of country of origin information – it can be assumed that it would expose them to a disproportionately higher risk of* refoulement. *EU Member States could be encouraged, for instance, to view the membership of a group at risk, as identified by UNHCR or EASO, as a serious ground for considering the country of origin not to be safe, due to the particular circumstances of the applicant within the meaning of Article 36 (1) of the Asylum Procedures Directive.

[51] Council of Europe, European Commission against Racism and Intolerance (ECRI) (2015), ECRI Report on Albania (fifth monitoring cycle), 9 June 2015, CRI(2015)18, para. 32.

[52] See, for example, UNHCR (2013), Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: The Former Yugoslav Republic of Macedonia, Geneva.

4. Rights of the child

According to Article 24 of the Charter, children have the right to protection and care that is necessary for their well being. In line with Article 3 of UN Convention on the Rights of the Child (CRC), Article 24 of the Charter requires that a child's best interests be a primary consideration in all actions relating to children, whether taken by public authorities or private institutions. The CRC as well as Article 24 of the Charter apply to all children, regardless of their nationality or status.[53]

Safeguarding the best interests of an unaccompanied child

The duty to safeguard the best interests of the child implies that such best interests must first be assessed. The UN Committee on the Rights of the Child, the supervisory body of the CRC, provides a framework for assessing and determining the child's best interests in its General Comment No. 14 (2013).[54] The Committee lists factors to consider when undertaking such assessment, including the child's views, the child's identity, preservation of the family environment and maintaining relations, the care, protection and safety of the child, his/her vulnerabilities, the child's right to health and the child's right to education. The balancing of these factors requires time to speak to the child, obtain his or her trust to understand his or her individual situation. An assessment of the child's best interests is an important safeguard and cannot be considered to prolong unnecessarily the asylum procedure.[55]

As the relevant provisions of Articles 25 and 46 of the Asylum Procedures Directive, dealing with guarantees for unaccompanied minors and the right to an effective remedy, apply to the concept of safe country of origin in general, they would also be used for the EU common list of safe countries of origin. Under Article 25 (6), coming from a safe country of origin is one of the few grounds that allows processing of unaccompanied children through an accelerated procedure. This is otherwise only possible in case of inadmissible repeat applications and where the child constitutes a danger to the national security or public order.

Asylum applicants channelled through accelerated procedures usually have shorter deadlines to appeal.[56] If applicants do submit an appeal, Article 46 (6) of the Asylum Procedures Directive does not require Member States to suspend the implementation of the return or expulsion decision. The appointment of a legal representative and the processing of the asylum claim by personnel who have the necessary knowledge of the special needs of children – as envisaged by Article 25 of the Asylum Procedures Directive – become meaningless, if there is no time to establish a relationship of trust with the child. It is difficult

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53 CRC, Article 2 and UN, Committee on the Rights of the Child (2005) *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005. See also CJEU, C-648/11, *MA and Others v. Secretary of State for the Home Department*, 6 June 2013, paras. 57-58 where the court uses Article 24 of the Charter in relation to an unaccompanied child seeking asylum.

54 UN, Committee on the Rights of the Child (2013), General Comment No. 14, 29 May 2013, CRC/C/GC/14.

55 See CJEU, C-648/11, *The Queen, on the application of: MA, BT, DA v. Secretary of State for the Home Department*, 6 June 2013, paras. 55 and 61; in this judgement concerning the application of the Dublin Regulation, the CJEU noted that an unaccompanied child with no family members in the EU should be examined by the state where the child is physically present not to delay unnecessarily the asylum procedure.

56 For example, a period of seven days to appeal a negative asylum decision taken in an accelerated procedure exists in Bulgaria, Hungary and Poland. See Asylum Information Database entries for these Member States, available at: www.asylumineurope.org/reports/country/bulgaria/asylum-procedure/procedures/accelerated-procedure; www.asylumineurope.org/reports/country/hungary/asylum-procedure/procedures/accelerated-procedure; www.asylumineurope.org/reports/country/poland/asylum-procedure/procedures/accelerated-procedure.

to imagine how under these circumstances the best interests of the child may be adequately assessed.

FRA opinion

Processing of asylum claims of unaccompanied children from countries on an EU common list of safe countries of origin through accelerated procedures should be expressly excluded. Such procedures do not provide sufficient time to assess the best interests of a child – a requirement that derives from the duty to give a primary consideration to the child's best interests set out in Article 24 of the Charter.

Preventing arbitrary detention of children

Article 43 (1) (b) of the Asylum Procedures Directive allows EU Member States to examine asylum claims submitted by applicants from a safe country of origin through border or airport procedures, if Member States have put such special procedures in place. According to Article 25 (6) (b) of the directive, this also applies to unaccompanied children. Asylum applications by accompanied as well as unaccompanied children can therefore be processed at the border or in a transit zone.

EU law allows Member States to deprive asylum seekers who are at the border or in a transit zone of their liberty, in order to decide on their right to enter the territory (Reception Conditions Directive, 2013/33/EU, Article 8 (3) (c)). The directive limits but does not exclude the detention of children.

Article 37 of the CRC requires that children be deprived of liberty "only as a measure of last resort and for the shortest appropriate period of time". When interpreting Article 5 of the ECHR, the ECtHR held that the detention of children is arbitrary in facilities which are inadequate to cater for their specific needs.[57] At the global level, it is increasingly considered that children should never be detained for immigration related reasons alone. According to the CPT "detention of children, including unaccompanied and separated children, is rarely justified and can certainly not be motivated solely by the absence of residence status".[58]

To ensure efficiency, an EU common list of safe countries of origin may be applied at borders in a manner which could lead to the systematic detention of applicants, including children. Such approach raises questions concerning the right to liberty and security laid down in Article 6 of the Charter. Article 6 has to be interpreted in light of the ECtHR case law, which requires an individualised assessment. Moreover, detention facilities at airports or at the land or sea border may not be equipped to accommodate children.[59]

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[57] ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, paras. 118-120; ECtHR, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, paras. 74-75; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, paras. 100-102.

[58] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2009), 20 years of combating torture. 19th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Strasbourg, Council of Europe, para. 97. For similar observations, see, for example: Inter-American Court of Human Rights, Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14 of 19 August 2014, para. 160; UN, Committee on the Rights of the Child (2005), General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, para. 61; Council of Europe, Parliamentary Assembly, Resolution 2020 (2014) on the alternatives to immigration detention of children, para. 9 (1) and Recommendation 2056 (2014) on the alternatives to immigration detention of children, para. 2.

[59] See FRA (2014), *Fundamental rights at airports: border checks at five international airports in the European Union*, Luxembourg, Publications Office; FRA (2014), *Fundamental rights at land borders: findings from*

Safeguards to reduce the risk of arbitrary deprivation of liberty for asylum applicants in general and for children in particular are included in Articles 8 to 11 of the Reception Conditions Directive. However, current research carried out by FRA on children in immigration detention indicates that in some Member States the practice of detaining children in asylum-related or return-related procedures is not uncommon.[60]

FRA opinion

In light of Article 6 on the right to liberty and security of the Charter, appropriate safeguards should be envisaged to address the risk of arbitrary detention of children whose applications are processed at borders which an EU common list of safe countries of origin increases.

selected European Union border crossing points, Luxembourg, Publications Office; FRA (2013), *Fundamental rights at Europe's southern sea borders*, Luxembourg, Publications Office.

[60] For migration detention of children, see the FRA project: http://fra.europa.eu/en/project/2016/migration-detention-children.

Concluding remarks

Designation of safe countries of origin can be a legitimate instrument to facilitate the processing of applications from persons whose claims for international protection are likely to be unfounded. Dealing with these claims in an effective manner can have a positive fundamental rights impact by allowing national asylum systems to focus on other persons whose applications are more likely to be well founded, thereby contributing to the reduction of processing times (where applicants remain in a limbo situation) for all applicants for international protection. An EU common list of safe countries of origin would, however, need to be accompanied by sufficient safeguards ensuring, in particular, that it is not to the detriment of fundamental rights of persons in genuine need of international protection originating from the countries in question.

Should the EU establish its own list of safe countries of origin, safeguards would need to be integrated at multiple levels. At the EU level, there must be a flexible review of the list of safe countries of origin ensuring that countries which can no longer be considered safe are promptly removed from the list. Furthermore, it should be considered to introduce additional safeguards concerning issues addressed in the Asylum Procedures Directive. Accompanying general safeguards, such as an automatic suspensive effect to appeals, with those specifically aiming at protecting vulnerable groups, notably certain minority groups at risk or children, would provide additional protection to persons who are at a specific risk of being unduly affected by the establishment of an EU common list of safe countries of origin. This is even more important given the critical views international monitoring bodies expressed regarding some of the countries suggested for this list.

Practical application of the necessary safeguards can only be ensured by fundamental rights-compliant implementation of the legislation at national level. Training of staff, availability of information, interpretation and legal representation are required to apply in practice the right to be heard and the need for an individual assessment of each applicant. Absence of such guarantees would give rise to an unacceptable risk of *refoulement*.

Finally, practical experience shows that, taken alone, the use of safe countries of origin is not necessarily a formula for ensuring swift examination of unfounded asylum claims. It is rather together with other practical measures at EU and national level – including additional staffing, provision of adequate legal advice to support swifter procedures, coordination of actions between different state entities – that backlogs of asylum applications can be addressed or prevented. This is particularly important taking into account the current need to identify and expeditiously implement measures that are legally sustainable.