

DEBUNKING THE “SAFE THIRD COUNTRY” MYTH

ECRE’S CONCERNS ABOUT EU PROPOSALS FOR EXPANDED USE OF THE SAFE THIRD COUNTRY CONCEPT

I. INTRODUCTION

The EU institutions are discussing the definition of the safe third country concept, which has been part of EU asylum law since the adoption of the 2005 Asylum Procedures Directive and features prominently in the European Commission’s (EC’s) proposals for the reform of the asylum *acquis*. Instigated by the European Council’s call for an alignment of the concept “with the effective requirements arising from the Geneva Convention and EU primary law, while respecting the competences of the EU and the Member States under the Treaties”, some EU Member States (EUMS) have floated far-reaching proposals to lower the currently applicable standards, going below the already questionable proposals submitted by the EC.

Current debates epitomise EUMS’ insistence on concepts that undermine access to protection in the EU within an overall strategy of containment of refugees in other regions. The safe third country concept is seen as the ‘silver bullet’ that will reduce pressure on EUMS’ asylum systems by deterring applicants and allowing for expedited examination and then deflection of asylum claims.

ECRE warns against the erosion of key principles underlying the international protection regime through the mandatory application of an unduly broad or even flexible definition of the safe third country concept in contrast to existing higher standards applicable in a number of EU Member States. Such an approach will limit refugees’ effective access to international protection in the EU. It will also undermine global efforts to increase solidarity in refugee protection and has major political implications for the EU’s relations with other countries.

II. ANALYSIS

The safe third country concept operates on the basis that an applicant for international protection could have obtained it in another country and therefore the receiving State is entitled to reject responsibility for the protection claim. As is the case for the “first country of asylum” concept, which covers refugees who have already obtained and can again avail themselves of protection in a third country, the safe third country concept is in most cases applied as a ground for declaring an application inadmissible and barring applicants from a full examination of the merits of their claim.

MANDATORY APPLICATION AND THE REFUGEE CONVENTION

A key feature of the EC proposal for an Asylum Procedures Regulation (APR) is the mandatory application of the safe third country (and first country of asylum) concept, with the stated aim of achieving a higher level of harmonisation. Such an approach is highly questionable since the concept has no clear legal basis in international refugee and human rights law. In fact, it is largely based on a flawed interpretation of the 1951 Refugee Convention as not allowing any choice for the refugee with regard to the State of refuge but requiring the refugee to request such protection at the earliest opportunity. However, whereas the Convention does not provide for an unfettered right to refugees to choose their host state, no obligation to apply in the first country reached after fleeing their country of origin can be derived from international refugee law either. According to UNHCR, the primary responsibility to provide protection rests with the State where asylum is sought. UNHCR EXCOM Conclusion No 15 (XXX) calls on States to take asylum seekers' intentions as to the country in which they wish to request asylum "as far as possible into account", while "regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State".

Mandatory application of the safe third country concept also contrasts sharply with EU commitments at the global level. In September 2016, EUMS committed in the New York Declaration to "a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States". Under the pretext of bringing EU asylum law in line with the Geneva Convention, systematic application of the safe third country concept would seriously undermine this commitment with major implications for the global protection regime. It may encourage third countries, including the major refugee-hosting countries, to follow Europe and adopt the concept or other measures to limit access to protection on their territories. Thus, protection space will shrink globally at a time when forced displacement is at record levels. Given its contested legal basis and political implications, at most the safe third country concept should be an optional tool for use in prescribed circumstances with sufficient safeguards in place.

REQUIREMENTS OF SAFETY UNDER EU LAW CONTESTED

Article 38(1) of the recast Asylum Procedures Directive (rAPD) lists five criteria for a country to be considered a safe third country, which include the possibility for the applicant to request refugee status and, if found to be a refugee, to receive protection "in accordance with the Geneva Convention". An assessment must be made as to the reasonableness of requiring the applicant to apply for international protection in the safe third country, through the existence of a connection to that country; the presumption of safety must be rebuttable and applied on a case-by-case basis; and the presumption of safety of the country for an individual applicant as well as his or her connection with such country must be challengeable. Both the requisite level of protection in the third country and the reasonableness requirement are eroded in the APR proposal and in Council debates.

Ambiguous standards of safety in the EC APR proposal and detrimental Council debates

Beyond its mandatory application, the Commission proposal amends the current EU law standards in two ways. First, while maintaining the first four criteria in Article 38(1) rAPD, protection "in accordance with the Geneva Convention" is replaced with "protection in accordance with the substantive standards of the Geneva Convention or sufficient protection as referred to in Article 44(2), as appropriate".

Construed to be in line with the current legal framework in Turkey, the only country applying a geographical limitation to the Refugee Convention, the wording is problematic. The distinction between substantive and "non-substantive" standards has no basis in the Convention and suggests that it could be applied by states on a "pick-and-choose" basis, i.e. that, beyond reservations allowed under the Convention, states may disregard some of its provisions. The proposed wording is also incompatible with the requirement in Article 78(1) of the Treaty on the Functioning of the EU (TFEU) for the EU's common policy on asylum to 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". Adopting the proposed wording in EU law would undermine the EU Treaty itself and its commitment to "the strict observance and the development of international law".

The inclusion of "sufficient protection" as an alternative benchmark to the Refugee Convention potentially widens the scope of application of the safe third country concept under EU law. The notion of "sufficient protection" is now more precisely defined in the proposal to include, beyond compliance with the principle of *non refoulement*, the right to legal residence, appropriate access to the labour market, reception facilities, healthcare and education and the right to family reunification. First, substituting protection in accordance with the Refugee Convention with "sufficient protection" undermines the EU's commitment to the Convention and its authority as the cornerstone of the global protection regime as it would allow Member States to transfer responsibility to countries offering a

lower standard of protection than required under the Convention. Second, compliance with such standards and effective access to such rights would be difficult to assess. Third, under EU law, subsidiary protection grounds are examined and subsidiary protection status granted, only after it is established that the applicant is not eligible for refugee status. If the safe third country does not apply such a hierarchy, the application of the concept could result in deflecting applicants who would have been entitled to refugee status in the EU to states where they only receive “sufficient protection”, a lower and generally more precarious protection status.

Furthermore, the Commission proposal assumes that the sufficient connection requirement is fulfilled once an applicant has transited through a third country which is geographically close to the country of origin. This is against UNHCR’s authoritative guidance (and practice in several EUMS), which considers that mere transit or entitlement to entry without actual presence do not constitute a sufficiently meaningful link - transit is often the result of fortuitous circumstances and does not necessarily imply the existence of a meaningful connection.

Despite the potential for increased and systematic use of the safe third country concept as a tool to deflect protection responsibility, for some EUMS the EC proposals do not go far enough. Far-reaching ideas to “redefine” the safe third country concept have been launched at Council level, with the aim of “enhancing cooperation with third countries and preventing new crises” as per the European Council Conclusions of June 2017.

One of the proposed changes is the deletion of any connection requirement between the applicant and the safe third country on the basis that it is not strictly speaking required under international law. This disregards international agreements such as the 1996 Hague Convention on Measures for the Protection of Children, where connection is used as a concept triggering protection obligations. According to Article 8 of that Convention, a State where a child is present may request another State to assume jurisdiction and take protection measures on the basis of the existence of a “substantial connection” between the child and the requested State. Some EUMS unsurprisingly rally behind proposals to strip to the bare minimum the definition of sufficient protection in the EC proposal by deleting from it references to access to the labour market, the right to family reunification or even access to legal residence. Other ways to expand the scope of the concept are being discussed, such as its application only to “certain zones” of the country concerned (analogous to the internal protection alternative) and its “adaptability” in situations where large numbers of applicants are arriving.

APPLYING THE SAFE THIRD COUNTRY CONCEPT IN PRACTICE: A REALITY CHECK

Proponents of applying the safe third country concept in more situations assume it will allow for more efficient decision making. However, such an assumption seems misguided in light of national practice and jurisprudence in European States setting higher protection standards than those currently required or proposed under EU law, and of human rights obligations embodied in EU law. Recent practice in Greece and Hungary shows that any efficiency gains inevitably imply serious human rights violations.

Requisite level of protection and connection criteria

Asylum authorities and courts in countries including Switzerland do not accept that applicants can find actual protection in Turkey as the Refugee Convention is only applied to European refugees there. The UK High Court concluded in a case concerning a Dublin transfer to Hungary that Turkey is to be considered an unsafe country because it retains its geographical limitation to the Convention and provides a status short of refugee status to non-European refugees.

On the sufficient connection requirement, courts in Austria, the Netherlands, Bulgaria and Greece (including after a Council of State ruling which recognised the status of Turkey as a safe third country) for instance, have ruled that mere transit does not constitute a sufficient connection, but require stronger links such as presence of family members with which the applicant still has contact, or prolonged stay or residence.

Proposals to simply delete the sufficient connection requirement as part of the EU law definition of safe third country too easily ignore the importance of existing ties with a particular country for a person’s successful integration and risk generating further onward movement, including to other EUMS. Moreover, they assume that third countries are willing to accept those rejected in the EU. Poor implementation of readmission and other migration agreements with third countries suggest this is wishful thinking for the majority of countries even with resort to considerable and morally questionable financial and political compensation.

Level of scrutiny required under Strasbourg jurisprudence and need for individual assessment

Assessment by asylum authorities of compliance by the safe third country with the criteria set in EU law is already challenging. The implementation of the EU-Turkey Statement has shown important gaps in monitoring the fate

of those returned to Turkey and in the collection and production of up-to-date information on the conditions for applicants in general. Reliance on general “assurances” obtained by EU institutions from the government of the third country or international organisations to justify application of the safe third country or first country of asylum concept raise serious questions of procedural fairness and compliance with the level of scrutiny of country information required by the European Court of Human Rights (ECtHR). ECtHR case law envisages the same standard of risk assessment for cases of return to third countries as for return to the country of origin. For both, rigorous scrutiny of conditions and actual treatment of applicants is required. Beyond an individualised assessment of whether the country can be considered safe for a particular asylum seeker, this places an obligation on asylum authorities to take into account international organisations' and NGOs' reports and the extent to which such organisations are able to carry out independent human rights monitoring in the country. The ECtHR has clearly rejected inclusion in a list of safe third countries as sufficient evidence for considering a country as safe for a specific applicant. It also consistently highlights States' obligations to proactively assess the risk of violations of Article 3 ECHR of their own motion, including when applying presumptions of safety elsewhere.

Faithful application of procedural standards under the EU asylum *acquis* and human rights law implies onerous obligations on national asylum authorities and courts to verify actual treatment of applicants, effective possibilities to rebut the presumption of safety in the applicant's individual circumstances, and access to an effective remedy. Recent experience in Greece shows that systematic application of the safe third country concept in truncated border procedures does not result in more efficient or shorter procedures and increases the risk of serious human rights violations, including refoulement. Similar practice in Hungary has already been judged unlawful by the ECtHR in the case of *Ilias and Ahmed v. Hungary*.

UNDERMINING THE EU'S CREDIBILITY AND INFLUENCE IN EXTERNAL RELATIONS

The Treaty on European Union (TEU) states the objectives of EU external action as promotion of human rights, democracy, sustainable development and conflict prevention. In both senses of the EU's normative power, i.e. as a positive role model and as a promoter of values in its external policies, the EU's identity, credibility and ability to influence will be undermined by the proposals. The expanded use of the safe third country concept would constitute another intrusion of narrowly conceived domestic policy priorities into EU external affairs, undermining efforts to build comprehensive and value-based external policies. Offering funding in exchange for “safe third countries” taking more responsibility places powers in the hands of countries which can hold the EU to ransom by cooperating or not. While it may suit some EUMS for the EU's external relations to be confined to migration control, it would certainly disrupt the EU's development as a credible diplomatic and political power.

III. RECOMMENDATIONS

As the Council and the European Parliament discuss their respective negotiating positions on the APR proposal, ECRE calls on EU institutions to refrain from expanding the scope of the safe third country concept beyond its definition in the rAPD. An accurate interpretation of States' obligations under international refugee and human rights law, efficiency considerations, and commitments on global responsibility-sharing all militate against codifying an unduly broad safe third country concept in EU asylum legislation. ECRE urges EU co-legislators and Member States to:

- » Maintain the safe third country (and first country of asylum) concept as optional concepts under EU asylum law
- » Clarify ratification and application in practice of the Refugee Convention without geographical limitation as the requisite level of protection for designation of a “safe” country. The concept of sufficient protection should be deleted as an insufficient legal basis to deflect protection responsibilities under the safe third country (and first country of asylum) concept
- » Reject mere transit as constituting a meaningful connection with the safe third country concerned and reject proposed definitions that dispense with the connection requirement
- » Oppose the application of the safe third country concept to certain zones of a State's territory
- » Ensure an effective opportunity for each applicant to rebut the safety of a third country in their individual circumstances, including through access to free legal assistance and representation and access to an effective remedy with automatic suspensive effect
- » Reject the adoption of safe third country lists both at national and European level as jeopardising thorough individual assessment of safety presumptions.

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