The Law and Practice on Safe Country Principles Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure

FINAL REPORT

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METHODOLOGY

The Commission of the European Communities (the Commission) presented a proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status in 2000 (COM/2000/0578 final). In the Explanatory Memorandum to the first proposal the Commission stated that diverging interpretation of the “safe country of origin” and the “safe third country” principles were an incentive to secondary movement between Member States. However, the approach taken was to allow Member States to decide whether or not to adopt the notion of safe country of origin or safe third country. If they decide to adopt or maintain national rules on these notions, their implementation will have to abide by the minimum standards set out by the Directive. Articles 18 (1) (c), 22, 23 and Annex I of the proposed Directive described the notion of third safe country and contained the minimum procedural safeguards applicable to the inadmissibility procedure. The application of the notion of safe third country to a particular applicant was ground to reject the application as inadmissible. Articles 28 (1) (e), 30, 31 and Annex 2 to the Directive set out the notion of safe country of origin. The application of this notion to a particular applicant may provide a ground to dismiss the application as manifestly unfounded.

In the amended proposal (COM(2002) 326 final/2) the accelerated procedure under Article 23 applies to both cases of inadmissibility of safe third country grounds and cases of applications declared manifestly unfounded on grounds of safe country of origin. It is noteworthy that Article 27 (3) of the amended proposal requires Member States to “give specific grounds for the designation of countries as safe third countries and for any subsequent exclusion or addition of such a country”. The 2000 proposal did not contain an equivalent provision. Article 28 of the amended proposal provides that an application may be rejected on “safe third country” grounds even though the applicant did not previously enter the third country. However, it is still necessary that the applicant had the opportunity to avail himself of the protection of the authorities of the third country. This opportunity may have arisen irrespective of the applicant having stayed in that country, e.g. in the case of transit. Both under the original proposal and the amended proposal the application of the “safe country of origin” principle is grounds for rejecting the application as manifestly unfounded. Article 30 (1) (3) of the amended proposal provides that Member states shall give specific reasons for the designation of countries as safe country of origin and for any subsequent exclusion or addition of a country as a safe country of origin.

Annex I to the Directive lays down the requirements for designation of a country as a safe third country. The amended proposal differs slightly from the original proposal. In the former it is required that applicants “are not denied the opportunity” to communicate with the UNHCR, whilst the latter provided that the applicant should be given the opportunity to communicate with the UNHCR. The role of the “organisations working on behalf of the UNHCR” is clarified in the amended proposal in that such organisations are those working in the third country on behalf of the UNHCR “pursuant to an agreement with this country”. Such a requirement was absent in the original proposal. Finally, the amended proposal makes it clear that if a decision is taken in an individual case that a country is safe, the general assessment as described in part II of the Annex I is not longer required.

Part II of the Annex I stipulates:

“Every general assessment of the observance of these standard for the purpose of designating a country as a safe third country in general or with respect to certain foreign nationals or stateless persons in particular must be based on a range of sources of information, which may include reports form diplomatic missions, international and non-governmental organisations and press reports. Member States may in particular take into consideration information from the UNHCR.

The report of the general assessment shall be in the public domain.”

Austria made a proposal for a Council Regulation establishing the criteria for determining the States which qualify as safe third States for the purpose of taking the responsibility for examining an application for asylum lodged in a Member State by a third country national and
drawing up a list of European safe third States. The Austrian proposal takes a different approach to the safe third country principle. It contains a European list of safe countries binding throughout the Community and monitored by the Commission according to the criteria set out in Article 1.\(^1\)

Against this background, the problem of the safe country principle must be understood (a) in the context of the policy towards the establishment of a Common European Asylum System in the light of the conclusions of the European Council at Tampere, Laeken and Seville; and (b) in its interactions with international standards, especially those laid down in the Geneva Convention relating to the Status of Refugees and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The following report describes and analyses the law and practice on safe country of origin and safe third country in Austria, Finland, the Netherlands, Germany, Sweden and the United Kingdom. In addition, the study has identified aspects of the law and practice in Denmark, France and Ireland insofar as they are of interest in light of the common standards in the amended proposal for a Council Directive. Annex 1 to the report describes the Spanish position and this information has been gathered with the assistance of the European Commission. Where indicated, the Spanish report contains additional information that has been gathered solely under the responsibility of the British Institute of International and Comparative Law and which has not been subject to verification by or consultation with the Spanish Ministry of the Interior.

The national reports have been compiled according to the methodology set out in the technical annex to the contract and in the methodology contained in the tender which was approved by the Commission and further discussed at the meeting on 17 December 2002. This methodology is reproduced below. The national reports have been written by:

<table>
<thead>
<tr>
<th>Country</th>
<th>Author</th>
<th>Reviewer</th>
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<tbody>
<tr>
<td>Austria</td>
<td>Till Proemmel, British Institute of International and Comparative Law</td>
<td>Professor Ulrike Brandl, University of Salzburg</td>
</tr>
<tr>
<td>Finland</td>
<td>Sari Sirva, Refugee Advice Centre</td>
<td>Professor Scheinin, Institute for Human Rights, Abo Akademi University;</td>
</tr>
<tr>
<td>Germany</td>
<td>Till Proemmel, British Institute of International and Comparative Law</td>
<td>Richter Wolfgang Bartsch, VG Braunschweig</td>
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<tr>
<td>The Netherlands</td>
<td>Gerrie Lodder, University of Leiden</td>
<td>Bertil Niehoff, Ministry of Justice</td>
</tr>
<tr>
<td>Sweden</td>
<td>Goran Larsson, Swedish Migration Board, Legal Practice Division</td>
<td>British Institute of International and Comparative Law</td>
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<tr>
<td>United Kingdom</td>
<td>David Spivack, British Institute of International and Comparative Law</td>
<td>Nicola Rogers, Barrister</td>
</tr>
<tr>
<td>Denmark</td>
<td>Nina Lassen, Danish Refugee Council</td>
<td>British Institute of International and Comparative Law</td>
</tr>
<tr>
<td>France</td>
<td>Alexandre Garcia, Ministry of Foreign Affairs</td>
<td>British Institute of International and Comparative Law</td>
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<tr>
<td>Ireland</td>
<td>Cabrini Gibbons, Irish Refugee Council</td>
<td>British Institute of International and Comparative Law</td>
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<tr>
<td>Spain</td>
<td>Spanish Ministry of the Interior</td>
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\(^1\) See OJ C17/6, 24.1.2003 for Austria’s proposal
Following completion, the national reports have been sent to the national authorities indicated in the list handed over by the Commission at the meeting on 17 December 2002. In particular:

<table>
<thead>
<tr>
<th>Country</th>
<th>National Authority</th>
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<tbody>
<tr>
<td>Austria</td>
<td>Mrs. Ulrike Wintersberger, Deputy Chairwoman of the Independent Federal Asylum Review Board</td>
</tr>
</tbody>
</table>
| Finland         | Jutta Gras  
Immigration Department  
Ministry of the Interior |
| Germany         | Richter Wolfgang Bartsch, VG Braunschweig                                          |
| The Netherlands | Bertil Niehoff, Ministry of Justice                                                |
| Sweden          | Goran Larsson, Swedish Migration Board, Legal Practice Division;  
Judge Carl-Otto Schele, Swedish Aliens Appeals Board                                |
| The United Kingdom | Kerry Giles, European Asylum Policy Unit, Immigration and Nationality Directorate (IND);  
Elaine Dainty, Country and Information Policy Unit, IND;  
Appeals and Judicial Review Unit, IND;  
Third Country Unit, IND |
| Denmark         | N/A                                                                                 |
| Ireland         | N/A                                                                                 |
| Spain           | Spanish Ministry of the Interior                                                   |

In addition, contact has been made Mr Johannes van der Klaauw at the UNHCR, and with representatives from The Refugee Council and the Danish Refugee Council. Account has also been taken of UNHCR consultation papers and guidelines wherever appropriate.
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<tr>
<th>No.</th>
<th>Question</th>
<th>Scope of Question</th>
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<tbody>
<tr>
<td>1</td>
<td>What are the requirements for designating third countries/countries of origin as safe countries and how have they been interpreted in case law and practice?</td>
<td><strong>Third countries</strong>&lt;br&gt;What are the criteria for designating a third country as safe? If the country does not adopt the safe third country principle, have administrative practice and the courts adopted a consistent approach to the problem?&lt;br&gt;What international standards, both customary and treaty law based, are taken into account in order to consider a third country as safe (e.g., the 1951 Geneva Convention, the European Human Rights Convention, the 1996 Covenant on Civil and Political Rights, the 1984 Convention against torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, and others)? Please specify the international standards taken into account and whether they are taken into account cumulatively or alternatively. Please specify how “agents of persecution” are defined.&lt;br&gt;What evidence is required in order for the third country to be considered “safe”? Please specify the kind of evidence taken into account (e.g., Reports of the UNHCR and other international organisations, reports and/or other documentation or oral evidence from NGOs, cases decided by international courts or tribunals, press reports, evidence acquired through diplomatic missions or diplomatic channels). Please specify whether a rule on the best evidence exists, e.g., whether some kinds of evidence have more weight than others, whether recourse to certain kinds of evidence is permissible only if better evidence is not available (e.g., reports from NGOs used only if the UNHCR unable to provide information).&lt;br&gt;<strong>Countries of origin</strong>&lt;br&gt;What are the criteria for designating a country of origin as safe? If the country does not adopt the safe country of origin principle, have administrative practice and the courts adopted a consistent approach to the problem?&lt;br&gt;What international standards, both customary and treaty law based, are taken into account in order to consider a country of origin as safe (e.g., the 1951 Geneva Convention, the European Human Rights Convention, the 1996 Covenant on Civil and Political Rights, the 1984 Convention against torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, and others)? Please specify the international standards taken into account and whether they are taken into account cumulatively or alternatively. Please specify how “agents of persecution” are defined.&lt;br&gt;What evidence is required in order for the country of origin to be considered “safe”? Please specify the kind of evidence taken into account (e.g., Reports of the UNHCR and other international organisations, reports and/or other documentation or oral evidence from NGOs, cases decided by international courts or tribunals, press reports, evidence acquired through diplomatic missions or diplomatic channels).</td>
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<td>2 Are safe countries designated by way of lists or individual decisions?</td>
<td>Third countries</td>
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<td>If the safe third countries are designated by way of lists, are such lists set out by law, by regulation or otherwise (eg by circular, etc.)? How do the different instruments for designating the country as safe determine the applicant’s ability to challenge that designation? If the safe countries are identified in individual decisions, to what extent is the designation of a third country as safe subject to review by higher administrative authorities and/or courts?</td>
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<td></td>
<td>If the safe third countries are designated in a list, are there ways to challenge the inclusion of a particular country in the list?</td>
<td>Does the inclusion of a country in a list allow for consideration of the safety of the country in relation to the particular applicant? Specify whether the inclusion of a country in the list constitutes a rebuttable presumption that the country is safe rather than a non-rebuttable presumption.</td>
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<tr>
<td></td>
<td>Countries of origin</td>
<td>If the safe countries of origin are designated by way of lists, are such lists set out by law, by regulation or otherwise (eg by circular, etc.)? How do the different instruments for designating the country as safe determine the applicant’s ability to challenge that designation? If the safe countries are identified in individual decisions, to what extent is the designation of a country as safe subject to review by higher administrative authorities and/or courts?</td>
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<td>3 What countries are considered as safe third countries and/or safe countries of origin according to the law in force?</td>
<td>Third countries</td>
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<tr>
<td></td>
<td>Please list those third countries considered as safe. Are there in place any mechanisms to exchange information with other Member States as to the third countries that are on the list?</td>
<td>Have there been major changes in the list since the list has been adopted? If so please explain the reasons for this and if not please also explain the reasons.</td>
</tr>
<tr>
<td></td>
<td>Have there been major changes in the list since the list has been adopted? If so please explain the reasons for this and if not please also explain the reasons. Please specify the basis on which regions are deemed safe which lie within third countries otherwise designated as unsafe.</td>
<td>Countries of origin</td>
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<tr>
<td></td>
<td>Countries of origin</td>
<td>Please list those countries of origin considered as safe.</td>
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<tr>
<th>Question</th>
<th>Third countries</th>
<th>Countries of origin</th>
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<tr>
<td>Are there in place any mechanisms to exchange information with other Member States as to the countries of origin that are on the list?</td>
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<td>Please specify the basis on which regions are deemed safe which lie within countries of origin otherwise designated as unsafe.</td>
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<td><strong>4</strong> What mechanisms exist to examine the situation in the countries in question and regularly review the legitimacy of the designation?</td>
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<tr>
<td>Third countries</td>
<td>Are there periodic review mechanisms? If so, please describe how these mechanisms work. If there is no periodic review, what other means are there of reviewing the list in question? What new evidence is required for a country that is on the list to be taken off the list?</td>
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<tr>
<td><strong>5</strong> For the purpose of reviewing the designation, what mechanisms exist to examine the situation of returnees in the countries in question <em>in situ</em>?</td>
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<tr>
<td>Third countries</td>
<td>If such mechanisms exist, please describe them. If such mechanisms do not exist, please describe what alternative mechanisms are in place to review the factual situation in the countries in question.</td>
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<td>Countries of origin</td>
<td>If such mechanisms exist, please describe them. If such mechanisms do not exist, please describe what alternative mechanisms are in place to review the factual situation in the countries in question.</td>
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<tr>
<td><strong>6</strong> What are the conditions for applying the notions to individual applicants according to the law in force e.g. with respect to safe third country: the period/nature of stay in the third country, the cooperation with the authorities of the third country with a view to admission</td>
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<tr>
<td>Third countries</td>
<td>What are the conditions for applying the notion of safe third country to the applicant? Please specify whether these conditions are set out by law, by regulations and/or by case law.</td>
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<td>To what extent are the circumstances of each particular case taken into account if the Member State operates a list-based system?</td>
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<td>What link is required between the applicant and the third country (eg members of the family in the country, a stay in that country, opportunity to avail himself of the international protection of refugee in that country or other)?</td>
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<td>Are the chances of readmission to the third country taken into account? If so, on what basis and based on what evidence? Is there any cooperation and/or communication with the authorities of the third country when seeking to return the rejected asylum seeker, in particular to ensure that the applicant is not subject to “persecution” <em>in situ</em>? Please specify any other verification mechanisms/procedures in place.</td>
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<td>Countries of origin</td>
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<td>7</td>
<td>How is the decision to apply these notions embedded in the asylum process (nature of the examination and the authorities involved, relationship to other mechanisms to reject responsibility for the application)?</td>
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<tr>
<td>Third countries</td>
<td>What authority makes the decision on the application of the safe third country principle in the first instance?</td>
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<td>Are the administrative authorities mandated to deal with applications provided with adequate legal training and with specific skills pertaining to unaccompanied minors and other vulnerable groups?</td>
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<td></td>
<td>What is the nature of the examination of the facts in the process leading to a decision on the application of the safe third country principle (e.g., does this examination consider documents, witness statements or is it a more superficial consideration of evidence that takes place)? Is there an accelerated procedure and, if so, how does it differ from the ordinary procedure? What procedural safeguards are applicable in these procedures? To what extent do the procedural safeguards differ from other procedures?</td>
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<td>Countries of origin</td>
<td>Is the decision on the application of the safe third country principle a decision on admissibility or on the merits? What practical consequences does this distinction have?</td>
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<td>What authority makes the decision on the application of the safe country of origin principle in the first instance?</td>
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<td>8</td>
<td><strong>What are the procedural consequences of the decision, for instance for the right to appeal and the right to request leave to remain pending appeal?</strong></td>
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<td>Third countries</td>
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<td>What review procedures (appeals, judicial review or others) are available against the decision? How do they differ from the applications that can be made against decisions taken on grounds other than safe third country principle? Please specify whether there are accelerated procedures.</td>
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<td>Is the applicant allowed to stay in the country after a first instance decision on the application of the safe third country principle? If so, are there specific legal requirements (eg. leave granted by the competent authority)? Does the legal position differ from the rejection of the application in the first instance on grounds other than the application of the safe third country principle?</td>
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<td>Please specify where there is a right to appeal from abroad (as is the case for example in the UK) whether there are any specific problems (eg evidence gathering, the risk of summary detention, absence of access to justice).</td>
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<td>Countries of origin</td>
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<td>What review procedures (appeals, judicial review or others) are available against the decision? How do they differ from the applications that can be made against decisions taken on grounds other than the safe country of origin principle? Please specify whether there are accelerated procedures.</td>
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<td></td>
<td>Is the applicant allowed to stay in the country after a first instance decision on the application of the safe country of origin principle? If so, are there specific legal requirements (eg. leave granted by the competent authority)? Does the legal position differ from the rejection of the application in the first instance on grounds other than the application of the safe country of origin principle?</td>
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<td>9</td>
<td><strong>Further comments</strong></td>
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<td>Third countries</td>
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<td>On the basis of academic, parliamentary, and judicial opinion in your country, please give an assessment of the safe third country principle according to the following parameters:</td>
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<td></td>
<td>Efficiency: Is the safe third country process efficient in dealing with asylum applications that currently cause a backlog in the system? Please consider, (a) the time for processing applications decided on safe third country principle grounds, and (b) the number of applications decided on safe third country principle grounds as compared to the total number of asylum applications for your Member State.</td>
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<td></td>
<td>Fairness: Are the procedures for determination fair? Does the efficiency of the legal process compromise the basic procedural rights of the applicants? Please assess fairness on the basis of international standards, in particular, Articles 13 and 16 of the European Convention on Human Rights, the Constitution of your Member State and the Charter of Fundamental Rights of the European Union.</td>
<td></td>
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</tbody>
</table>
Effectiveness: Is your Member State able to meet the needs it purports to address through application of the safe third country principle? How does your Member State ensure that only legitimate applications are considered?

Safe countries of origin
On the basis of academic, parliamentary, and judicial opinion in your country, please give an assessment of the safe country of origin principle according to the following parameters:

Efficiency: Is the safe country of origin process efficient in dealing with asylum applications that currently cause a backlog in the system? Please consider, (a) the time for processing applications decided on safe country of origin principle grounds, and (b) the number of applications decided on safe country of origin principle grounds as compared to the total number of asylum applications for your Member State.

Fairness: Are the procedures for determination fair? Does the efficiency of the legal process compromise the basic procedural rights of the applicants? Please assess fairness on the basis of international standards, in particular, Articles 13 and 16 of the European Convention on Human Rights, the Constitution of your Member State and the Charter of Fundamental Rights of the European Union.

Effectiveness: Is your Member State able to meet the needs it purports to address through application of the safe country of origin principle? How does your Member State ensure that only legitimate applications are considered?
AUSTRIA

Definitions

“AsylG” means the Federal Act on Granting of Asylum (“Bundesgesetz über die Gewährung von Asyl (Asylgesetz – AsylG)” Asylgesetz) of 14th July 1997. It is the main instrument regulating the granting of asylum, and all citations in this report refer to that Act unless indicated otherwise. The Act was implemented by the “Verordnung des Bundesministers für Inneres zur Durchführung des Asylgesetzes (Asylgesetz- Durchführungsverordnung – AsylG-DV” (Federal Minister of the Interior’s Decree Concerning the Enforcement of the Asylum Act) of 30th December 1997.

“AVG” means the Administrative Procedures Act (Allgemeines Verwaltungsverfahrensgesetz) 1991

“BAA” means the Federal Asylum Authority (Bundesasylamt)

“FrG” means the Aliens Act (Fremdengesetz) of 2002. This is the federal act concerning entry, stay and residence of foreigners. The “Verordnung des Bundesministers für Inneres zur Durchführung des Fremdengesetzes (Fremdengesetz-Durchführungsverordnung – FrG-DV) (Aliens Act Enforcement Decree by the Federal Minister of the Interior) of 19th December 1997 was passed to enforce the Aliens Act.


“UBAS” means the Independent Federal Asylum Review Board (Unabhängiger Bundesasylsenat).

“UVS” means the Administrative Court (Unabhängiger Verwaltungssenat)

“VwGH” means the Administrative Court of Justice (Verwaltungsgerichtshof)

“VfGH” means the Constitutional Court (Verfassungsgerichtshof)

Question 1

(a) Third Countries

(i) The notion of safety

A country is safe where the applicant is protected from persecution, § 4 (1) AsylG. The wording (“is able to find protection”) implies that the actual present availability of protection (instead of any previous opportunity while transiting) is required. This would normally only be the case where the applicant is allowed to (re-) enter the safe country which practically necessitates the existence of a readmission agreement (Schubabkommen) with the country in question.2

The required protection is granted, where (§ 4 (2)):

There is no threat as laid down in § 57 (1), (2) FrG, i.e. to life, of torture, of the death penalty or of persecution on account of race, religion, nationality, membership of a particular group or political opinion (infringement of art. 2 or 3 ECHR, Protocol No. 6 of the Convention on the Abolition of the Death Penalty, or of art. 33 (1) of the Geneva Convention)

And either:

a procedure for the assessment of the status of a refugee under the Geneva Convention must be provided (or such a procedure implementing the Geneva Convention has already been concluded)

or:

it is ensured that such a procedure is provided by another country if the third country is likely to apply its own safe country principle, passing the applicant on. It is argued that it could be deduced from §4(3)3 (“EU-reservation”) that the procedure in which the application is finally assessed on its merits must not fall below the level set by the “EU asylum-aquis”. The latter contains the 1995 Council Resolution on Minimum Standards in asylum procedures and lists a personal hearing, the right of appeal and a reasonable period of time to exercise that right (3-7 days³). Where an asylum procedure on the merits has already been concluded (asylum barred by means of res iudicata), it is argued that that procedure must have fulfilled the requirements laid down for a procedure to come. This is to avoid contradictions;⁴

Additionally;

there must be a temporary right to remain and a protection from expulsion equivalent to § 57 FrG (above) whilst the procedure is being exercised. Where the hearing on the merits is finally conducted in another (fourth or further) country it was held to be sufficient that such a right be derived from a provisional court order which will “normally” be granted in such cases⁵.

Finally, § 4 (3) AsylG contains a rebuttable presumption according to which the requirements set out above are generally met where the country in question has ratified the Geneva Convention, has established procedures implementing the Convention’s basic principles and has ratified the ECHR. The VwGH expressed the view that the presumption only refers to the effectiveness of the legislation and its enforcement with regard to the implementation of the Conventions.⁶ Thus, subsection (3) does not declare the country to be safe unless facts indicate otherwise. It simply states that in situations where the conventions are ratified, and a procedure safeguarding Geneva standards is established, the authority may presume the rules of these Conventions to be effectively implemented. As a result, the BAA is generally relieved from individually investigating whether authorities of the third (or further) country actually observe the principles laid down in the convention. This presumption is rebuttable on the basis both of concrete and specified claims of individuals and official knowledge on the part of authorities⁷. It is reported however, that this presumption under subsection 3 was never practised and a full evaluation was carried out in each case.⁸

Apart from these safety criteria, § 4 (3) AsylG states that circumstances which comply with an act of the Council of the European Union do not constitute a lack of safety. Although the meaning of this provision has not been entirely clarified yet, it obviously aims at incorporating EU asylum standards into the domestic regime (e.g. those set by the 1992 London Resolutions) so that the level of asylum rights will, in regard to safe country cases, not be higher than required by standards set on EU-level. In an order dated 13 March 2003,⁹ the ViGH accepted a submission for alleged unconstitutionality (infringement of the principle of legality) of this § 4 (3) 2 AsylG on the grounds that the wording was uncertain (leaving it especially unclear what part of EU legislation would have to be considered as relevant in this context; especially doubted for the 1992 London Resolutions). Further, that the section was an unconstitutional “dynamic cross-reference” - incorporating the law of a foreign legislator in its current form, in contrast to an unchangeable piece of legislation. A final assessment can be expected in June 2003.

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³ VfGH 24.6.1998, G 31/98 (VfG Slg15369); VfGH 24.2.2000, 99/20/0246. The Constitutional Court required a minimum of seven days in order to provide for the effectiveness of judicial review. Initially two days were foreseen. See Unabhängiger Bundesasylsenat (UBAS), Written comments on the draft report (6 February 2003).
⁴ Feßl/Holzschuster, § 4 nr 5.
⁵ VwGH 11.11.1998, 98/01/0284.
⁶ VwGH 23.7.1998, 98/20/0175.
⁷ Feßl/Holzschuster, § 4 nr 4a with further references.
⁸ See UBAS, Written Comments.
⁹ B 1736/02-10 and B 1744/02-10.
Finally, the safe country principle is not applicable in cases where the applicant is a citizen of the EEA, or asylum has been granted to the parents of unmarried asylum seekers under age, or asylum has been granted to the asylum-seeker's spouse or under-age children (§ 4 (4)).

(b) Countries of origin

The general situation in an applicant’s country of origin is referred to under § 6 Z 5: Applications are manifestly unfounded, where due to the general political circumstances, legal situation and application of the law in the country of origin, there is no well-founded fear of persecution for the reasons set forth in art. 1 section A (2) of the Geneva Convention (race, religion, nationality, membership of a particular group or political opinion), unless there is any other indication of a risk of persecution in the country of origin.

This provision may be viewed as approaching a safe country of origin concept. However, it should be noted that this procedure is normally not applied in practice.

The procedure here differs from that of a regular asylum application under § 7 only insofar as applications will be qualified as being one of five different cases of manifestly unfounded applications, to which special rules may apply (set out below).

This provision is a result of the 1992 London Conclusions and as such the assessment of the criteria set up in the text of § 6 Nr. 5 (above) shall take into account factors such as previous numbers of applications and admission quota, respect for human rights, democratic institutions and stability. Any source of information available should be used; reports by the UNHCR have a special weight.

This wording establishes a rebuttable presumption. Still, a regular investigation procedure guided by the principles set out in the AVG, e.g. an oral hearing, must be conducted. It follows, that the implications of “other indications” is crucial in the individual case.

(c) Exceptional leave to remain

Even if residence is denied (on whatever grounds), leave to remain in Austria may exist in certain cases: It may result from the prohibition of deportation according to § 8 AsylG (non-refoulement principle), 57 FrG (where a threat is imminent to life, torture, death penalty; or to life or liberty on the grounds listed in the non-refoulement principle as laid down in art. 33 Geneva Convention). Since a claim is deemed inadmissible following a § 4 denial, the relevant authority does not apply these provisions (§ 75 (1) 2 FrG); the level of protection set by § 57 FrG being furthermore a requirement for the qualification as “safe” under § 4 anyway. Leave to remain for the time until the relevant authority makes a decision is granted under § 19 AsylG. Although this does not apply where the applicant enters Austria illegally, the applicant may, according to court practice, stay until the application is decided on, even if only as inadmissible on the grounds of the safe country principle under § 4.

Question 2

(a) Third countries

The criteria set out above will be assessed individually to each applicant. The rebuttable presumption under subsection 3, however, provides a set of easily applicable criteria that allow a consistent approach on certain countries by those who have to apply the law or review the decision.
As an administrative decision, this assessment as safe is to be challenged as such. The question of judicial remedies and appeals is dealt with in question 8 below.

(b) Countries of origin

§ 6 requires an individual assessment. However, the notion “regularly...no material danger...” in nr 5 enables officials applying the law or reviewing the application to develop a consistent approach towards certain countries unless “other indications” give rise to a deviating assessment in an individual case. Again, the application of the criteria on the case results in judicial review as the way to challenge the assessment as safe.

Question 3 a) and b)

Austria does not operate a list-based system either in respect of third countries or countries of origin. Consistency of approach must therefore be deduced from relevant recent decisions and judgements by the BAA, UBAS16 and VwGH. To date, decisions or judgements concerning both countries of origin and third countries, are not consistent to such an extent that would permit an understanding of a presumption of safety in its original meaning. The following recent judgments concerning border countries (the most likely to be referred to under § 4 procedure) refer to the criteria outlined above in 1(a), whose non-fulfilment prevented the assessment of the country as safe:

A 3-day time limit for filing an appeal in the Slovak asylum procedure was held to be too short to assess the whole procedure as effectively implementing the Geneva standards17. Further, art. 3 ECHR was believed not to be sufficiently well implemented18.

The Czech law according to which an applicant, illegally leaving the country during an asylum procedure, loses the right to have his case assessed when he returns (and therefore would be sent back to his country of origin), was held to constitute insufficient protection against refoulement19 where the applicant was in imminent danger of inhuman treatment in Russia20.

Hungary's asylum legislation does not always guarantee a provisional right to remain during the asylum procedure and may also not ensure a decision on the merits in all cases21. In other cases, extraordinarily short time limits were held to undermine the required effectiveness of judicial review22.

Generally speaking, effective judicial recourse has been found to be lacking in a number of cases in several bordering countries because of excessively restrictive time limits for filing an appeal.

Question 4 a) and b)

Since the criteria for designating a country as safe are to be applied in each individual case, the BAA and the UBAS respectively must examine the situation in the country in question in each case. Particular focus is on the country’s asylum law and practice in the context of the § 4 requirements, examining whether the asylum procedure effectively implements the Geneva Convention and/or ensures an effective procedure in a fourth or further country.

It should be added that the UBAS and the VwGH (at second instance) frequently come to different assessments, and even where the VwGH overrules the UBAS, the latter may still make a conflicting judgement on the same substantial question arising in another individual case.

Question 5 a) and b)

16 Unabhängiger Bundesasylsenat (Independent Federal Asylum Review Board).
17 UBAS Zl. 231.145/1-II/04/02, 9.10.2002.
18 UBAS bi-annual report 2000/01, 20.
19 Article 3 ECHR, which is part of Austrian constitutional law, was considered not to be applied in a consistent manner.
20 UBAS Zl. 227.336/6-VIII/22/02, 18.10.2002.
21 UBAS Zl. 226.360/6-II/04/02, 27.8.2002.
22 UBAS bi-annual report 2000/01, 20.
Whilst the VwGH encourages the use of information to be provided by Austrian embassies abroad, the UBAS points to the limited resources of representations abroad and the need to adjust their resources to serve the requirements of the Asylum Act\(^23\). Other relevant sources are, according to the UBAS, country reports taken from generally available relevant media / literature, witnesses and medical and legal experts (especially as the foreign asylum procedure often has to be assessed in respect of the requirement of an asylum procedure effectively implementing the Geneva Convention’s standards and ensuring the principle of non-refoulement\(^24\) and reports by non-governmental organisations\(^25\). In co-operation with the Verwaltungsgericht Wiesbaden (Germany), an online database containing information on basic data on countries of origin is used\(^26\).

**Question 6**

(a) Third countries

The application requires, that the alien is able to find protection against persecution in a country, where the aforementioned standards have been implemented (§ 4 AsylG).

The use of the word “is able to” implies an actual ability and opportunity to be protected (§ 4 (1) AsylG). The wording further implies that the actual possibility to (re-) enter the third country is required, which is practically only the case where there is a readmission agreement with the country in question\(^27\). Such agreements exist with all bordering countries.

The definition further implies that not even a previous transit through the third country is necessary and, consequently, the question of sufficient contact does not arise. This reflects the change from Austria’s previous conception of “previous security”, which sought to ascertain whether the applicant could have sought protection in a third country during transit, to that of “available security”, which asks whether protection is available elsewhere at the time of the application in Austria\(^28\). Notwithstanding the assessment under § 4 however, in practice the readmission agreements, usually required to actually carry out a deportation order, normally contain a set of requirements indicating whether and to what extent an applicant needs to have had contact with the country alleged to have been transited.

A somewhat broad term is the requirement that an asylum procedure for assessing the status of a refugee (under the Geneva Convention) needs to “be open” for the applicant, § 4 (3). This connotes an actual accessibility to such a procedure and might require the BAA to investigate the practices of other countries. The same is true for the alternative requirement, that such a procedure be “certain to take place” in another country (where it is likely that the third country exercises its own safe country principle and passes on the applicant). It is held that complementary investigations into the findings of other, non-governmental institutions by, for instance, questioning the author of NGO reports, are sufficient\(^29\). In practice, whilst this is an easier process compared to undertaking field research in each case, the variety of available sources causes difficulties\(^30\). In this context the rebuttable presumption proves helpful:

Concerning the rebuttable presumption in subsection (3) it is arguable what is necessary in order to have “implemented the basic principles” of the Geneva Convention. A restrictive view is expressed by the VwGH that the presumption only refers to the effectiveness of the legislation and its enforcement in regard to the implementation of the conventions\(^31\). Thus, subsection (3) does not mean the country is safe unless facts indicate otherwise. It rather means that where the conventions are ratified and a procedure safeguarding Geneva

\(^{23}\) UBAS bi-annual report 2000/01, 13.
\(^{24}\) UBAS bi-annual report 2000/01, annex 2.3.
\(^{25}\) VwGH 11.11.1998, 98/01/0284.
\(^{26}\) UBAS bi-annual report 2000/01, 23.
\(^{27}\) Feßl/Holzschuster, § 4 nr 2.
\(^{29}\) VwGH 11.11.1998, 98/01/0284.
\(^{30}\) Feßl/Holzschuster § 4 nr 4a.
\(^{31}\) VwGH 23.7.1998, 98/20/0175.
Convention standards is established, the authority may presume the rules of these Conventions to be effectively implemented. As a result, the BAA does not have to investigate whether authorities of the third country actually observe the principles laid down in the convention. Even this presumption, however, may be rebutted. For this purpose it is not necessarily the applicant’s duty to adduce evidence; the BAA is ex officio obliged, as mentioned above, to take into account the facts and, previously, to collect the relevant data. Again, it must be added that this presumption is not carried out in practice, rather there is a full investigation into the criteria set out in the previous subsections.

(b) Countries of origin

Concerning the application of § 6 Z 5, the country in question needs to be the “country of origin”. In accordance with § 1 Z 4, this depends on the applicant’s citizenship or, where the applicant has none, on his/her place of habitual residence.

Question 7

(a) Third countries

(i) Authorities involved

The authority in the first instance is the BAA in Vienna, § 37, accountable to the Ministry of the Interior and with branches in all Länder. The BAA is bound to follow instructions given by the Minister. Education and ongoing training must ensure sufficient qualification of its servants, § 37(5). Appeals are lodged to the UBAS which acts as a tribunal in the sense of Art. 6 ECHR. It is the second and last instance in asylum matters.

(ii) Procedure

(1) Rejection at the border (§ 17)

§ 17 prescribes a different procedure, depending on whether the applicant arrives by plane or otherwise directly from the country of origin (in the sense of art. 31 Geneva Convention), § 17 (1), or if he/she did not arrive directly, § 17 (2).

The reference to Art. 31 Geneva Convention arguably requires that the applicant directly comes from his country of origin, without having transited countries where he/she was safe from persecution and refoulement. This leaves the procedure under § 17 (2) for the event in which the applicant comes from a safe third country (§ 4 (2)).

In a preliminary assessment (a second examination is carried out by the UBAS on appeal) the BAA decides whether asylum will finally (“not improbably”) be granted. “Improbability” refers to the case where the applicant comes from a safe third country. Consequently, the applicant will be rejected (§ 17 (2)) and may only file his/her application from outside the country. For this purpose, the applicant will be provided with a form in a language that he/she understands (§§ 17 (3), 16 (2)).

The final rejection and the assessment as “improbable” (§ 17) on the grounds of the safe third country principle may be challenged before the UVS and the UBAS respectively, as set out below in question 8.

It should be noted that this rejection, although based on the BAA’s assessment of the likelihood of admission, is neither a decision on the merits (and is declared as such) nor really

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32 VwGH 6.7.1999, 98/01/0602.
33 See UBAS, Written Comments.
34 The UBAS is a special type of the so-called “Unabhängige Verwaltungssenate” (Art. 129c Bundes-Verfassungsgesetz).
35 Feßl/Holzschuster § 17 nr 3.
36 Feßl/Holzschuster § 17 nr 3.
a decision at all (§§ 17 (4), 31). Rather it is a mere internal act of notification vis-à-vis the border police that will then accordingly reject the applicant or allow entry. This is to avoid a *res iudicata*, otherwise barring subsequent applications on other occasions. A further application in another country and even from within Austria is therefore possible, where the applicant subsequently succeeds in entering the country by other means.

However, the procedure under § 17 is described as being practised “very rarely”, “almost never” and as “dead law”. In fact only 22 such cases have reached the UBAS since 1st January 1998.

(2) The decision on the application under § 4

The application can be submitted to the BAA or public security authorities (§§ 24 AsylG; 6 AVG); applications submitted in an official language of the UN are translated by the BAA, § 24 (2). An application may also be submitted at an Austrian representation abroad: The BAA will assess whether it is likely that asylum will be granted, in which case the applicant will receive a visa in order to pursue the asylum procedure from within the country, § 16 (2), (3).

Minors are then represented by a parent or, if this is legally or de facto not possible, by the local youth welfare, § 25. Minors are capable of (generally) submitting applications during the procedures, where they cannot be represented by a parent, § 25 (2) 1.

In general, (not just for minors), the decision is made following a hearing. The hearing is not conducted where the applicant is not capable of contributing to the investigation, § 27 (1). The applicant is required to disclose any relevant information and produce any available relevant documents. The applicant may also be searched if he/she appears to be unwilling to provide such documents. These special duties to co-operate, and others listed in § 27, limit the general principle of investigation *ex officio* (§ 28). Any applicant may be accompanied by a confidant; minors have to be accompanied by their legal representative (§ 27 (2), (3)). Whilst there is no accelerated procedure at the BAA itself, it is stated that especially in the case of under-age refugees, hearings are often carried out too soon and too fast, causing these minors psychological trauma. Furthermore, the lack of opportunity to elaborate political circumstances is a particular problem and there is the insufficient training for officers interviewing minors during the hearing. Similarly, the representatives sent from the social youth welfare are often insufficiently briefed and often only have first contact with the minor at the hearing itself. The BAA claims it regularly held seminars on how to deal with traumatized, sexually abused and minor persons.

The application is ultimately decided in accordance with § 4. The relevant authorities will assess the third country’s position in respect of the possible grounds for a deportation prohibition under § 57 FrG; the asylum procedure of the third country (or possibly that of a fourth and further countries, insofar as these all are likely to pass the applicant on, § 4 (2)); the right of temporary stay during the procedure and; protection from deportation to a level equivalent to § 57 FrG. It should be added that this implies the effectiveness of the law and its enforcement, which in practice may prove to be difficult for the relevant authorities. Investigations would therefore have to include the practice of local decision makers in the foreign country.

Asylum will be refused on the grounds that the application is inadmissible under § 4 (2), (3) if the applicant could be protected from persecution in another country. Whilst the decision is one of admissibility, and not on the merits, it does address questions of substantial law, such as the right not to be deported, §§ 4 (2) AsylG, 75 (1) FrG. Deviating from the regular procedure, a refusal on the grounds of § 4 requires an corresponding declaration in a language familiar to the applicant, pointing out the decision as being based on the safe

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37 EB RV 686 BlgNR 20, GP. 24.  
38 Feßl/Holzschuster § 17 nr 3.  
39 See UBAS, Written Comments.  
40 See UBAS, Written Comments.  
41 www.asyl.at/umf/asyl/einvern.htm  
42 See BAA, Written comments.
country principle (§ 27 (1)). The BAA furthermore declares in the language used in the third country, that a decision on the merits has not been made (§ 27 (2)).

When entering Austria via an airport, the application filed at the airport border control may only be dismissed as inadmissible under § 4 (2) (safe third country) if the UN High Commissioner gives consent, § 39 (3). This consent will be required unless under an agreement another country is responsible for the asylum procedure.

As the assessment is on admissibility only, the non-refoulement decision under §§ 8 AsylG; 57 FrG is not applicable (see above, 1 (c)). It should be added that the standard of protection of § 57 FrG is contained in the previous qualification of a third country as safe.

(b) Countries of origin

(i) Authorities involved

For authorities involved see (a) (aa) above.

(ii) Course of procedure

(1) Rejection at the border

§ 17, which concerns border procedures, applies in the same manner as described above for safe third countries.

(2) The decision on the application under § 6 Z 5

If the applicant originates from a country where the general situation in regard to that country’s politics, its laws and their enforcement, does not normally give rise to a material danger of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion (art. 1 A (2) Geneva Convention), the application will be dismissed as manifestly unfounded, § 6 (on the merits - unlike the dismissal in the case of third country safety, being assessed as inadmissible (§ 4 (1))\(^4\)), unless the applicant can prove persecution in his individual case.

The general rules on administrative procedures apply and require a hearing and an investigation ex officio despite this presumption\(^44\).

This provision follows the 1992 London Conclusions and so the assessment along the criteria set out in the text of § 6 Z 5 (above) shall take into account factors such as previous numbers of applications and admission quota, respect for human rights, democratic institutions and stability. Any source of information available should be used; reports by the UNHCR have a special weight\(^45\).

Again, when entering Austria via an airport, the application filed at the airport border control may only be dismissed as inadmissible under § 4 (2) (safe third country) if the UN High Commissioner gives consent, § 39 (3). This consent will be required unless under an agreement another country is responsible for the asylum procedure.

Question 8

As Austria does not operate a list based concept, judicial review is normally concerned with the individual BAA’s administrative decision - more precisely, the assessment of the country as “safe” (§ 4 (2)). The provisions are not scrutinized for their constitutionality. The first (and last regular) instance to review a decision is the UBAS, but appeals to the VwGH (highest

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\(^4\) Therefore, unlike the case of a § 4-denial, after the application of the criteria in § 6 Z 5, the non-refoulement principle as laid out in §§ 8 AsylG, 57 FrG is carried out as a second phase of the internal procedure at the BAA; described above under 1 c).

\(^44\) Feßl/Holzschuster § 6 nr 2.

\(^45\) Feßl/Holzschuster § 6 nr 3; RV 686 BflNR 20. GP 19.
administrative court) or the VfGH (constitutional court) may be lodged in certain circumstances.

(i) Rejection at the border, § 17

As already mentioned, the procedure under § 17 (2) is rarely practised. However, two scenarios will constitute a rejection: (1) the BAA’s assessment of the application’s prospective success as improbable on the grounds of the safe third country principle and; (2) the act of rejection at the border by the border police which is determined by the BAA’s assessment in (1). Although the BAA’s assessment is originally laid out as a mere internal act of notification, assuming the border police decision to reject is not challengeable, the applicant can apply for revision of the BAA’s assessment by the UBAS (§ 17(4) AsylG). This will then be revised independently from the act of rejection by the border authorities. This leads to a review by two different UVSs, namely by the UBAS (in nature being a special UVS) in regard to the assessment of the application’s prospects with regard to § 4 and by the regular UVS in regard to the act of rejection (just as any other act of enforcement in administrative matters). Accordingly the UBAS will deal with the asylum-specific or safe-country-related questions while the UVS might be occupied with complaints concerning the physical act of rejection, such as proportionality etc. The relevant procedure before the UBAS is not entirely clear: As for the first (internal) assessment by the BAA, § 17 (5) AsylG applies, requiring a decision within five days. On the other hand it is assumed that § 32 AsylG, setting out the accelerating elements for the appeal procedure for regular applications from within the Austria (see next section) does not apply. It is questionable to what extent the general administrative procedural regime set out in the AVG can contribute to filling the gap.

(ii) Decision under §§ 4 and 6 Z 5, following an application from within Austria

(1) The Unabhängiger Bundesasylsenat (UBAS, the Independent Federal Asylum Review Board) in Vienna, Art. 129c B-VG, is the second instance to apply the AsylG (after the BAA) and it functions as the first impartial instance of judicial review for decisions made by the BAA (§ 38 (1)). Broadly, individual members of the UBAS decide the cases (§ 7 UBASG). They must be Austrian citizens, hold a law degree from University and have a minimum working experience of 2 years in the area of alien and asylum law, or 4 years in any other area (§ 1 UBASG). They need not be qualified as judges. UBAS members are independent from any instruction, they work according to preset schedules (responsibility for the cases are assigned according to the country of origin) and they are not allowed to work in positions likely to cause conflicts of interests or involving accountability to instructions, (§§ 2 ff UBASG). Questions have been raised as to whether UBAS members are de facto designated in a way ensuring impartiality equivalent to that of a regular court. As part of the category of the Unabhängige Verwaltungssenate (UVS), the UBAS has its roots in the former bodies of administrative judicial review that were established on a higher level of the same deciding authority (in this case the Ministry of the Interior). This tradition is allegedly mirrored by the policy of selecting members of the UBAS. Interestingly, a similar concern is not expressed with regard to the regular UVSs. However, this dispute arose whilst the newly introduced UBAS was being established and commencing its work, and has since seemed to have ceased. In a 2002 judgment the Verwaltungsgerichtshof expressly affirmed the impartiality of the UBAS.

Refusals on the grounds of § 4 (safe third country) and § 6 Z 5 (safe country of origin) are – following the 1992 London Conclusions on the abuse of asylum procedures and safe countries - subject to an accelerated appeal procedure before the UBAS: The applicant has, instead of the ordinary 14 days (§ 63 (5) AVG), only 10 days (§ 32 (1)) in which to apply for review. The UBAS on the other hand shall decide within a period of 10 days – a period that can be prolonged for another 20 days where this is necessary for further evaluation of the

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46 7 a) bb) (1).
47 It is pointed out however, that even according to the law as originally ment to be laid out by the legislator, an equivalent recourse in regard of the assessment on the safe third country principle is provided, as the review of the rejection included that assessment as its foundation; Feßl/Holzschuster § 17 nr 3. In this case however, the UBAS would not be involved in the review process.
48 MP Kier in a Question to the Chancellor, 2922/J 20. GP.
facts, § 32 (3). However, even if the authorities do nothing by the end of this extended period, the authorities will not suffer any sanctions until the expiry of six months subject to a complaint from the applicant (§ 27 VwGG, complaint for delay at the next instance, VwGH\textsuperscript{50}). Although an application is dismissed as inadmissible and not as unfounded on the merits, it is argued that the assessment of §§ 4 (2) AsylG, 75 (1) FrG (see above) as substantial law makes § 67d (3) AVG inapplicable (requiring a “procedural decision”), giving the opportunity of an oral hearing of appeal also in cases of § 4-denials.

Furthermore, since the UBAS is a special Unabhängiger Verwaltungssenat (UVS, a first instance administrative court), the general provisions in constitutional law (B-VG), the law governing the procedure and competence of the Verwaltungsgerichtshof (VwGG) and the general law governing administrative procedure (AVG) apply. They do not apply whenever special provisions of the AsylG come into play.

An appeal to the UBAS has suspensive effect, § 64 (1) AVG.

(2) For the further route of appeal there are no deviations from the regular regime. Appeals can be lodged with the Verwaltungsgerichtshof and/or the Verfassungsgerichtshof where the applicant claims either a violation of his rights – the appeal will be rejected if there is a lack of fundamental relevance of the legal question involved (Art. 133 (3) B-VG) and/or of his constitutional rights (Art. 144 (1) B-VG). These complaints do not have suspensive effect \textit{per se} but the courts addressed will normally grant such an effect, preventing any possible expulsion before a decision is made\textsuperscript{51}.

**Question 9: Further comments**

Whereas the procedure in § 6 Z 5 (safe country of origin) is scarcely ever utilised, 83 cases of § 4-denials (safe third country) were reported for 2001 of which 73 could be concluded by the BAA, while 10 cases reached the second instance. The desired aim to accelerate procedures may not be being efficiently addressed because although under § 4 (2) AsylG the applicant’s case may be assessed on the merits in a fourth or further country, it must be ensured that the law in place corresponds to the standards in place in § 4. This results in an assessment of the asylum laws of various countries as opposed to an assessment of the merits of an individual case. This may possibly outweigh the resources saved by not assessing the application on the merits itself\textsuperscript{52}. This concern is particularly acute in the likely event where the applicant has travelled through more than two or three states that each has safe country principles in place.\textsuperscript{53} According to a statement by a representative of the Ministry of the Interior, the BAA increasingly applies the regular asylum procedure to § 4 cases. I.e. it assesses the question of persecution instead of the asylum regime in a possible safe third country as this is likely to cause even more work due to the restrictive policy exercised by the courts in view of §§ 4 and 6 Z 5.\textsuperscript{54} It is questionable whether the restrictions of rights of appeal as set out above are still legitimate against this background, taking into account the limited (factual) effects of this regime which was originally intended to save resources and speed up procedures.

\textsuperscript{50} VwGH 2000/01/0173, 7.9.2000.

\textsuperscript{51} See BAA, Written comments.

\textsuperscript{52} See BAA, Written comments: § 4-procedures “often difficult and lengthy”

\textsuperscript{53} Klingan, Die „kleine“ Abänderung des § 4 Abs. 2 AsylG”, juridikum 1/02, 20/21.

\textsuperscript{54} Die Presse 6 April 2000 „Statt Drittstaaten prüft Österreich Asylanträge jetzt lieber selbst“, www.diepresse.com/services/archiv/archiv_print.asp.
FINLAND

Definitions


“Directorate of Immigration” refers to an independent office within the Ministry of the Interior, which issues first instance asylum decisions

Introduction

The numbers of asylum seekers in Finland have been and continue to be low in comparison with other European Union Member States since 1991 when the prevailing Aliens Act entered into force. The numbers have varied from approximately 1,500 to 3,600 during this period.

The legal definition of a refugee as stipulated in Article 1(A)2 of the 1951 Geneva Convention relating to the Status of Refugees has been incorporated practically verbatim in Section 30.1 of the Aliens Act.55

The Aliens Act, further, makes provisions on the complementary forms of protection in Section 3156. This provision is based largely on Article 3 of the European Convention on Human Rights, Article 3 of the UN Convention against Torture and Section 9.4 of the Finnish Constitution.

The application of Section 30.1 of the Aliens Act has been extremely strict in Finland the annual recognition rate having varied from less than 0.2 % to 1 %. In 2002 Finland granted 14 refugee statuses.

In comparison, the number of asylum seekers granted residence permits on grounds of need of protection (Section 31) is considerably higher, 250 in 2002. In total, 17.7% of all decisions in the asylum procedure made by the Directorate of Immigration in 2002 were positive57. UNHCR’s statistics suggest that in 1995-1999 42.9% of applications were successful. Between 1990-1999, this figure was 50.8%, one of the highest amongst EU member states.

The safe country of origin notion was introduced in July 2000 (Section 33b of the Aliens Act, 648/2000). These amended notions were triggered following a relatively large influx of Roma asylum seekers from Slovakia and the Czech Republic in 1999 and 2000. In conjunction with media-fuelled concern, the Finnish Parliament became concerned with the potential abuse of the asylum system and the need to protect its integrity and credibility. The amendments to the Aliens Act were introduced hastily with considerable political pressure particularly from the Conservative Party (“Kansallinen Kokoomus”) who held the post of the Minister of the Interior at that time. The amendments were finalised on the basis of an opinion of the Finnish Parliament’s Constitutional Committee. The Finnish Parliament passed the Act by a clear majority of votes.

The accelerated procedure

Accelerated procedures will apply in the following instances: Dublin Convention cases, manifestly unfounded applications, safe third country cases and safe country of origin cases. The accelerated procedure is an exception to the guiding principles of (a) processing

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55 “An alien shall be granted asylum and issued a residence permit if, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, he resides outside his country of origin or habitual residence and if, owing to such fear, he is unwilling to avail himself of the protection of the said country.”

56 “An alien residing in Finland may be issued a residence permit on the basis of his need of protection if he, in his country of origin or habitual residence, is threatened by capital punishment, torture or inhuman or degrading treatment or if he cannot return there because of an armed conflict or environmental catastrophe.”

57 The Directorate of Immigration information note 15 January 2003
applications individually in a normal procedure (b) the existence of an effective legal remedy (c) the right to a suspensive review. In 2002, 57.3% of asylum applications were dealt with in the accelerated procedure. In 2001, 71% were dealt with through the normal procedure and 29% through the accelerated procedure.\(^{56}\)

In 2002, 322 applications were channelled through the accelerated procedure on safe country of origin grounds.\(^{58}\) Of these 322, 5 were Latvian, 8 were Lithuanian, 6 were Polish, 274 were Slovakian (of whom 114 were Roma),\(^{60}\) 27 were Czech, 1 was Hungarian and 1 Estonian.

5 applications were channelled through the accelerated procedure on safe country of asylum grounds, and in 344 cases on Dublin Convention grounds.\(^{61}\) The vast majority of returns on Dublin grounds were enforced to the Nordic Countries and Germany.

The Aliens Act is undergoing a comprehensive reform. The Cabinet introduced a Bill to Parliament on 17 January 2003, however, the imminent elections on 16 March 2003 meant that Parliament rejected the Bill due to there being insufficient time for consideration. The notions of safe third country and safe country of origin have been debated in the Cabinet and the Ombudsman for Minorities has been commissioned to prepare a study on the application of these two notions. The new Cabinet and Parliament will debate these notions after the elections.

**Question 1**

(a) **Third countries**

The definition of a safe third country is laid down in Section 33a (648/2000) of the Aliens Act 2000:

> As a safe country of asylum for an asylum seekers can be regarded a State which, without a geographic reservation, has acceded to and complies with the Convention relating to the Status of Refugees (Finnish Treaty Series 77/1968), the International Covenant on Civil and Political Rights (Finnish Treaty Series 8/1976) and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Finnish Treaty Series 60/1989) and complies with them.

The Directorate of Immigration processes in a single procedure both the asylum and complementary protection claim. Therefore it takes the aforementioned international treaties into account alternatively, since the legal grounds for the two forms of international protection are based in different instruments (see above). However, in the context of a civil law system, the adjudicators do not justify their decisions in detail but merely with reference to the applicable international instrument. It is, therefore, difficult to analyse in detail which instrument prevails in the assessment of the asylum claim.

The issue of “agents of persecution” is covered in Section 30.1 of the Aliens Act which complies with the UNHCR’s Handbook and other guidelines. Finland applies the 1951 Geneva Convention fully and accepts non-state agents as persecutors. In the context of applying safe third country or safe country of origin notions the issue has not been dealt with or analysed by the first instance administrative decision-maker, the Directorate of Immigration or the courts.

(b) **Countries of origin**

The definition and notion of a safe country of origin were introduced to the Aliens Act in 2000 in Section 33b (648/2000). The definition of a safe country of origin reads as follows:

\(^{56}\)Directorate of Immigration newsletter, 15 January 2003  
\(^{58}\)Statistics of the Directorate of Immigration on all asylum decisions 1 January through 31 December 2002  
\(^{60}\)A study conducted by the Finnish authorities in 2002 revealed that the 114 Roma had previously made 102 asylum applications in Finland, Norway and other EU member States.  
\(^{61}\)Ibid.
As a safe country of origin for an asylum seeker can be regarded a State where he is not at risk of persecution or severe violation of human rights.

When... assessing a safe country of origin, particular account shall be taken of:
1) whether the State has a stable and democratic political system;
2) whether the State has an independent judicial system, and whether the level of jurisdiction is in compliance with the requirements imposed on a fair trial; and
3) whether the State has acceded to the principal international conventions on human rights, and whether there have been serious violations of human rights in the State.

The rationale behind the introduction of the safe country of origin according to the travaux préparatoires of Section 33b is to channel asylum applications of individuals originating from certain countries into the accelerated procedure. The individual claims and all particular indications that the country would not be safe to the applicant are taken into consideration when processing individual asylum applications.\(^6^2\)

The list, according to the travaux préparatoires, is not meant to be exclusive but to give guidelines on a holistic assessment of the asylum claim. As the asylum claims are assessed on an individual basis the adjudicators, namely the Directorate of Immigration and courts of appeal, must consider regional differences in the respective states and vis-à-vis the individual applicants personal situation\(^6^3\).

The travaux préparatoires make explicit reference to the 1992 London Conclusions on states where there generally cannot be considered to be a risk of serious persecution. Four elements are mentioned:

1) the recognition rate and number of refugees in member states
2) existence of democratic institutions
3) consideration of human rights
4) stability of the state.\(^6^4\)

The practical interpretation of the safety notions

The duty to assess whether the safe third country or safe country of origin notions are applicable, lies with the Finnish Directorate of Immigration. The guiding principle is one of individual assessment. However, the procedural rules are strict and tight time limits apply.

When applying the safe third country of origin or safe third country notion the procedure is always accelerated. The accelerated procedure in the application of Sections 33a and 33b was introduced in 2000. Section 33c (648/2000) reads as follows:

The Directorate of Immigration may reject an application for asylum and residence permit, and refuse entry at the same time, if the alien has come from:

1) a safe country of asylum referred to in section 33a in which he could have received protection referred to in section 30 or 31 and to which he can safely be returned; or
2) a safe country of origin referred to in section 33b in which he does not risk a treatment referred to in section 30 or 31 and to which he can safely be returned.

Preconditions for granting asylum or residence permit shall be assessed individually for each applicant for asylum, taking into account of the applicant’s report on his circumstances in the State concerned and information on the

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\(^{62}\) The Bill to amend the Aliens Act (HE 15/2000), p. 20.

\(^{63}\) Ibid.

\(^{64}\) Ibid.
situation in the country. The authority shall ask the applicant in particular to provide reasons for not considering the State concerned safe for him.

The Directorate of Immigration shall decide on the application at the latest within seven days of the interview record being finished and registered at the Directorate of Immigration.

The Directorate of Immigration shall provide the alien who will be returned to a safe country of asylum with a document to the effect that his application has not been examined in substance in Finland. No document shall be given when a decision on the application is taken under section 34b.

Asylum seekers are all interviewed individually either by the local police or the Directorate of Immigration. The police will carry out the interview where the safe country of origin or the safe third country notions are presumed to apply. According to the regulations on the asylum examination the police must carry out the interview without delay (Articles 33(a) and (b)). Further, the interview can be and indeed is generally conducted according to a truncated version of the asylum interview protocol (protocol “U3”).

The grounds presented by the applicants and all specific factors implying that the state concerned might not be safe for the applicant are taken into consideration when deciding on the case. The presumption that a state is safe for the applicant may be rebutted, if the applicant presents well-founded reasons against it. In this case the application will be referred to an ordinary procedure, and if necessary, further information on the case will be obtained.

However, the time frame for processing asylum applications to which safe third country or safe country of origin notions are applied, is seven days from the day the documents were registered in the Directorate of Immigration. From the applicant’s perspective this time is not enough for providing evidence to rebut the presumption of safety. Access to a competent lawyer and translation services together with the preparation of a defence cannot be accomplished in seven days. Legal aid is not granted for the first instance administrative decision making procedure so all applicants are dependent on the services of the Finnish Refugee Advice Centre, (an NGO providing free legal assistance to all asylum seekers in Finland). As the receptions centres are scattered around the country the lawyer will commonly be located in a different city. In practice, the procedure therefore usually takes two to three weeks.

These practical obstacles make it extremely difficult if not impossible to provide evidence to the Directorate of Immigration in order to rebut the safety notion. As the initial hearing is also carried out in an accelerated form and by using a short interview questionnaire it could be concluded that the procedure relies on presumptions which guide the decision making and leave little room for individual assessment of the safety of an individual applicant.

The Directorate of Immigration has access through its information and legal unit to all relevant and central human rights reports published both by NGOs and IGOs. It has staff devoted to producing and finding country information. However, given the extremely short time to process a case when applying the safety notions, the real possibilities of making a thorough assessment of safety are very limited.

There are no rules on the best evidence: Finland applies a free evidence theory whereby there are no formal rules on admissibility of evidence. However, the Directorate of Immigration does give a considerable weight to country reports prepared by Governments, particularly the U.S. State’s Department annual country reports and the UK Home Office Immigration and Nationality Department country assessments.

The Finnish Refugee Advice Centre has also provided extensive country of origin information concerning asylum applications of Slovakian and Czech Roma. The evidence has been

based on UNHCR position papers, Roma Rights Centre reports and the background information on the standard of asylum procedure in the Czech Republic, particularly vis-à-vis the Roma asylum seekers. This information has been admissible, however, it remains unclear to what extent the evidence has been considered.

Questions 2 and 3

There are no official, exhaustive lists of safe third countries or safe countries of origin. The definitions laid down by law are general and leave room for interpretation. The travaux préparatoires, however, include a short list of countries that “could be” considered as safe. Furthermore, they include a presumption on the safety of certain countries.

Given the fact that the time limit to process an asylum claim when the safety notions are applied is extremely short, it can be stated that the non-exhaustive “list” of presumed safe countries does, in effect, strongly influence the decision-making. To rebut the presumption would require a considerably longer time than the seven days the law allows. The statistics from the first instance decision-making body, the Directorate of Immigration, support the argument that the unofficial lists in the travaux préparatoires of the Aliens Act strongly influence the decision-making.

(a) Third countries

In Finnish terminology, the notion of safe third country is referred to as “safe country of asylum”. However, this term not only covers third countries but also the notion of first country of asylum. This refers to a situation where an applicant has already received protection in a state, but decided to leave for another state to apply for protection there.

The travaux préparatoires of Section 33a elaborate the notion. A safe third country (safe country of asylum in the Finnish terminology) is a state through which an asylum seeker has entered Finland and where he could have received adequate protection. When the Aliens Act is amended, the words “has received or [could have received]” shall be added to the second sentence of section 33(c)(1)(1), to reflect the fact the inclusion of the notion of first country of asylum.

The notion of safe country of asylum was first introduced into the Aliens Act 1998 (593/1998) in Section 33a and later amended in July 2000 (648/2000). Since then, the definition or the non-exhaustive and non-binding list of safe third countries has not been changed. The ongoing comprehensive reform of the Aliens Act has not included any analysis on the need to review or amend the amendment of 2000.

Prior to the 1998 Aliens Act, the designation of a third country as safe required an Act of Parliament, thus excluding the possibility of designation by decree. However, the Administrative Committee of the Finnish Parliament accepted the interpretation included in the draft decree that EU Member States and EEA Member States, Switzerland, the United States, Australia, Canada, Japan and New Zealand would be considered safe third countries. However, the Aliens Act does not include any list of safe third countries, nor does it include any authorization to create lists of safe third countries either by governmental decree or regulation.66

In the administrative and legal practice of the Directorate of Immigration and the first instance appeals body, the Helsinki Administrative Court, the definition of a safe third country has also been applied to the associated countries accepted to the negotiations for the full membership of the European Union, namely Hungary and the Czech Republic.67

Finland has readmission agreements with Estonia, Latvia, Lithuania and Bulgaria. At the time of the amendment to Section 33a, Finland was negotiating a readmission agreement with Romania. All readmission agreements reiterate the compliance with the 1951 Geneva

66 The Bill for amendments of the Aliens Act (HE 15/2000), p. 20
67 Ibid.
Convention. As regards the associated countries, a strong presumption on the applicability of the safe third country notion prevails.

The Finnish Directorate of Immigration and the Department of Immigration in the Ministry of the Interior work in close cooperation with other Nordic countries and EU Member States, meeting regularly to exchange information and examine case law.

Finland has applied the safe third country notion relatively rigidly in that the countries considered to be safe have predominantly been either EU Member States or associated countries, such as Hungary or the Czech Republic. There is no case law on the issue of regional safety.

(b) Countries of origin

The Finnish authorities do not use any lists of safe countries of origin on the basis of which applicants could automatically be returned to their country of origin. Indeed, Section 33b does not contain any list of safe countries of origin. However, in the travaux préparatoires, the presumption of the safety of certain countries could be introduced in respect of EU Member States, EEA member states, Switzerland, the United States, Australia, Canada, Japan and New Zealand. The presumption of safety is also strong for the associated countries. However, if there are doubts about the safety to an individual applicant, the Directorate of Immigration should take a cautious stance in applying the safe country of origin notion.

There have been no changes to the definition of a safe country of origin or to the “list” of such countries.

As can be seen in the statistics of the Directorate of Immigration, all countries assessed to be safe countries of origin have been associated EU accession states. The need to elaborate the criteria for regional safety has not arisen.

Question 4

(a) Third countries

Section 33b of the Aliens Act requires individual assessment of each asylum claim. The actual situation in the third country is to be assessed by a list of criteria laid down in law. Based on the practices of the Directorate of Immigration the administrative decision-makers rely heavily on governmental country of origin information together with reports produced by various UN bodies, the UNHCR and human rights organisations. However, given the fact that in an overwhelming majority of cases applying the safe third country notion the respective country has been one mentioned in the “list” of the travaux préparatoires, the decisions indicate no further analysis which would go into details and give guidance on how to assess safety. Case law largely concerns countries such as Hungary, the Czech Republic and Romania.

(b) Countries of origin

The assessment of the safety of a country of origin is similar in practice to that of safe third countries. As the time limit to process a claim is short, it leaves little time to analyse an individual country. This indicates that the Directorate of Immigration and the appeals courts rely heavily on the “list” in the travaux préparatoires of Section 33b.

Question 5

(a) Third countries

At present and indeed in 1999 and 2000, when the large number of asylum claims made by

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68 The Bill for amendments of the Aliens Act (HE 15/2000), p. 20
the Slovakian Roma were processed, there were no established mechanisms to examine the situation of returnees in situ. The then Ombudsman for Foreigners, Mr. Antti Seppälä, raised the issue in public and demanded a fact-finding mission to Slovakia to monitor the situation of returnees. As a large number of the Roma had voluntarily cancelled their asylum applications, they were returned through the voluntary returns programme of the International Organisation for Migration (IOM). The IOM, the Ombudsman, the Directorate of Immigration and NGOs discussed the possibility of the IOM monitoring the returnees. No actual plans were ever drawn up or ever materialised.

Unofficial reports, however, were prepared on the situation of the returnees to Slovakia. The Roma asylum seekers were very much in the public eye and as such the media paid visits to Slovakia, especially to Kosice. In particular they focused on the push factors behind the large-scale movement of the Roma from Slovakia to EU Member States.

(b) Countries of origin

There are no official mechanisms to monitor the situation of the returnees in situ. There has been no serious discussion on possible fact-finding missions or cooperation with NGOs to this effect.

Question 6

(a) Third countries

The issue of the duration of stay in a safe third country was raised in the context of the Slovakian Roma transiting in Prague on their way to Finland, even though they only spent a few hours in Prague airport. Similarly, Slovakian Roma transiting through Budapest only spent a few hours at Budapest airport. As there were no direct flights from Slovakia to Helsinki, such transits were the only option.

The Directorate of Immigration and the Helsinki Administration Court argued that the transit was sufficient to trigger the application of the safe third country notion. Counsel for the asylum seekers argued that that this would be unreasonable and was prevented by the Dublin Convention, which holds that such transits do not amount to admission into the country in question. It should also be noted that at the same time a group of approximately 30 Palestinian asylum seekers from Lebanon entered Finland via Bulgaria. The issue of their transiting through Bulgaria was not raised by the authorities, raising the question of whether or not the Slovakian Roma were discriminated against by the Finnish asylum procedure.

Finland has readmission agreements with countries that are, in practice, considered safe third countries. However, as was the case with the Roma, no specific or individual inquiries were made before applying the safe third country notion. Neither the appeals court nor the Helsinki Administrative Court found it relevant to conduct such inquiries.

In the 1990’s Finland received a substantial number of Somali asylum seekers. Many of them had resided for extensive periods in Ethiopia or Kenya. In 1994-1995 the possibility was raised that they could be properly protected in one of these two countries. Finnish authorities (the Directorate of Immigration and the Office of the Ombudsman for Foreigners) and an NGO (the Finnish Refugee Advice Centre) made a fact-finding trip to Kenya and Ethiopia. It should be noted that at that time the notion of a safe third country did not feature in the Finnish Aliens Act. Based on their findings, Kenya and Ethiopia were not considered to be safe for Somalis. Consequently, all Somali asylum seekers were treated by the authorities in the usual manner and received either refugee status or other protection in Finland.

It was argued in some cases that the presence of the UNHCR in Ethiopia and Kenya made them safe countries. Such cases were few in number and the Appeals Court rejected the arguments. However, it should be noted that not all the issues relating to the safety of Ethiopia were debated in full (e.g. readmission, the prior consent of the readmitting country and the existence of durable and effective protection).
**b) Countries of origin**

What is considered to be “safe” for an individual applicant is laid down in Section 33b of the Aliens Act. The detailed regulations on asylum procedure do not elaborate on these criteria or offer any advice on their practical interpretation.

As the vast majority of the decisions made on the safe country of origin have been for citizens of Slovakia, Poland and the Baltic countries, there has been no further analysis on how to apply the criteria laid down in Law. Given the extremely short time limit for processing applications involving safe countries of origin, it is fair to assume that there is a presumption of safety. As the time limit is only seven days, the applicant has no opportunity to effectively rebut this presumption.

The authorities, as a rule, do not ask for a rejoinder or in any other way inform the applicant of the fact that the notion of safe country will be relevant in the decision making process. Thus, an individual applicant is not necessarily aware during the procedure that his application may be decided on the grounds of safe country of origin.

**Question 7 a) and b)**

Over the past three years, the staff of the Directorate of Immigration responsible for interviewing asylum applicants have received training in dealing with vulnerable groups such as children and women. The training has also been disseminated to other staff members. However, the asylum interviews in accelerated procedures are generally conducted by police officers. They receive only general training and do not receive special sensitivity training on how to deal with vulnerable groups.

Finnish asylum procedure is a single procedure, thus there is no separate admissibility hearing. In principal, the merits of a case are examined during an individual interview. However, given the seven-day time limit and the fact that the police are entitled to use a short form of interview, the assessment of the merits cannot be comprehensive or thorough. If the Directorate of Immigration, when processing an application, considers that it cannot make a decision on the basis of the asylum interview record, the Directorate may ask the police to conduct an additional investigation in the case or obtain additional information on the case in another way, for example through its own Legal Service and Country Information or the Ministry for Foreign Affairs.

**Question 8**

The rationale behind introducing the safe third country and safe country of origin notions into the Aliens Act was to channel applications where these notions are applied into accelerated procedures. As the legal safeguards are more limited than in the normal procedure the legal impact of the application of the notion of safe countries is considerable. These issues are now discussed in detail.

(a) **Third countries**

The right to appeal when the safe third country notion is applied is laid down in Section 57 of the Aliens Act (537/1999):

> A decision made by the Directorate of Immigration under this Act with regard to a matter other than one referred to in paragraph 2 or in section 13, paragraph 3 of this Act may be appealed to the Country Administrative Court as provided for in the Administrative procedure Act on the grounds that the decision is contrary to the law.

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An alien who is dissatisfied with a decision of the Directorate of Immigration on asylum or residence permit issued due to need of protection or a related decision on refusal of entry taken by the Directorate of Immigration, or a decision on the cessation of refugee status, may appeal against the decision to the Administrative Court of Helsinki, as provided for in the Administrative Judicial Procedure Act, on the grounds that the decision is contrary to the law. (648/2000).

(...)

A decision of the County Administrative Court referred to in paragraphs 1 and 2 may be appealed only if the Supreme Administrative Court grants a leave to appeal. The leave may be granted only if it is important to have the issue decided by the Supreme Administrative Court for the application of law in other similar cases or for reasons of uniform judicial practice or if there are other weighty grounds for granting the leave of appeal.

The rule on the suspensive effect of the appeal made by virtue of Section 57 is laid down in Section 62.2 and 3 of the Aliens Act (648/2000):

A decision of the Directorate of Immigration on refusal of entry made under section 34b or 34c may be enforced as soon as the decision has been served on the applicant, unless otherwise provided by the appeal authority. A decision of the Directorate of Immigration on refusal of entry made under section 33c or 34a may not be enforced until eight days after serving the decision on the applicant, unless otherwise provided by the appeal authority. Before measures are taken to enforce the decision, it shall be made sure that the term mentioned above has included at least five working days. A decision of the Directorate of Immigration on deportation may not be enforced before it has become final.

An application for a leave to appeal against a decision of the Administrative Court concerning refusal of entry to an asylum seeker shall not suspend the enforcement of the decision, unless otherwise decided by the Supreme Administrative Court.

As already discussed, the seven day time limit for the first instance decision making body makes it extremely difficult in practice to rebut the presumed safety of a third country. The applicant may not even be aware of the fact that the notion is being applied. Within the given time limit an applicant should have access to a lawyer who, in turn, must acquire an interpreter and prepare legal arguments. In practice, this procedure has proven to be impossible.

The right to appeal is guaranteed in Law. The time limit is 30 days from the passing of the decision on the applicant. However, decisions on refusal of entry can be enforced within eight days unless the Helsinki Administrative Court grants a suspension order. A single judge makes such orders. For lawyers representing the applicants, this procedure allows in practice one or two days to meet the client and prepare the appeal. This has proven to be insufficient time for effectively representing the client. Frequently the most convincing arguments that can be presented within such time limits concern the applicant's state of health, family ties to Finland or other humanitarian reasons. None of these arguments touch upon the issue of safety.

The legal safeguards in the normal asylum procedure are, in comparison, considerably wider. An appeal has an automatic suspensive effect and an oral hearing may be granted. The vast majority of appellants benefit from an oral hearing before a panel of three judges. The court is allowed to examine both the interpretation of the law and the merits. The free evidence theory applies so there are no strict rules on the admissibility of evidence, which is in contrast to common law countries.
The appeal, as a rule, is made while the applicant in the country. However, the law does not exclude the possibility to apply for an appeal from abroad, although this has not been done in practice. The difficulty to represent one's client after he has left Finland is obvious: in most cases lawyers lose contacts with their clients who see no reason in continuing the procedure.

The effectiveness of appeals in accelerated procedures has been seriously questioned by lawyers in private practice, NGO lawyers, and by academics. The Constitutional Law Committee of Parliament discussed the issue in 2002 and gave its statement on the compatibility of the Finnish accelerated asylum procedure with Article 13 of the ECHR and with Article 33 of the EU draft directive on asylum procedures. The Finnish accelerated procedures, which lack suspensive effect, were discussed in the light of the requirements of Article 33 of the draft EU directive, in which the standard of the right to suspensive effect is higher than is in force currently in Finland. Article 13 of the ECHR was discussed in the light of recent relevant decisions (Jabari v. Turkey, 11.7.2000, Conka v. Belgium, 5.2.2002).

The Committee concluded that immediate enforcement of a refusal of entry decision may violate Article 13 of the ECHR. This would be where the national authority, despite well-founded claims presented to it, does not ensure that the enforcement is not contrary to the prohibition on mass expulsion or torture. However, the rules laid down in Section 62 of the Aliens Act are not per se incompatible with the ECHR. It is, nevertheless, possible that such violations may occur if the provision is applied mechanically and ignores the requirements of Section 9.4 of the Finnish Constitution. It is obvious, according to the Committee, that formal guarantees of the suspensive effect of the appeal would be provided by a system that is based on automatic suspension of removal. This, however, would work against the practical effectiveness of the system. The Committee concludes that Finland should aim to amend Article 33 paragraph 3, of the draft Directive to include a phrase that suspensive effect may not be extended to a person who is returned to a safe third country unless the applicant has made a well founded claim that removal would violate his human rights.

(b) Countries of origin

Please see 8(a).

Question 9

One preliminary observation worth making in the context of an evaluation of the Finnish asylum legislation is that the issue of national interest and abuse of the asylum system dominated the discussions in the lead up to amendments to the Aliens Act. This left little room for issues such as effective remedies and adequate legal safeguards. Instead, emphasis was on procedural issues, in particular on the duration of the normal procedure and the need to introduce new accelerated procedures. Arguably, the material grounds for channelling asylum applications into accelerated procedures were not analysed with similar care.

Safe third country and safe country of origin notions de lege ferenda

A survey on the law of the application of the concepts safe third country and of safe country of origin is topical in the Finnish context. The Aliens Act is undergoing a comprehensive reform that was initially to be accomplished before the parliamentary elections of 16 March. The Cabinet introduced the Bill to the Parliament 17 January 2003 and it was discussed at the plenary session of the Parliament of 23 January 2003. The discussion evolved quite centrally around the accelerated procedures and the safe country of origin notion. The Conservative Party was fully committed to the accelerated procedures where safety notions were concerned whereas the Green Party was particularly critical.

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71 Åbo Akademi Institute of Human Rights in its expert statement on the proposal for the comprehensive reform of the Aliens Act, 31 December 2001. The Institute states that in all cases the appeals court must be guaranteed a factual right to assess individual appeals. Lack of suspensive effect is not in compliance with this principle and is, further, problematic in light of decisions made by the European Court of Human Rights.


73 Constitutional Law Committee, 3 April 2002, pp. 2-3.
Due to the limited time frame before the elections, the Parliament did not process the Bill. The new Cabinet will have to start the legislation procedure in the Parliament anew.

(a) Third countries

The notion of safe third country is included in the Cabinet’s Bill in Section 91 with similar wording as in the current Section 33b of the Aliens’ Act. The inclusion and lack of further analysis has been strongly criticised both by NGO’s and scholars alike (please see footnote 17).

Many academics (most notably Prof. Martin Scheinin74) together with NGO’s and practicing lawyers have criticised the definition of the safe third country. Prof. Scheinin has commented that there is a need to emphasize the needs of an individual and thorough assessment of the safety to the individual applicant. NGO’s have stressed the shortcomings of the legal safeguards, especially the lack of automatic suspensive effect of the appeal.

From the Government’s point of view, the notion of safe third country has served its purpose. Numbers of so-called abusive asylum claims have been reduced and the asylum system has functioned more efficiently. The Helsinki Administrative Court has stated in its opinion on the report of the working group on the Aliens Act that the legislation has worked relatively well.

From a practitioner’s perspective the safe third country notion has been problematic. The asylum interview is carried out by the police using a shorter form of interview protocol than in the normal procedure. The interviews have been short and superficial, sometimes lasting only one hour during which time the travel route and identity of the applicant are also examined. Thus the grounds and, more importantly, the grounds for rebutting the safety presumption, can be extremely difficult to ascertain. The seven-day period in which to process the application leaves practically no opportunity to send further evidence to rebut the safety presumption. In many cases, the applicant has no access to a lawyer before his case is decided. Further complications are created by the fact that the client or his legal counsel may not be aware that the safe third country notion is applied. However, the Immigration Department at the Ministry of the Interior points out that the Helsinki Administrative Court has confirmed the assessments made by the Directorate of Immigration concerning the safety of a certain country for a certain applicant. It would thus seem that usually no essentially new evidence is presented during the appeal phase.

The most detailed analysis on the safety of a third country was conducted in 1999 and 2000 in the context of approximately 2,000 asylum applications from Slovak Roma. The Directorate of Immigration argued that the Czech Republic had acceded to the 1951 Geneva Convention, had a fair and efficient asylum procedure and that the Roma had, in fact, a real possibility to have access to that domestic procedure. However, the Czech authorities were not consulted prior to the decision-making on readmission of the applicants. The Finnish Government had no fact-finding mission in the Czech Republic, nor, indeed, in any other countries presumed to be safe third countries.

The first instance appeals body, the Helsinki Administrative Court, was provided with extensive evidence to rebut the safety of the Czech Republic vis-à-vis the Roma. The Finnish Refugee Advice Centre provided detailed evidence on the inadequate standard of the asylum procedure for the Roma based on the information received from the UNHCR regional office in Stockholm. It was further argued, with the supporting evidence from the Roma Rights Centre and various other human rights reports that the protection offered to the Roma in the Czech Republic fell short of the effectiveness standard as the Roma faced serious discrimination and persecution in the Czech Republic.

The Helsinki Administrative Court admitted the evidence. However, all appeals were rejected on grounds of the safe third country notion. There were no oral hearings nor rejoinders requested from the Directorate of Immigration on the evidence presented by the legal counsel. The vast majority of the decisions were made by a single judge, except in some

74 Prof. Martin Scheinin in his expert statement to the Constitutional Law Committee in the Parliament, February 2002.
cases, concerning first appellants from a certain state which were processed by three judges. As the refusal of entry decisions were effectively enforced, only in a few individual cases were extraordinary appeals made to the Supreme Administrative Court arguing fundamental fallacy in interpreting the law. All appeals were turned down with scarce reasoning.

In summary, the decisions of the Helsinki Administrative Court have been discouraging. The mechanisms for assessing the safety of a third country have not been elaborated. It is clear that the Finnish Courts have been quite mechanical in their interpretation of the safe third country notion. In particular, case law has not elaborated on which factors are relevant in determining what is meant by “safe”. The list of safe third countries is in practice used as a guideline as to which countries are to be deemed safe, and so it can be assumed that any assessment by the courts of a particular country is done very generally, and, as was the case for the Roma, conducted in a group assessment. Given the short time period of seven days for processing an individual asylum claim, it is unlikely the Directorate of Immigration is capable of analysing in any detail the safety of the respective third country in individual cases.

The right to a review may constitute a violation of Article 13 of the ECHR. The refusal of entry can be enforced after eight days from the serving of the decision. The time available for making an appeal is simply too short. As the Helsinki Administrative Court grants no suspension orders in practice, the right to a review has become almost theoretical. Generally there prevails an atmosphere of frustration among lawyers in defending clients in cases where the safe third country notion has been applied. Hence, private lawyers are somewhat reluctant to take on these cases.

Assessment of decision practice

The reality of access to legal assistance is unsatisfactory in the current system. Given the fact that asylum procedures in general are complex and the legal interests at stake considerable, the right of access to a lawyer is important in ensuring a fair and effective appeals procedure. Legal aid is granted in appeals procedures. However, there are not many private lawyers who are specialised in asylum law so the vast majority of the appeals are made by the nine lawyers of the Finnish Refugee Advice Centre. As the reception centres are scattered around the country, the lawyer may not necessarily have his office in the same community as the client. There are also other practical obstacles such as the availability of a competent interpreter. Finally, producing evidence and drafting legal arguments is a time consuming process. In the current system the time limit of eight days after which the removal from the country can and, indeed usually is enforced, is simply insufficient to represent one's client effectively. By virtue of Section 62.2 of the Aliens Act the removal decision can be enforced after eight days unless the Court grants a suspension order. The fact that the Helsinki Administrative Court does not, in practice, grant suspension orders, gives rise to justified criticism on the effectiveness of the right to a review in accelerated procedures.

The Constitutional Committee stated In its opinion 16/2000 (on the Government proposal for an Amendment to the Aliens Act 15/2000), the Constitutional Committee stated that an immediate enforcement of a refusal of entry leads to a situation where any possible appeal must be lodged from abroad, which may be in many ways more difficult than an appeal procedure carried out on the spot. The Committee considers, however, that this kind of arrangement is consistent with section 21 of the Constitution of Finland. When settling the date for an immediate enforcement of a refusal of entry decision, the authorities must secure that the person concerned can appeal against the decision in an appropriate manner.

(b) Countries of origin

The notion of a safe country of origin is also included in the s.92 of the Bill, with similar wording to that found in the current s.33b of the Aliens Act.

Criticism towards the notion of safe country of origin has been harsh. Both scholars and practicing lawyers together with NGO’s have pointed to fundamental fallacies in the definition of a safe country. It is incompatible with international refugee law and serious doubts are raised about whether it constitutionally acceptable to legislate on the entry and country of
residence of an alien. The notion should, according to many, be abolished from the Aliens Act.

The Finnish Refugee Advice Centre together with nine other NGO’s met with the authorities in October 2002 and presented their comprehensive analysis of the proposed reform of the Aliens Act. They argued that international law has not accepted a definition of a safe country of origin. Furthermore, it is incompatible with Article 3 of the 1951 Geneva Convention prohibiting discrimination on the grounds of nationality. Finally, the Finnish Aliens Act requires that each individual asylum application is determined individually. This is clearly jeopardised if the asylum claim is rejected merely on grounds of the country of origin.

In practice, there have been similar shortcomings to those described in the previous chapter on safe third countries. The review procedure falls short of the requirement of an effective remedy and has proven to be inefficient. The analysis provided above also applies to the safe country of origin notion.

Annex 1: Case law from the Directorate of Immigration and Appeals Tribunals

(a) Third countries

As described earlier, the vast majority of decisions applying the safe third country notion concern the applications of Roma from Slovakia who entered Finland through the Czech Republic or Hungary. All applications since 1999 have been rejected on relatively formal grounds: e.g. the country accedes to the 1951 Geneva Convention, or the country has in place an effective and fair asylum procedure offering effective protection. In all cases the Directorate of Immigration assumed automatically the returnees would be readmitted. No formal consent was sought from the respective countries, although the Ministry for Foreign Affairs discussed the matter at a general level with the authorities of the above mentioned countries.

The Helsinki Administrative Court has rejected virtually all appeals where the presumption of safety was rebutted. However, there is an important case concerning a young Kurdish woman from Turkey who claimed asylum but was rejected in Germany (Helsinki Administrative Court 27 February 2002, no. 02/0187/7). The Helsinki Administrative Court initially rejected the appeal for a suspension order, thus making the appeals procedure incompatible with the standards laid down in Article 13 of the ECHR. Her lawyers took the case before the European Court of Human Rights, which applied Rule 39 on 20 December 2001 (Application no. 78063/01, A. v. Finland). The Finnish Government complied with the request made by the Court. The following arguments were brought before both the Helsinki Administrative Court and the European Court of Human Rights:

“Ms. (A’s) asylum claim has been rejected in Finland on the grounds of the Dublin Convention. According to the established practice of the Directorate of Immigration, Finland does not seek prior confirmation from the countries from which asylum seekers are removed that the provisions of the Dublin Convention are guaranteed (i.e. on whether rejected asylum seekers can, in fact, reclaim asylum and present new, relevant facts.) The Finnish authorities rely automatically on the State parties to the Dublin Convention in applying the relevant international human rights instruments and re-examining the risk of refoulement prior to removal. Therefore, there are no guarantees given by the German authorities that Ms. (A.) can effectively have her need of international protection re-examined in Germany. As Ms. (A.) has required new, relevant evidence on her past torture experiences in Turkey, there is now a risk of torture and inhuman treatment thus creating a risk of chain deportation. The Finnish Government has not provided any evidence of the existence of effective procedural safeguards in Germany protecting Ms. (A.) from being removed from Germany to Turkey. As regards a possible fresh asylum claim, I would like to emphasize that the Bavarian Administrative Court has rejected her appeal partly because it lacked credibility. It is therefore highly questionable that Ms. (A.) could now successfully present her new evidence on past torture experiences.

According to case law from the European Court of Human Rights (T.I. v the United Kingdom) chain deportation can also violate Article 3 of the European Convention on Human Rights.
The UNHCR was invited by the Court to submit a statement. This statement argued that indirect removal could violate the *non-refoulement* principle. The deciding factor in the case was the fact that German authorities had given explicit guarantees the applicant could on her return make a fresh claim for asylum as well as claims for protection under section 53(4) and 53(6) of the German Aliens Act. As the Finnish Government has not acquired such guarantees it remains uncertain that Ms. (A.) can effectively be protected against removal to Turkey from Germany. Thus the Finnish Government would violate Article 3 by removing Ms. (A.) to Germany.” (Application lodged on behalf of Ms. A. 19 December 2001, LL.M. Sari Sirva, Refugee Advice Centre)

The Helsinki Administrative Court consequently granted a suspension order and the case was struck out by the European Court of Human Rights. The Helsinki Administrative Court overruled the deportation order with reference to the medical reports used in the case. The issue of the safety of a third country (strictly speaking a Dublin State Party) was touched upon but not considered a decisive factor. However, one of the ruling judges, Judge Ulf Ekebom, stated in a seminar on November 14 2002 that the decision was exceptional in the Finnish context as Dublin cases do not raise an issue from the Court’s perspective.

The case itself, together with Judge Ekebom’s comment, indicates that the appeals tribunal is reluctant and cautious in its interpretation of the safe third country notion.

The Supreme Administrative Court has not granted any leave to appeal in cases where the safe third country notion has been applied.

(b) Countries of origin

The overwhelming majority of the cases decided by the Directorate of Immigration on grounds of the safe country of origin notion concern the Roma from Slovakia and Poland. The decision-making process is simplistic: reference is made to the international legal instruments binding on the relevant country and to the country’s compliance with the 1951 Geneva Convention. There is no elaborate analysis of issues such as whether there is the opportunity for a fair trial or whether democratic institutions are present.

Appeals tribunals have no relevant case law on the application of the safe country of origin notion.

The Helsinki Administrative Court plays an important role because it examines whether the individual assessment made by the Directorate of Immigration is correct as regards the safety of a certain state for a certain individual. So far, the Helsinki Administrative Court has agreed with the assessments of the Directorate of Immigration.

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75 Judge Ulf Ekebom, in his commentary speech in the seminar on medical treatment and legal rights of torture survivors, Helsinki, 14 November 2002.
GERMANY

Definitions


“BAFl” means the Federal Office for the Recognition of Foreign Refugees (Bundesamt für die Anerkennung ausländischer Flüchtlinge)

“Bundesrat” means the “Upper House” of the German Parliament. It is the constitutional organisation through which the Länder participate in the German Federation

“BverfG” means the Federal Constitutional Court (Bundesverfassungsgericht)

“GG” means the Basic Law, i.e. the Constitution (Grundgesetz) as amended in June 1993

“VG” means the Administrative Court of first instance (Verwaltungsgericht)

Question 1

(a) Safe third countries

The safe third country concept is set out in § 26a Annex I AsylVfG, listing countries as safe regardless of the individual case. It is complemented by § 27 AsylVfG, denying asylum where the applicant was safe in any other country before coming to Germany76.

(i) The notion of safety as set out by the law in force:

"Persons persecuted on political grounds shall have the right of asylum", art. 16a (1) GG.

This Basic Right does not arise where the applicant comes from a "safe third country", i.e. all EU member states, designated directly by the Grundgesetz in art.16a (2) GG. By this same provision, Parliament is enabled to specify a second group of safe third countries by an Act requiring Bundesrat approval. The condition is that such countries comply with the 1951 Geneva Convention77 and - cumulatively - with the 1950 European Human Rights Convention (ECHR). Currently, Annex I to § 26a AsylVfG lists such countries. The BVerfG held these notions required the country in question to have joined the agreements and in particular that an applicant is – according to the law in force – not deported to the alleged country of persecution without examining whether persecution under art. 33 of the Geneva Convention or treatment contrary to art. 3 ECHR (torture or inhuman or degrading punishment or treatment) is pending.

Even where an applicant is from a country deemed safe under these provisions, Germany might still be obliged to carry out the asylum procedure where it has obligations under an international agreement (art. 16a (5) GG, § 26a (1) Nr.2 AsylVfG), such as the Dublin Convention. The relationship between the third country concept and the Dublin Convention is not yet fully clarified. In particular where another signatory state is not willing to take responsibility, the relevant authority, the BAFI, tends to restrict Germany’s responsibility for taking a decision on the merits as defined under art. 8 Dublin Convention and then possibly to apply § 26a AsylVfG. Similar issues arise concerning a change of responsibility (e.g. art. 11 (1) 2 Dublin Convention) after the entry of the applicant into a signatory’s territory. Again it is argued, this would not fulfil the requirements of § 26a Nr.2 AsylVfG so that the third country concept was not barred.

76 See below, ee).
77 As amended by protocol on 31 Jan. 1967.
Following judgements by the VG Greifswald\textsuperscript{78} and the BverfG\textsuperscript{79} Germany was only obliged not to obstruct asylum procedures assessing the refugee status in compliance with the Geneva Convention in one of the Dublin signatory states. However, it could comply with this duty either by transferring the matter to the responsible signatory state or by making the assessment itself. As the Dublin Convention did not give a substantial right of asylum but only governed procedural responsibility, this assessment would therefore be carried out according to national law, which, in the case of Germany, contains the third country concept\textsuperscript{80}.

(ii) International standards

As for the second group of countries, designated by Act of Parliament (art. 16a (2) GG, § 26a (2) AsylVfG), the standards set by the Geneva Convention and the ECHR are taken into account. For a designation it is crucial that these standards are actually complied with (art. 16a (2) GG: “...application ...is assured”). (See cc) below).

It is unclear to what extent the two conventions have to be complied with\textsuperscript{81} (taking the provisions on social insurance in the Geneva Convention and art. 8 ECHR as an example). It is argued that among the minimum core principles to comply with:

The country in question must provide a procedure for the assessment of the alleged refugee-status “meeting certain minimum requirements” and being \textit{de facto} accessible for the applicant. Henkel\textsuperscript{82} furthermore points out the refugee must be able to provide for his/her living (or it must be provided for) and the third country must observe the principle of non-refoulment (art. 33 (1) Geneva Convention). (This will not be the case where the country in question has a readmission agreement with a country not applying the principle of non-refoulment). Moreover, Henkel states art. 33 Geneva Convention requires an individual assessment of a case. In BVerfGE 94, 49/92 f\textsuperscript{83}, however, the Bundesverfassungsgericht held a safe country concept may be applied by the third country as long as no chain deportation into the country of origin is imminent.

(iii) Compliance to be assured

For countries listed by Parliamentary Act compliance with the two conventions must be assured in practice in order to be eligible for safe third country status (art. 16a (2))\textsuperscript{84}.

(iv) External flight alternative under § 27

§ 26a AsylVfG can be seen as complemented by § 27, barring asylum where the applicant comes from any other safe country (other than those under § 26a AsylVfG). Safety in this context denotes no “political persecution” in the sense of art.16a GG (in terms which are partly different to those in the Geneva Convention, as set out below in b) bb) and cc)). Present and future safety is presumed if

(i) the applicant has remained in the country in question for longer than three months without having been persecuted and if there is no danger of being deported to a persecuting country ( § 27 (3) AsylVfG) or

(ii) where s/he was issued a passport under art 28 of the Geneva Convention.

A normal case under § 27 AsylVfG is dealt with as per any normal application for asylum. The presumptions tend to be easily rebutted\textsuperscript{85}, resulting in an individual assessment of the case. Restrictions or accelerated procedures only apply where the case is an “obvious” one and in such cases, these restrictions or accelerated procedures are the same as for safe country

\textsuperscript{78} 17.11.1999, - 5 A 1057/98 -
\textsuperscript{79} 26.1.1998, - 9 B 434.97 - juris.
\textsuperscript{80} Der Einzelentscheider (EE) 03/2001, 1 ff.
\textsuperscript{81} Henkel, Das neue Asylrecht, Neue Juristische Wochenschrift (NJW) 1993, 2705/2707; Wolff, Die Asylrechtsänderung in der verfassungsgerichtlichen Prüfung, DÖV 1996, 819/826.
\textsuperscript{82} Henkel NJW 93, 2705/2707 f.
\textsuperscript{83} BVerfGE 94, 49/92 f. (Federal Constitutional Court Report, vol. 94 at 49/ 92 f).
\textsuperscript{84} BVerfGE 94, 49/90 ff.
\textsuperscript{85} Renner, § 27 nr 59, 65.
cases under §§ 26a, 29a AsylVfG cases (see below). Unlike §§ 26a, 29a AsylVfG cases, however, cases of external flight alternative will generally result in an individual assessment of the case under the deportation regime which refers to the question of persecution as well. The procedure, however, is rarely used. In the following analysis, therefore, the focus will be on the safe country regime under §§ 26a, 29a AsylVfG.

(b) Countries of origin

(i) The notion of safety

Safe countries of origin may be designated by Parliamentary Act requiring the consent of the Bundesrat, art 16a (3) GG. Annex II to § 29a (2) AsylVfG contains a corresponding list. Countries can only be so designated if they meet the conditions set out in art. 16a (3) GG, according to which there must neither exist "...political persecution nor inhuman or degrading punishment or treatment...".

With reference to the Materialien (legislator's considerations), these requirements will not be fulfilled unless there is safety throughout the whole country and for all inhabitants.

For future amendments of the list in Annex II the judgement of the Bundesverfassungsgericht will have to be taken into account as well. It is worth mentioning that the existence of the death penalty is not necessarily a hindrance for a general qualification as safe.

(ii) International standards

The notion of "political persecution" refers to the equivalent term in art. 16a (1) GG as it was traditionally understood in the previous art.16 (2) GG.

While on the one hand non-state persecution is regularly not recognised, in other respects the term "persecution" in Art. 16a GG is regarded as wider than the enumeration in the Geneva Convention.

The criterion of degrading punishment or treatment was inserted as a safeguard in conformity with art. 3 ECHR, as such treatment may result in political persecution and should therefore be assessed individually and not by way of lists, by their nature forecasting the situation in a country.

For the assessment of those countries actually included in the current list i.e. for the introduction of § 29a II Annex II AsylVfG) the legislator was guided by the 1992 London Conclusions.

(iii) The meaning of persecution

The persecution must be political. Misadventures resulting from natural disasters, wars and civil wars do not entitle to protection as a refugee. Persecution is political if it is based on race, religion, nationality, membership of a social group or political opinion.

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86 BT-Drs. 12/4152, 8.
87 BVerG DÖV 1996, 650 LS.
88 BVerGE 94, 134-144.
89 BVerGE 94, 137.
90 BVerGE 54, 358; BVerwGE 67, 318 f; 72, 277; BVerfG in Deutsches Verwaltungsblatt (DVBl.) 2000, 1518 is also considering state-like structures; e.g. for protagonists in a continuing civil war: BVerwGE (Federal Administrative Court Report) 114,18.
91 On the differences between the notions of "political persecution" and the Geneva "refugee" see Bienwirth, Archiv des Völkerrechts 1991, 295/304f.; BVerwGE 89, 296; 95, 42.
92 BVerfG DÖV 1996, 650 LS; Schmidt-Bleibtreu / Klein, Kommentar zum Grundgesetz, art. 16a Nr 7.
93 Henkel NJW 93, 2705/2708.
94 BVerGE 54, 357; 56, 235; 76, 158; BVerwGE 80, 3243; 87, 141.
Political persecution may be limited to a certain region if there is no reasonable internal flight alternative. It is normally state-persecution and may accordingly differ from the Geneva "refugee" (see above). On the other hand the term of "political persecution" covers any unchangable personal characteristics and can therefore be wider than the notion "refugee" of the Geneva Convention which refers to an enumeration. Persecution by private persons may be qualified as indirect state-persecution, if the state encourages private persons, supports acts of persecution or fails to protect from such acts because it is not willing or able to do so. This is to be distinguished from the case where the state is in principle capable of protection to a certain degree but does not have the necessary resources.

(iv) The assessment

Non-persecution and the non-existence of inhuman or degrading punishment or treatment must be "safely deducible" (art.16a (3) GG).

The key criteria for an assessment as safe are its "laws, enforcement practices and general political conditions", art. 16a GG. This is a non-exhaustive list of criteria; other relevant criteria evaluated by authorities or courts may be taken into account such as recent admission quota (also those in other EU member states) or reports by Germany's representations abroad. Information provided by non-governmental organisations should also be considered, notwithstanding that this source of information is not mentioned in the legislator's considerations.

Concerning the laws in force, the BVerfG furthermore points out as possibly relevant: the fact that any area of life may be affected and that guidance may be offered by the notion of refugee in art. 1 A 2. Geneva Convention, the 1966 International Covenant on Civil and Political Rights, the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the ECHR – where it was crucial whether these international standards have been incorporated as binding domestic law.

With regard to enforcement practices, the willingness to allow the scrutinising of these standards in situ by independent organisations can be an indicator of the congruence of the law and the legal practice. Also a certain degree of stability is required in order to assume continuity of the legal position and of law enforcement, since a list-based system designates countries for numerous cases, therefore anticipating the situation in the future.

When Annex II was first introduced, the legislator took into account "the general political situation" (incl. democratic structure of the state, independent judiciary, multi-party system and the right of freedom of expression), the respect for human rights (including the compliance with the principles of international human rights agreements, in particular the UN International Covenant on Civil and Political Rights, the ECHR and the UN Convention against Torture) and the willingness of the state concerned to admit independent international organisations monitoring human rights situations and the stability of the country in question (including its opinion that no significant changes are imminent). It is also claimed all available sources were used including the past experience of relevant German authorities and the judiciary as well as material from the UNHCR and international human rights organizations.
Furthermore "reports from diplomatic representations " are described as "important sources of background material".

For the assessment of those countries included in the current list i.e. with reference to § 29a (2) Annex II AsylVfG, the legislator refers to the 1992 London Conclusions. These Conclusions include the consideration of NGO reports, which are interestingly not mentioned in the official Materialien to the existing list.

**Question 2**

(a) Safe third countries

(i) The nature of the act of designation

The countries are designated by way of list.

EU member states are qualified by the Basic Law itself, art. 16a (2) GG. Additional safe countries are specified by an Act of Parliament in accordance with art. 16a (1) of the Basic Law (§ 26a (2) Annex I AsylVfG). These provisions aim at giving effect to standards laid down in the Geneva Convention and the ECHR.

(ii) Challenging the designation

The designation itself may be challenged according to its nature as an Act of Parliament and a provision of Basic Law.

German procedural law would regularly require a judicial review of a Verwaltungsakt (administrative act) of the BAFI rejecting an application on the grounds of the safe country principle. If the administrative court believes § 26a (2) Annex I is unconstitutional, it will then submit the question whether § 26a is to be applied to the Constitutional Court (art. 100 GG). If unsuccessful (because the court believes it does not breach the Grundgesetz and therefore does not submit to the Constitutional Court according to art. 100 GG), the applicant may issue a Verfassungsbeschwerde (constitutional complaint) directly to the Constitutional Court.

The designation as safe by virtue of EU membership under art. 16a (2) GG itself (because of the constitutional nature of the designation) can be challenged on the grounds that the amendment resulting in the current art. 16a was infringing art. 79 (3), 1, 20 (3) GG (which prohibits to restrict the principles laid down in arts. 1 and 20, namely the protection of human dignity and the rule of law) or otherwise violates constitutional law, e.g. procedural rights.

In the case of an additional designation by § 26a (2) Annex I AsylVfG it might be argued that this Act violated the Grundgesetz, on the grounds that either it did not comply with the enabling provision art. 16a (2) of the Grundgesetz (in particular, the requirements for a country to be considered as safe) or because it otherwise violated the Grundgesetz, including procedural rights. However, in 1996 the Bundesverfassungsgericht held the legislator had, when assessing the criteria for designation as set out in art. 16a (2) GG, a scope of evaluation and assessment that could only be exceeded if it acted in bad faith or did not reach justifiable conclusions in its reasoning.

(iii) Non-rebuttable presumption

Safety is a non-rebuttable presumption

(iv) Exceptional leave to remain on individually assessed grounds

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109 Henkel NJW 93, 2705/2708.
110 Henkel NJW 9, 2705/2708.
111 This can be made by any individual who believes his basic rights as accorded by the constitution have been infringed by a court decision or directly by the law in question. (Art. 93 of the Basic Law)
112 BVerfG DÖV 1996, 647/650.
The presumption of safety is undermined to a certain degree in practice and by Constitutional Court rulings concerning deportation under §§ 51 ff AuslG:

Following a decision to reject an applicant on safe third country grounds, the issue of deportation arises. To a large extent the same standards apply to each and, accordingly, the presumption of safety on the basis of which asylum is denied applies to the deportation rules as well113 (see § 31 (4) AsylVfG). This avoids any individual assessment of the case, as originally intended.

However, in 1996 the Bundesverfassungsgericht114 held that the regime was only constitutional on the condition that a list of exceptions applied which limited this indirect effect of the presumption where the deportation rules would then have to be exercised in full. These cases would then require an individual assessment against some of the aforementioned international standards (e.g. art. 3 ECHR and art 33 Geneva Convention).

Additionally, in practice the problem of uncertain travel routes commonly arises115, as do cases where the third country is unwilling to readmit the applicant, e.g. because of a time limit or other requirements agreed upon (e.g. the requirement of a certain link with the allegedly transited country) in a readmission agreement. Here the deportation regime is assessed in respect of a country different from the safe third country in the sense of s. 26a AsylVfG, so that again the presumption of safety does not affect the question of deportation. The question of safety in respect of the intended country of deportation must therefore be assessed individually. § 26a AsylVfG is therefore of more relevance at border cases under § 18a AsylVfG where it is obvious where the applicant comes from.

Finally, some reasons for a deportation prohibition (i.e. §§ 53 (1)-(3) and (5)-(6), 55 AuslG) are not at all taken into account by the standards referred to under the safe third country presumption so that these also have to be individually assessed.

Although it is not entirely clear, it must be assumed that each of the above exceptions applies to the deportation regime only, and not the safe country concept under the asylum regime116. However, the resulting individual assessment with regard to substantial aspects of safety would seem to undermine the concept insofar as such assessments were intended to be avoided via the list-based concept. The right to remain which may possibly follow, approximates to the right of asylum (s. 3 AsylVfG) and is referred to as “kleines Asyl.” (literally, “small asylum”). The exceptions mentioned are as follows:

- The list-based concept cannot by its nature anticipate and therefore incorporate rapid unpredictable changes, e.g. a coup. (Nor can such changes be reacted on by way of list-amending order under 26a (3) / 29a (3) AsylVfG.). This is referred to under the term of the limits of the Konzept normativer Vergewisserung (“concept of normative ascertainment”)117;
- Additionally, this concept does not take into account cases in which, the applicant faces a danger of being persecuted or inhumanly treated by an otherwise safe third country. This situation might arise where the third country has political ties with the country of origin and therefore refuses to grant appropriate rights for that particular applicant, or where the third country is clearly flouting the Convention by refusing to offer any protection in an individual case118;
- It is uncertain from which safe third country the applicant came from and so the applicant will be deported to a country different to the country of transit. The consequence of this is that the presumption of safety in respect of the alleged transit country will not apply for the country of destination;

114 BVerfG DV 96, 647/649.
115 As set out above the safe third country regime does not require the proof from which particular country the applicant came from, but only the certainty the s/he came from any safe third country (and all neighbouring countries are deemed safe) – whereas a deportation order necessarily refers to a particular country.
116 Marx, § 26a AsylVfG nr 74 ff.
117 BVerfG NVwZ 1996, 700/705.
118 Pieroth in Jarass / Pieroth, Grundgesetz, Art. 16a nr 28; in order to avoid a violation of Germany’s duties with respect to art. 13 ECHR: Marx. Asylverfahrensrecht 1999, 26 a nr 67.
• Where the applicant faces the death penalty if he is returned (53 (2) AuslG) this is not covered by the presumption because it does not fall within the ECHR (art 2 (1)).
• The same is true where the applicant faces being the victim of an imminent and severe crime which the country in question is incapable of offering protection from (53 (4))119;
• Finally, personal humanitarian reasons as set out under 55 AuslG (exceptional temporary leave to remain) such as severe illness or pregnancy may bar the deportation for a limited period120.

However, apart from the willingness of the destination state to admit the applicant, the BAFI will only consider these exceptions where the circumstances suggest such a case. The applicant must adduce clear indications that his case falls under one of the above exceptions.121

(b) Safe countries of origin

(i) The nature of the act of designation

Countries of origin may be listed as safe by Acts of Parliament (§ 29a (2), Annex II AsylVfG).

(ii) Challenging the designation

As the list is an Act (§ 29a (2) Annex II AsylVfG) it needs to be challenged in the way described for § 26a (2) Annex I AsylVfG above (e.g. on the grounds that the requirements for the designation as set out in art. 16a (3) GG were not met by a country listed in the Annex, filing judicial review with a submission to the BVerfG under art. 100 GG or by Verfassungsbeschwerde, art. 93 GG).

The legislator’s assessment requires the collecting and evaluation of information. In accordance with general principles of German constitutional law the BVerfG held that the legislator has a power of evaluation and assessment of his own (Beurteilungs-, Einschätzungs- und Wertungsspielraum).122 The court will therefore restrict its review as to whether the approach taken is reasonably justifiable in terms of methodology or as to whether the legislator acted in good faith.

(iii) Rebuttable presumption

The safe country of origin principle in art. 16a(3) GG is a rebuttable presumption (Regelvermutung)123. The applicant must prove, that he/she is - as an exception - persecuted in the country designated as safe. The applicant must refer to circumstances of his own personal history of persecution; statements concerning the general situation in the country of origin are not sufficient124. Rebutting the presumption will therefore be more difficult, where the line of argument refers to general circumstances in that country which, by their nature, would normally be considered when generally designating the country by way of listing125. Arguments supporting a different assessment of the country as a whole would therefore have to be submitted in the course of a constitutional review (see above) of the designation (under art. 100 GG or art. 93 GG).

(iv) Exceptional leave to remain

With regard to the scope of the resulting presumption and possible individual assessments under the deportation regime, please see the equivalent section above for safe third countries.

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119 BVerfG NVwZ 1996, 700/705.
120 BVerGE 94, 49 / 95.
121 BVerfG DOV 96, 647/649.
122 BVerfGE 94, 144; Schmidt-Bleibtreu / Klein, art. 16a nr 7.
123 Schmidt-Bleibtreu / Klein, art. 16a nr 7
124 BVerfGE 94, 115 f.
125 BVerfG DOV,650/654.
Question 3

(a) Safe third countries

At the time of introduction of the first Annex I to § 26a, Finland, Norway, Austria, Poland, Sweden, Switzerland and the Czech Republic were designated as safe. Apart from the EU member states (designated by art. 16a (2) GG itself), these are now Norway, Poland, Switzerland and the Czech Republic.

(b) Safe countries of origin

At the time of introduction of the first Annex II to § 29a, Bulgaria, Gambia, Ghana, Poland, Romania, Senegal, Hungary, the Czech Republic and the Slovak Republic have been designated. Currently Bulgaria, Ghana, Poland, Romania, Senegal, the Slovak Rep., the Czech Rep. and Hungary are on the list.

Using the enabling provision § 29a (3), the Federal Government removed Gambia from the list by way of order of 23 July 1994 following the overthrow of the Government by a military coup and the repeal of the Constitution. On 8 April an Act of Parliament eventually removed the country from the list.

Question 4

The Government “continuously monitors the fulfilment of the requirements”. It is supported by additional reports produced by the Foreign Office “at irregular intervals and at times of political change”. Information gathered by NGOs is also taken into account. The Government makes a “reasoned statement” to the Bundestag on the situation of the designated countries with regard to the criteria set out above. An asylum report is submitted to the Bundestag on a yearly basis.

Under §§ 26a (3) and 29a (3) AsylVfG, the Federal Government can and must suspend the status given by listing under § 26a (2), Annex I and § 29a (2) Annex II respectively by way of order without the consent of the Bundesrat being required (§ 26a (3) and § 29a (3) AsylVfG). Changes in a country's legal or political situation must pose a reason for presuming that the requirements mentioned in art. 16 a (2) or (3) GG respectively ceased to exist. The order shall expire no later than six months after its taking effect. It would then have to be replaced by an Act of Parliament amending Annex I / II.

Question 5

Germany describes reports of diplomatic representations abroad as "important source" of “background material” (as above).

Cases are reported in which returnees have finally been able to prove further acts of persecution after they had been returned already and, as a result, were issued with a visa by the German Embassy with which to re-enter Germany. However, these cases concerned the assessment of "political persecution", not the designation as a safe country itself (see Annex II).

Question 6

(a) Safe third countries

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127 BGBl. 1993 I, 1070.
128 Wollenschläger / Schraml, JZ 94, 61/63.
129 www.stahmann-anwalt.de/Asylrecht.de
It is not required that the applicant directly comes from a safe country before entering Germany. In addition, it suffices that the applicant entered from any safe third country; it is not required to prove from which. This seems to be of immense practical importance since an estimated 50% of the cases fall within this category.

When arriving by plane, a transit stop in a safe country giving the opportunity to apply for asylum in that transit country will suffice. The Constitutional Court places a non-stop transit through a third country by public transport (i.e. by train) in the same category as non-stop flying over it, because of the lack of opportunity to get in contact with relevant authorities. However, the non-stop transit in a private vehicle, allegedly locked and sealed, does not fall into the same category and therefore § 26a AsylVfG is applicable. In such a case it has been argued that the alternative view was contrary to the legislator’s intention, since art.16a GG, § 26a AsylVfG would otherwise be easily circumvented (it would normally not be possible to prove that a private lorry was not locked). It appears as if the courts will normally take into account whether an applicant had a reasonable opportunity to use the transit for applying in the third country and, if not, will also take into account whether an applicant appears to be responsible for not having the actual opportunity in the particular case or whether the behaviour appears as an abuse or circumvention.

After having applied in Germany, a short intermediate stay in another safe country does not fulfill § 26a AsylVfG. It has been considered, obiter, this might be different, if an application procedure in Germany was settled in the meantime.

Investigations as to the authenticity of the route are – in accordance with the general principles – conducted ex officio (§ 86 VwGO). The deliberate destruction of evidence on the travel route however may (allegedly in accordance with general principles of procedural law) impose the burden of proof for the declaration of a certain route on the applicant, where the authorities cannot verify the statement themselves. § 26a AsylVfG has also been held to apply where the ground for the exercise of the right of asylum is first established after the applicant entered Germany. In this context the Court has doubted whether a previous safe country transit merely as a tourist would lead it to a different conclusion.

In accordance with the legislator’s considerations it has been held that the returnee’s destination is irrelevant for the application of the safe country regime. This applies even where the refugee does not know the third country himself, so that a subsequent application in that particular country is practically not possible.

However, the returnee’s destination is relevant to the question of deportation as a qualification of the destination as “unsafe” in the sense of §§ 51, 53 AuslG or the unwillingness to readmit an applicant may produce de facto refugees, unless deportation to the country of origin or another safe country is possible. As §§ 51, 53 AuslG also seek to implement the Geneva Convention (§ 51 (1) AuslG) and the ECHR (§ 53 (4) AuslG) however, these grounds for a right to remain will also regularly be precluded where the applicant transited a safe third country. There are however exceptions and in this context the question of readmission and the treatment of the returnee in situ may be dealt with between the authorities involved. As this concerns the question of deportation subsequent to the denial of a right of asylum in the first place, this is set out more detailed in section 7.

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130 BVerfG DÖV 96, 647/648.
131 BVerfGE 94, 94 f; BVerwGE 100, 25 ff; VGH Baden-Württemberg DÖV 95, 207.
132 HessVGH DÖV 2001, 920.
133 OVG NW DÖV 97, 514 f.
134 BVerwGE 105, 194.
135 BVerfG DÖV 96, 647/648.
136 BVerwGE 105, 199.
137 ThürOVG DÖV 97, 170 f.
138 BVerwGE 109, 174.
139 HessVGH in juris nr MWRE110540200.
140 Materialien, BT-Drs. 12/4450, 20.
141 BVerwG NWZ 96, 700/702 ff; BVerwGE 100, 23; BVerwG DVBl. 1996, 290; BVerfGE 94, 87.
142 BVerwG DVBl. 1996, 290/292.
(b) Safe countries of origin

The citizenship of the individual applicant of one of the countries listed in Annex II to § 29a AsylVfG is authoritative.

Question 7

(a) Safe third countries

(i) Authorities involved

(1) Border authorities

When entering the territory from neighbouring countries by land, the border authorities (Bundesgrenzschutz, Länder and custom authorities) will refuse entrance on the grounds of the third country principle, § 18 (2) AsylVfG, and therefore decide on whether the applicant actually came from or through a safe country on the list.

(2) The Bundesamt für die Anerkennung ausländischer Flüchtlinge (BAFl.)

In the alternative, any application submitted from within Germany (§ 13 AsylVfG) will be directly dealt with by the BAFl. The BAFl is a public institution in its own right but under the jurisdiction of the Federal Government and bound by its instructions. The BAFl is responsible for granting refugee status (§§ 5, 31 (1), (2) AsylVfG); for questions of deportation prohibitions under § 51 AuslG (imminent danger of persecution); 53 AuslG (prohibiting deportation for imminent violations of rights conferred under the ECHR), and deportation orders under § 34 AsylVfG.

Einzelentscheider (sole decision makers) assess the application for asylum (§ 5 (2)). The Einzelentscheider is a civil servant (Beamter), not bound by instructions unlike the BAFl in general. The minimum qualifications are set out in § 5 (2) AsylVfG according to which he must be of gehobener Dienst. By way of order by the Ministry of the Interior (requiring Bundesrat consent), however, it may also be a civil servant of mittlerer Dienst, if the following requirements are met: he/she must be a senior civil servant with particular professional experience who distinguishes him/herself by special qualifications and capabilities. Those who are to have contact with the applicant are trained in dealing with vulnerable groups, such as minors. These are informed about the possibility to request specifically trained personnel. The BVerfGE held, those deciding in the “airport-procedure” under § 18a AsylVfG needed special training or a particular qualification.

(ii) The decision-making process

(1) Border authorities

As for rejections at borders under §§ 18 (2) Nr.1, 26a AsylVfG, the general principles of administrative procedural law apply, i.e. the principle of investigation ex officio (§ 86 VwGO), the right to consultation, the right to obtain advice and the right to be heard (§§ 24, 25, 28 administrative procedural code, VwVfG). The applicant is under a special duty to co-operate, § 15 AsylVfG (see below (2) (a)). The decision is normally made orally although a written form can be requested for (§ 39 (2) VwVfG). In this case a statement of grounds is provided, 39 (1) VwVfG. It has been held at first instance that in a case of refusal on safe country grounds, the submission of an application to the BAFl (below) must be possible.

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143 Information supplied by the BAFl. on 24 March 2003.
144 BVerfGE 94, 166.
145 VG Frankfurt NVwZ Suppl. 2/1993, 16.
The BAFl

Decision on the application for asylum, § 31 (1), (3), (4) AsylVfG

The procedure starts with the application for asylum (§ 13 AsylVfG), which automatically results in a temporary right to remain for the time the procedure is being carried out and which will automatically lapse when asylum is denied (§§ 55, 67 AuslG). As the decision is based on the list, the decision-making process itself is short where safe country transit can be proved.

It must be noted that where the applicant himself states to have transited one of the listed countries, the authority can skip the hearing, § 24 (1) 3 AsylVfG. The whole decision-making process is then reduced to a mere internal “process” of “checking” the current list and does not really constitute a “procedure” from the applicant’s point of view.

However, for applications from within Germany, the travel route is difficult to clarify. Where it is established that the applicant has at least transited any (unspecified) listed country (all neighbouring states are deemed safe under the regime) there will be no asylum but still an individual assessment of Geneva and ECHR criteria under the deportation regime (set out above under section 2 and below (b)). The practical relevance and the desired effect of the list based regime is therefore much more significant for border cases under § 18a AsylVfG where it is clear where the applicant comes from.

Otherwise, the Federal Office makes the decision containing a written justification and served, with information on legal remedies available, on those concerned. Where the asylum application is only turned down pursuant to § 26 a AsylVfG, the decision together with the deportation order under § 34 a AsylVfG shall be served on the alien himself.

The procedure is characterised by the principle that the investigation into any relevant particular, § 24 AsylVfG, and the personal hearing under § 25 AsylVfG is conducted ex officio. The principle of investigation ex officio is, however, limited in effect by the interplay with §§ 25 (1) ff and 15 AsylVfG: The applicant must co-operate and set out the reason for persecution and adduce any information that might be of relevance in this context, especially on his recent places of residence, routes of travel, stays in other countries and whether there is another asylum application submitted somewhere else in Germany or abroad, § 25 (1) AsylVfG. The applicant must adduce any fact that may bar deportation (e.g. under § 53 AsylVfG) as well. Furthermore, the applicant is under a general duty to co-operate, § 15 AsylVfG: He is supposed to disclose what is relevant for assessing the requirements under the Act and provide available documents (passports, tickets, visa etc.). This provision also applies where there is no specific duty to act or refrain from acting in the course of the asylum procedure, § 15 (1) AsylVfG. As a result, it is argued, the duty to adduce and prove the facts is de facto imposed on the applicant.

The hearing is the crucial part in the decision making process and the rules for all applications apply. If the applicant does not speak German, an interpreter is to be provided, (§ 17 AsylVfG). According to § 12 AsylVfG a minor is capable of procedural acts (and of receiving administrative acts) from the age of 16. This capability is to be assessed ex officio. Under the age of 16 representation is necessary, normally by parents, and, if not available, the “guardianship court” designates a representative.

If the applicant fails to appear at the hearing without good reason the decision will be made without hearing the applicant’s statement in cases where the applicant is located at a reception centre (§ 25 (4) AsylVfG). Otherwise the BAFl may give the applicant the opportunity to submit a written statement. If this statement is not submitted within one month,

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146 Renner, § 15 AsylVfG nr 3.
147 There is no hearing if the applicant is a child under the age of 6, born in Germany provided the facts are sufficiently known from its parents’ files, § 24 (1) 3 AsylVfG.
148 Renner, § 16 nr 6.
the decision will be made without taking the applicant's statement into account, § 25 (4) AsylVfG.

Late submission of evidence (after the hearing) may be disregarded, if the decision by the BAFI was otherwise delayed; § 25 (3) AsylVfG.

(b) Decision on deportation

If the BAFI refuses asylum on the grounds of § 26a (1) AsylVfG, a deportation order is issued together with that refusing asylum (§ 34a AsylVfG) in order to accelerate the process of terminating the aliens stay.

Such an order under § 34a requires that

1. The deportation into a particular country is de facto possible because that country is willing to take the applicant back. This is either ensured by unilateral agreements or through informal communication between the authorities involved on both sides, and;

2. Deportation must not be barred under §§ 51 or 53 AsylG so that the applicant is protected from being sent to where there is an imminent danger of persecution, to life, of torture or of death penalty or of violations of rights deriving from the ECHR. However, as already set out in section 2, the requirements of §§ 51 and 53 are regularly not fulfilled as they mainly aim to implement the standards set by art. 33 of the Geneva Convention and art. 3 of the ECHR (see §§ 51 (1), 53 (4) AsylVfG) so that the presumption of safety regularly also affects the deportation regime. Accordingly the BAFI will normally not assess the deportation prohibitions at all (§§ 51 and 53) which might otherwise provide an asylum-type status (§ 3 AsylVfG).

In some circumstances the BAFI will assess the requirements of these provisions where there is a reason to believe that the presumption of § 26a AsylVfG does not apply. This might be where because of its nature the list based presumption does not cover the case in question, for example in a case of unpredictable changes in a country. Although it is not entirely clear, these exceptions are not meant to give an exceptional right of asylum against the wording of art. 16a (2) GG, § 26a AsylVfG, rather they grant a de facto refugee status insofar as deportation is prohibited under §§ 31, 34a AsylVfG, 51, 53, 55 AuslG which might otherwise provide an asylum-type status (§ 3 AsylVfG).

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(b) Safe countries of origin

(i) Authorities involved

See 7 a) aa) above

(ii) The decision-making process

(1) Regular decision on the application, §§ 29a, 31 AsylVfG

Asylum will regularly be denied as "manifestly unfounded" on the grounds of § 29a AsylVfG when the applicant comes from a listed country of origin, § 29a AsylVfG, art. 16a (3) 3 GG (as explained in 1 b). There is a rebuttable presumption that applicants from such countries are not persecuted due to the "general situation" in that country.

The application procedure commences by submitting the application (§ 13 AsylVfG) to the BAFI. At the same time the applicant receives the temporary permission to stay according to §

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150 BVerfGE 94, 49/97f.
151 Marx, § 26a nr 74 ff; Jarass / Pieroth, art. 16a nr 28; Renner, Ausländerrecht, München 1999, § 31 nr 4 on the case where readmission by the third country is rejected on the grounds mentioned.
55 (1) AsylVfG. The general rules governing the asylum procedure (set out above 7 a) aa) (2)) apply, with the following additions:

Instead of the regular hearing under § 24 (1) AsylVfG the rebuttal procedure (Widerlegungsverfahren) is conducted during which the applicant is given the opportunity to rebut the presumption (laid down in § 29a (2), Annex II AsylVfG) that he is not persecuted for reasons of race, nationality, membership of a particular social group or political opinion or other individual unchangeable characteristics.

The applicant is not required to prove the persecution itself, rather to bring the presumption into doubt. Thereafter the case will be dealt with as a regular asylum application and the regular procedures will apply. In order to bring the presumption into doubt, the applicant needs to adduce the relevant facts. Evidence should be named and / or specified (especially witnesses, experts etc), but does not have to be available at the time of this Widerlegungsverfahren152. In its assessment the authority has a duty to disclose information known to it (without a duty of further investigation)153.

However, the applicant must refer to circumstances of his own personal history of persecution; statements concerning the general situation in the country of origin are not sufficient154. Rebutting the presumption will therefore be more difficult, where the line of argumentation refers to general circumstances in that country, which by their nature would normally be considered when generally designating the country by way of listing155. Arguments supporting a different assessment of the country as a whole would therefore have to be submitted in the course of a constitutional review of the designation (by a Verfassungsbeschwerde art. 93 GG; or conducted within the framework of a procedure of judicial review, art. 100 GG, see above 1.).

If the applicant succeeds in bringing the presumption into doubt, a regular procedure on the application follows. Therefore in practice the rebuttal procedure might only shift into the regular hearing by addressing the question in how far persecution actually takes place in the particular case (then, however a denial as “manifestly unfounded” can still be the outcome, as well as an admission) and by changing procedural principles to that of a regular asylum procedure, especially to an investigation ex officio for the hearing under § 24 AsylVfG.

Regularly however, the presumption results in a denial of asylum. The temporary right of stay granted during an asylum procedure (§§ 63, 55 AsylVfG) automatically expires as the order to leave is immediately enforceable (§§ 55, 67 AsylVfG)156.

(2) Notification of imminent deportation, § 36 AsylVfG

Linked to the decision on the application itself, a notification of imminent deportation under § 36 AsylVfG states a period of time in which the alien must leave the country. While normally there is no legally prescribed period, it is only one week without any extensions possible, where the application, like that under § 29a, is manifestly unfounded, § 36 (1) AsylVfG.

(3) Entry via airport (Flughafenverfahren)18a AsylVfG
A special procedure applies where the applicant submits his/her application when arriving from a listed country of origin by plane. In principle, the procedure set out above (§ 29a AsylVfG) is carried out at the airport before the applicant enters Federal territory. For this purpose the applicant stays at an accommodation facility in the airport’s transit area. However, § 18a AsylVfG implements further elements of acceleration that also furthermore restrict the applicant’s rights of appeal.

The application must be submitted immediately (normally within 2 days\textsuperscript{157}). For the hearing/rebuttal procedure which also takes place immediately, the regular rules apply (see above). However this procedure is exercised after what is often an exhausting journey and is likely to have a special impact on a person that might still be traumatized by persecution. Accordingly trained personnel are expected to take this into account\textsuperscript{158}. The applicant may furthermore be accompanied by a representative, § 14 VwVfG\textsuperscript{159}. Afterwards a legal adviser can be contacted, § 18a (1) AsylVfG.

If the applicant succeeds in bringing the § 29a presumption into doubt, he/she may enter with a § 55-permission (automatically granted as a temporary right to remain as long as an asylum procedure is being conducted) and may pursue the application from within Germany. If the applicant is unsuccessful, the border authorities will refuse entry into Germany and the BAFI will deny asylum (with the consequences set out below 8.), attaching a notification of imminent deportation, stating that he/she will be deported in case of an entry, which is immediately enforceable. The alien will then be rejected to his country of origin (provided deportation is not prohibited under §§ 51, 53, see above).

**Question 8**

**(a) Safe third countries**

Several decisions made by relevant authorities need to be distinguished. Procedural consequences differ accordingly. Decisions on the grounds of the safe country principle can normally be enforced immediately and without delay by preliminary court orders (art. 16a (2) 3 GG, § 34a (2) AsylVfG).

**(i) Rejection by border authorities**

The border authorities will refuse entry if the applicant comes from a listed country (§ 18 (2) Nr.1). According to art. 16a (2) the right of asylum does not come into existence, so that not even a preliminary or provisional right of stay can be claimed. As a police enforcement measure, the rejection can be immediately enforced, § 80 (2) Nr. 2 VwGO (Verwaltungsgerichtsordnung, administrative court procedural code). In accordance with the regular administrative provisions the applicant can seek judicial review, demanding a Verwaltungsakt granting entry, § 42 VwGO. An objection (normally to be previously submitted to the authorities, Widerspruch under §§ 68 ff VwGO and suspending an administrative act’s effect) is inadmissible, § 11 AsylVfG (which applies for any decision made under the AsylVfG, including that which is not made on the grounds of the safe country principle).

Filing a judicial review does not have suspensive effect, § 75 AsylVfG. This applies for all reviews issued on the grounds of the AsylVfG whether or not the safe country principle is involved. Normally a provisional court order could be applied for under § 123 VwGO\textsuperscript{160}, but art. 16a (2) 3 GG declares deportation possible without any delay\textsuperscript{161}. Exceptions to this apply, as set out below cc), for example, in cases where rapid changes cannot be responded to in time.

\textsuperscript{157} Renner, § 18a AsylVfG nr 15.
\textsuperscript{158} BVerG EuGRZ 96, 271/282.
\textsuperscript{159} Renner § 18a nr 17.
\textsuperscript{160} OVG Hamburg EZAR 611 Nr3; HessVGH EZAR 220 nr 1; the administrative court would issue an order in favour of the applicant, if he/she would have to fear irreparable damage to life, limb or liberty and show prima facie that the requirements of § 18 (2) AsylVfG are not fulfilled; Schmidt-Bleibtreu/Klein, art. 16a nr 6.
\textsuperscript{161} BVerGE 94, 99.
Deviating from the regular rules on procedure before administrative courts but congruent with any other matter decided under the AsylVfG, judicial review must be submitted to the administrative court of first instance (VG) within one week AsylVfG (instead of normally 2 weeks in other asylum matters and one month under general administrative law, § 74 (1) VwGO).

(ii) Decision on the application

The VG Frankfurt (above) has held that in cases of refusals of entry under § 18 (2) Nr.1 AsylVfG, the applicant must be given the opportunity to formally apply for asylum under the regular procedure. Asylum however will regularly be denied on the grounds of § 26a.

The possible denial of asylum due to the third country principle (§ 31 (4)) is to be challenged in the regular way, in this case on the grounds that either the applicant did not come from a country listed in Annex I, or that the designation of the country as safe is not justified by the enabling Grundgesetz-provision art. 16a (2) 2 because the requirements (the notion of safety) are not met in the country in question or because the Grundgesetz has otherwise been infringed.

The usual objection submitted to the authority (§§ 68 ff, Widerspruch) is inadmissible (§ 11 AsylVfG, as generally with decisions under the AsylVfG) and the administrative act may be declared immediately enforceable. Judicial review (§ 42 (2) VwGO) again, has no suspensive effect (as has generally no claim on the grounds of the AsylVfG, § 75) and must be filed within one week (§ 74 AsylVfG). No second instance appeal is available, § 78 AsylVfG (normally Higher Administrative Court (OVG) and possibly the Federal Administrative Court (BVerwG)). Preliminary court orders (§ 123 VwGO) have no suspensive effect because of art.16a (2) 3 GG and therefore do not result in a temporary right to remain. Again, exceptions to this apply, for example, in cases where rapid changes cannot be responded to in time (exceptions set out below cc).

(iii) Deportation order, § 34a AsylVfG

The outcome of the judicial review will ordinarily have to be awaited from outside Germany since the denial will be accompanied by a deportation order (§ 34a (1)). In practice this deportation order is the crucial decision to be challenged as its enforcement entails the physical act of deportation. Judicial review may be issued on the grounds, that the requirements of § 34a are not met (set out above in section 7), perhaps because the third country was unlawfully designated as safe or because he did not come from a designated country or deportation was prohibited under the exceptions set out above (sections 2, 7).

Once again, §§ 11 and 75 AsylVfG apply. This means that no objection can be submitted to the authority (Widerspruch, §§ 68 ff VwGO), and an application for judicial review under § 42 (2) VwGO must be filed within one week (§ 74 AsylVfG), does not have suspensive effect and is limited to one instance only (§ 78 AsylVfG). Additionally, the deportation order can be immediately enforced under § 80 (2) Nr.2 VwGO.

The remaining way to obtain temporary relief is normally by application for a suspension of enforcement by way of provisional court order under §§ 80 (5) or 123 VwGO. § 34a (2) AsylVfG however explicitly prohibits the issue of an order suspending deportation to the third country on the grounds of the safe third country concept (§ 26a AsylVfG). This is backed by art.16a (2) 3 GG which allows the enforcement of any measure designated to terminate the stay of an applicant coming from a safe third country.

However, when Art.16a (2) 3 GG, § 34a (2) AsylVfG whose very clear wording establish the core provisions for the accelerated procedure, were challenged as unconstitutional (allegedly violating the constitutional right of having access to an effective review), the Bundesverfassungsgericht162 (Constitutional Court) saved these provisions by declaring them

162 BVerfGE 94, 49 ff.
constitutional under the condition of making exceptions which, in practice, amount to a considerable restriction of their effect. Exceptions to the accelerated procedure result from court rulings, where

- there is a serious doubt that the applicant came via a listed safe third country\(^{163}\);
- the applicant may sometimes claim “personal” or “humanitarian” reasons in the context of the deportation procedure in the sense of § 55 AuslG (generally barring deportation where there is no right to remain under the general Aliens Act)\(^{164}\);
- the applicant may be deported not to the third country but to his country of origin (claiming that his safety from persecution must be assessed under § 51 AuslG)\(^{165}\), or
- there are other reasons that could not be anticipated by the list in § 26a AsylVfG Annex I because of its nature (such as rapid changes in the country in question or where there are reasonable concerns that the third country itself could as an exception persecute the particular applicant; see above limits of the “Konzept normativer Vergewisserung” set out in 2 and 7 a) bb))\(^{166}\).

In these exceptional cases a provisional order suspending the enforcement of deportation may be obtained under § 80 (5) VwGO (under the restrictions of § 36 AsylVfG however\(^ {167}\), set out below b) for countries of origin, as this is the regular procedure there).

In the event of unexpected changes in a particular country however, the authority should be given the opportunity to deal with this problem by addressing that country’s authorities by themselves and possibly be given the assurance that the particular case will be dealt with in compliance with the conventions\(^ {168}\). If not, the judicial review procedure applies as set out at the end of section aa) above.

It should be added that the accelerated appeal procedure under art. 16a (2) 3 GG; § 34a (2) AsylVfG is not applicable on the Verfassungsbeschwerde and therefore not on possible preliminary rulings under § 32 BVerfGG which could also result in a provisional or temporary right of stay. However, it is doubted that a provisional protection from deportation would be granted in practice\(^ {169}\).

(b) Safe countries of origin

(i) Decision on the application

Where the applicant is from a listed safe country of origin, the application will be deemed “manifestly unfounded”, unless he/she can adduce facts or evidence that creates a presumption that he/she faces political persecution (art. 16 (3) 2 GG; § 29a (1) AsylVfG).

Once again, the regular objection submitted to the authority is not admissible (§ 11 AsylVfG). Judicial review (§ 42 VwGO) has no suspensive effect, § 75 AsylVfG (as with any review of decisions under this Act).

In distinction from other cases of unfounded asylum applications, manifestly unfounded applications may only be revised once by the administrative court of first instance (VG), whose judgment cannot be appealed from, § 78 (1). The appeal must be submitted within one week (§ 74 (1) AsylVfG).

In principle a preliminary court order could be applied for (§ 123 VwGO) but a provisional right to remain will regularly be sought by challenging the notification of imminent deportation.

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\(^{163}\) BVerfGE 94, 49/101 f.

\(^{164}\) BVerfGE 94, 49/95 f.

\(^{165}\) BVerfGE 94, 49/113 f.

\(^{166}\) BVerfGE 94, 49/104.

\(^{167}\) Only where there are “serious doubts” whether to the legality of the decision, with shorter time limits and without oral hearing.

\(^{168}\) BVerfG DÖV 96, 647/650.

\(^{169}\) Pieroth, Jarass/Pieroth 16a nr 29.
(below), as its suspension will revive the temporary permission to stay under § 55 (1) AsylVfG (originally deriving from the application for asylum, §§ 67, 55 AsylVfG).

(ii) Notification of imminent deportation

Attached to the denial of asylum under § 29a AsylVfG, the notification of imminent deportation under § 34 AsylVfG establishes the duty to leave the country within a time set at the discretion of the authority (thereby ending the right of stay under § 55 AsylVfG). In a manifestly unfounded case, this period is 1 week without any possible extension, § 36 (1) AsylVfG. Again, any objection submitted to the authority (§ 11 AsylVfG) is inadmissible. Judicial review is admissible but limited to one instance (§ 78 AsylVfG), has no suspensive effect (§ 75 AsylVfG, applying to appeals against any measure under the AsylVfG) and the action must be filed within one week, § 74 (1) AsylVfG.

By way of distinction from safe third country transit (§ 26a AsylVfG), preliminary court rulings are not barred but in fact the crucial means of challenge; successful suspension of the notification will revive the temporary permission to stay under § 55 (1) AsylVfG (originally deriving from the application) since deportation is not allowed before this court ruling is issued, § 36 (3) AsylVfG. The following qualifications and restrictions apply in the accelerated procedure under § 36 AsylVfG:

The application must be filed within 1 week, § 36 (1) AsylVfG, the procedure is written only (oral hearing only in exceptional circumstances). Facts and evidence that are not disclosed by the applicant will not be considered unless they are known to the court or are obvious (restricting the usual principle of investigation ex officio, § 86 VwGO). Facts disregarded in the previous administrative procedure for delaying may be precluded where a consideration would delay this § 80 (5) procedure. The court should conclude the procedure within 1 week, although this period may be extended, § 36 (3), (4) AsylVfG. This also marks the maximum period to remain for temporarily.

The notification of imminent deportation is only suspended under § 80 (5) VwGO, where there are serious doubts as to whether the notification is lawful, § 36 (4) AsylVfG. (This requires a higher degree of probability when forecasting the outcome of the judicial review than that required for a regular application for a § 80 (5) suspension). Although technically only the notification is subject to a preliminary challenge (i.e. by way of § 80 (5) VwGO) and not the decision under § 29a AsylVfG (on the right of asylum itself)\(^{170}\), the application of § 29a and thereby the question of possible persecution will be taken into account as well\(^{171}\).

(iii) “Airport procedures” under § 18a AsylVfG

In contrast to the regular procedure the following provisions apply in denials under § 29a where the application falls under the so-called “airport-procedure” under § 18a AsylVfG.

Any application for a preliminary court order is taken as a request for a provisional order granting entry and setting aside the notification of imminent deportation, § 18a (5) AsylVfG. A successful order will additionally set aside the rejection of entry (§§18, 18a) so that as a result the applicant can enter Germany in order to pursue his/her regular application procedure from within the country.

However, the application for a § 80 (5)-ruling must be filed within 3 days and facts not submitted by the applicant or the authority will be disregarded, unless already known to the court or are obvious. Late submission of facts may be precluded and serious doubts in

\(^{170}\) The notification, challenged by way of § 80 (5) VwGO seeking suspensive effect, technically only requires a previous denial of asylum in order to be lawful itself. Such a decision exists even if this previous § 29a-decision on the right of asylum was unlawful. It is therefore noteworthy that the lawfulness of the application of the denial of asylum under § 29a is taken into account as well, when deciding on the notification: in this way the merits of the case, i.e. the question of persecution is taken into account.

\(^{171}\) Renner, § 34 nr 16.
regard to the lawfulness of the decision under § 29a AsylVfG, are required. (See above), §§ 18a (4), 36 (4) AsylVfG.

Various institutional safeguards established by the Bundesverfassungsgericht exist in order to ensure that the particular circumstances of the Flughafenverfahren do not amount to unreasonable impediments for an effective access to judicial review.

- Organisational measures shall ensure that the applicant is able to understand the grounds on which the decisions were made (both legal and factual), including with the aid of an interpreter;
- Organisational measures shall also ensure that the applicant understands what kind of appeals are available, what they require, and that he is assisted in assessing the prospects of a possible review and in submitting further applications;
- Free access to an experienced lawyer (which may include experience with the country of origin in question) on any day of the week, including weekends, where necessary with the assistance of an interpreter;
- If so requested, and without even having to provide a reason, the applicant must be granted a further four days in which to apply for a preliminary court ruling under §§ 80 (5), 123 VwGO.

A copy of the applicants files must be sent to the relevant court as soon as a decision is made (36 (2) AsylVfG), thereby ensuring that the time periods provided under the relevant provisions and the safeguards established by law and under the mentioned Court ruling allow an effective right of appeal in the sense of the Constitution.

Question 9

(a) Efficiency and effectiveness

The safe country concept has proved efficient insofar as it has reduced the number of asylum applicants from 438,191 in 1992, the year before the current regime was introduced, to 127,210 in 1994, the year after the introduction. The restrictions on provisional rights to remain combined with accelerated procedures have undoubtedly reduced the numbers of persons staying without good reasons.

Germany’s safe country policy was borne out of its belief that it received a disproportionate share of asylum applicants compared to that of its European neighbours. The safe country approach sought to aim at achieving a “just share of the burden” among European countries. However, the introduction of the safe country regime has seen Germany’s poorer, eastern European neighbours carry a greater share of the burden. Germany’s relations with its western European neighbours, this is now governed by the Dublin Convention. It is therefore questionable whether the idea of the “just share of the burden” as allegedly reflected by the regime in place actually justifies Germany’s unilateral approach to the problem. Interestingly, there are judgements in which this idea appears to be equated with reducing the number of asylum seekers in Germany.

It should also be added that the three landmark decisions by the Bundesverfassungsgericht have declared the German regime constitutional only under the condition that various exceptions are observed and safeguards are introduced. These seem to undermine the effect of the very cornerstones of the regime:

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173 These safeguards must be of “organizational” or “institutional” nature, i.e. it is not enough to currently have officials de facto observing these requirements in the course of their duties but there must be according internal procedures in place that ensure compliance in every case.
174 Schmidt-Bleibtreu / Klein, art. 16a nr 4.
175 BT-Drs. 12/4052.
176 Marx, Asylverfahrensgesetz Kommentar, § 26a nr 18.
177 BVerwGE 105,194 and 199; BVerwG DÖV 97, 920; OVG NW DÖV 97, 382/383; Marx, § 26a nr 17 ff.
178 BVerfGE 94, 49 ff.
In practice, considerable exceptions to the list-based assessment under the deportation regime illustrate its limited capabilities (sections 2 and 7, limits of the Konzept normativer Vergewisserung), requiring individual assessment of the Geneva Convention and other international standards\(^{179}\). For the same reason the restrictions on provisional court orders and other measures normally leading to provisional rights to remain (constituting a restricted and accelerated appeal procedure) are undermined (section 8). Finally, the fast-track airport procedure requires safeguards to be established by way of organisation; the resources this requires may be unattainable for smaller countries and, moreover, may outweigh the resources intended to be saved by its introduction (section 8).

(b) Fairness

The safe country regime has not sought to substantially restrict the substantial rights of asylum seekers in Germany. Instead, the safe country principle is only intended to filter out those applications that are manifestly unfounded. Nonetheless, the safe country principles place two severe restrictions on the applicant’s procedural rights. First, his submission is partly subject to restrictions that apply on any matter under the Asylum Procedural Act (such as §§ 11, 75 a.s.o.). Second, his submission is partly subject to special restrictions applicable to the safe country cases (such as art. 16a (2) 3, (4) GG, §§ 18, 18a, 34a (2), 36 AsylVfG). It has been argued that these restrictions might infringe the Grundgesetz with regard to the right of access to have effective recourse to the courts (art.19 (4) GG) and of human dignity (art.1 GG). Whilst the Bundesverfassungsgericht could establish that the safe country principle is constitutional if subject to certain safeguards, questions as to the constitutionality of this regime may remain and it is doubtful whether it can be sustained on the grounds of efficiency and effectiveness.\(^{180}\)

\(^{179}\) BVerfG DÖV 96, 647 LS; See above 7 a) at the end.

\(^{180}\) BVerfG DÖV 96, 647 LS: 650 LS and 654 LS ff respectively.
THE NETHERLANDS

Definitions


Introduction

Under the previous Aliens Act there was a list of safe third countries and a list of safe countries of origin. According to the original text of the draft of the new Aliens Act, safe third countries and safe countries of origin would be designated by way of lists. However, the motion Kamp altered this position by providing a definition of safe (third) countries. The motion proposed that countries would be regarded as safe if they were party to the relevant international treaties and if there was no information available that these countries didn't comply with their obligations under these treaties. By providing a definition, the aim was to enable the rejection of a greater number of asylum-seekers on the ground that they originated from a safe country, or that they had stayed in a safe third country in the accelerated procedure.

The travaux préparatoires to the current Aliens Act did not give any indication that existing lists would be used as an indicative source for the future. On the contrary, the new Aliens Act was seen to offer a good opportunity to emulate the German position on safe third countries.

In the current Aliens Act, safe third countries are those countries which are party to the Geneva Convention and the European Human Rights Convention or to the Geneva Convention and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment. Moreover, stemming from the principle of non-refoulement, formal ratification of the aforementioned treaties is not enough; ratifying countries must also comply with their obligations under the treaties.

Compared to the situation under the previous Aliens Act, the number of safe third countries and safe countries of origin has increased.

As under the previous Aliens Act, the legislation contains a presumption of safety, which is rebuttable where the asylum seeker makes a claim that is not manifestly unfounded that the country concerned doesn’t comply with its international obligations in his particular case. Thus there is no automatic rejection. Instead there will always be a substantive examination of the facts and circumstances of the individual asylum seeker. The burden of proof is – in accordance with the UNHCR Handbook – on the asylum seeker. But the Minister has to collect adequate information enabling him to assess whether the asylum seeker has made a claim that is not manifestly unfounded that the country concerned doesn’t comply with its obligations.

The application of the safe (third) principle has been elaborated in the Aliens Circular along the following terms. If it is known that a country doesn’t comply with its international obligations generally, the asylum seeker can easily claim that these obligations are not complied with in his/her individual case. This would be the case in respect of those countries for which a categorical protection policy is in force, countries for which a moratorium on decisions has been instituted and countries that - according to information of the Ministry of Foreign Affairs – violate fundamental human rights.

There are verification mechanisms. The country reports of the Ministry of Foreign Affairs are the basis for determining whether a country complies with its international obligations and for the examination of individual asylum requests. In these reports, information from other sources such as reports from UN-bodies, reports from NGO’s, papers, magazines is used and taken into account. Secondly, the IND examines and (if necessary) verifies information of the
asylum seeker that refutes the presumption of safety. Therefore, the IND has several means, such as country reports, investigation by the Ministry of Foreign Affairs in individual cases, computerized data system.

The relevant Dutch asylum legislation for the purposes of this report is contained in the new Aliens Act 2000. The new Act entered into force on 1 April 2001 and the following points provide a useful outline of its main provisions.

Only one type of residence permit can be granted to asylum seekers, regardless of whether they receive protection under the Refugee Convention, Article 3 ECHR, humanitarian grounds, categorical protection or (in a limited category of cases) family reunification. For all accepted asylum seekers, the rights and benefits connected with the asylum permit are the same. The "residence permit asylum" is granted for a period of three years. After three years a permit for an unlimited period may be given. The reason for introducing this single asylum status was the wish to prevent asylum seekers from lodging appeals solely for obtaining a status with a better package of rights and benefits. The asylum procedure was radically changed:

- Asylum claims may be dealt with in an ultra-short procedure of 48 “processing hours” (this excludes the hours between 22.00 and 08.00). This was possible under the old legislation as well, but the impact of the accelerated procedure was increased under the new law. The only criterion for the selection of cases for this short procedure is, whether it is possible to deal with the case (which means in practice: to reject the application) in a careful manner within 48 processing hours.
  a) If an asylum claim is rejected, there is an appeal to a District Court. The appeal only suspends expulsion if the asylum claim is not dealt with in the 48 hrs procedure and if the application is not a reiterative version of an earlier one. However, a preliminary decision to bar expulsion may be asked with the Court. When the appeal concerns a 48 hrs procedure, the term for lodging an appeal is shorter. Courts deal with those cases in a rather expedient manner.
  b) From the decision of the Court, both the asylum seeker and the Minister may lodge an appeal with the Division for Administrative Jurisdiction of the Council of State ("Afdeling bestuursrechtspraak van de Raad van State"). The appeal does not suspend expulsion. A preliminary decision to bar expulsion may be asked from this Division. The Division has been able to deal with 48 hrs cases rather expediently till now.

- When an application for a "residence permit asylum" is refused, the applicant is expellable by force of law as soon as the term left to leave the country is expired. No separate decision of any authority concerning expulsion is needed. The decision to reject an asylum application also ex lege leads to the effect that no reception facilities are available anymore and a ground for eviction from accommodation in order to terminate reception facilities. This is referred to as the "multi-comprising decision" ("meeromvattende beschikking").

This system enables the authorities to deal with asylum claims quickly. Since the new law entered into force a growing percentage of asylum seeker is treated in the 48 hrs procedure. According to information provided by the IND, the numbers of asylum applicants in the Netherlands dropped with 35 % in the first six months of 2002. This may, at least partly, be attributed to the effects of the new legislation. In part too, it may be attributed to the decreasing influx of new asylum seekers has enabled the IND to devote entirely to a careful and fast examination of asylum requests in the 48 hrs procedure.

**Question 1**

(a) **Third countries**

Under current Dutch asylum law there are different provisions based on the safe (third) country principle, though the words “safe third country” are not explicitly used. Two of those provisions are to be found in Article 30 of the Dutch Aliens Act containing imperative grounds for refusing asylum: first, a provision referring to the case in which another country is
responsible for the asylum request according to the Dublin Convention (article 30 (a)) and, second, a provision to refuse an asylum-seeker who has stayed in a third country with which the Netherlands has entered into a readmission agreement (article 30 (d)). These provisions must be applied without judging the question whether the asylum seeker should be given protection. The criteria for establishing that a third country is safe are different for each of those provisions:

Article 30 (a)
- The mere fact that another contracting party with the Dublin Convention is responsible is apparently deemed sufficient for assuming that this other country is safe. Article 30 (a) also requires that the other country has to be a party to the Geneva Convention.

Article 30 (d)
For applying this provision, the following questions must be answered affirmatively:
- Is there a readmission agreement between the Netherlands and the third country? and
- Is the third country party to the 1951 Geneva Convention, the European Human Rights Convention and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment? or
- Has it otherwise bound itself to abide the obligations flowing from article 33 of the 1951 Geneva Convention, article 3 of the European Human Rights Convention and article 3 of the 1984 Convention against torture and Other Cruel, Inhuman or Degrading Treatment and Punishment?

Here, the international standards that the third country must comply with are taken into account cumulatively.

Three other provisions based on the principle of a safe third country can be found in Article 31 containing facultative grounds for refusing asylum. Article 31:2(h) covers the situation in which an asylum seeker stayed in a third country before he came to the Netherlands. Article 31:2(i) refers to the specific situation in which it is established that an asylum seeker who stayed in a (third) country before, will be readmitted to that country. Finally, article 31:2(j) covers the situation in which it is established that an asylum seeker has the possibility to stay (reside) in a third country where he previously stayed. Again, the criteria for establishing that a third country is safe are different for each of those provisions:

Under article 31:2 (h), for a refusal of an asylum application on the ground that the asylum seeker has stayed in a third country, the third country must be a party to the 1951 Geneva Convention and the European Human Rights Convention or the 1984 Convention against torture and Other Cruel, Inhuman or Degrading Treatment and Punishment. Further, countries which, according to article 1 (B) of the 1951 Geneva Convention, only recognize refugees originating from Europe, are not regarded as safe third countries.

Here the international standards that a third country has to comply with are partly taken into account cumulatively, partly alternatively.

It should be noted that this article will not be applied if the applicant makes a claim that is not manifestly unfounded that the country is not complying with those obligations as far as he is concerned or when a (legal) remedy must be supposed completely illusory.

Article 31:2 (i) may be applied to asylum seekers who will be readmitted into a third country until they will have found protection elsewhere. This provision contains no specific criteria as to whether the third country can be designated as safe. However the Aliens Circular contains more detailed rules. Criteria for designating a third country as safe according to this provision are:

a) the third country is a party to the 1951 Geneva Convention and complies with its obligations from this Convention in good faith; or

b) the third country is not a party to the 1951 Geneva Convention or does not complies with its obligations from this Convention in good faith, but the asylum
seeker has a permit to stay in the third country which offers in itself enough
protection against refoulement, or he can obtain such a permit to stay.

This article cannot be applied if the asylum seeker has applied for asylum in the third country
and his application has been rejected and there are no (judicial) review options open.

Article 31:2 (j)
According to current Dutch policy, this provision can only be applied to asylum-seekers whose
applications on the 1951 Geneva Convention, or other binding international instruments, or on
other humanitarian grounds have been rejected. Thus, this exception is only relevant when an
asylum seeker is in the position to receive a residence permit by way of "categorical
protection". "Categorical protection" is at stake when the Netherlands' Government decides to
grant a residence status to all asylum seekers from a specific country while returning to that
country is deemed to be disproportionately harsh in relation to the general situation there.
The provision itself contains no specific criterion as to whether the third country can be
designated as safe. However the Aliens Circular contains more detailed rules.

Criteria for designating a third country as safe according to these rules are:

a) there is no "categorical protection policy" regarding this country;

b) in the third country there is no danger of harm to body, life, and freedom for
the asylum seeker;

c) the personal conditions of the stay in the third country were for the asylum
seeker not particularly harsh; and

d) the third country does not expel the category of aliens concerned without
thorough consideration.

Agents of persecution
According to present policies and relevant texts agents of persecution are:
• 1951 Geneva Convention: government officials or other persons or groups if the
government is not willing or not able to offer protection.
• European Human Rights Convention: government officials or other persons or groups if
the government is not willing or not able to offer protection.
• 1984 Convention against torture and Other Cruel, Inhuman or Degrading Treatment and
Punishment: government officials and persons who act in official capacity.

Evidence, presumption of safety
As has been explained above, the designation of a safe country is governed by precise and
formal legal criteria. In general, no further proof will be examined so long as it appears from
information of the Ministry of Foreign Affairs that the country complies with its international
obligations. Only if an individual asylum seeker would challenge the safety of a particular
country, the question of proof might arise. The burden of proof will lay with the asylum seeker
although the burden will be slightly lighter where the applicant makes a claim that is not
manifestly unfounded that he comes from a country that is not complying with its obligations
under the Geneva Convention, the ECHR or the CAT (articles 31:2(g) and 31:2(h)). In such a
case, the IND must examine whether the country in question complies with its international
obligations in practice.

If the asylum seeker invokes reports from non-governmental organisations or from foreign
official sources, these will be evaluated by the Minister in the light of what is generally known
of the country. For the Minister of Aliens’ Affairs and Integration, the most important sources
of evidence are the country reports of the Dutch Minister of Foreign Affairs. In these reports
information of other (non-) governmental organisations and evidence of other sources is
incorporated. According to the Division of Administrative Jurisdiction of the Council of State,
those Country Reports are considered expert reports. The Division has repeatedly ruled that
the Minister of Aliens’ Affairs and Integration may rely on such reports, provided that they give information in an impartial, objective manner and disclose their sources – as far as possible and justifiable. The Minister may however not rely on these reports if there are concrete reasons for questioning the correctness or completeness of the information. (See for instance the decision of the Division of 12 October 2001, published in the Dutch periodical JV 2001,number 325). It should be noted that the Division and the Courts of first instance only cursorily review the Minister’s decisions, asking whether the Minister made his decision reasonably. This form of judicial self-restraint is similar to the application of the “Wednesbury principles” in judicial review in the UK, as described in the Vilvarajah judgement of the European Court of Human Rights of 30 October 1991\(^\text{181}\). To date, no decisions of the Division are known in which it was stated that Minister should have taken countervailing proof of an official Country Report of the Minister of Foreign Affairs into consideration.

(b) Countries of origin

The Aliens Act has one provision dealing with the principle of the safe country of origin. This is Article 31:2(g) providing a facultative ground for refusing asylum.

Article 31: 2 (g)
Asylum may be refused on basis of this provision if the following questions are answered affirmatively:

- Is the country of origin party to the 1951 Geneva Convention and the European Human Rights Convention or the 1984 Convention against torture and Other Cruel, Inhuman or Degrading Treatment and Punishment;

The international standards with which the country of origin must comply are partly taken into account cumulatively and partly alternatively.

This article explicitly provides that it will not be applied if the applicant makes a claim that is not manifestly unfounded (though does not have to prove) that the country does not comply with its obligations under these treaties as far as he is concerned.

Question 2

(a) Third countries

Whereas earlier Dutch asylum legislation provided lists of safe third countries and safe countries of origin, the introduction of the new legislation in April 2001 abolished these lists. Under the current Act, the only list of countries used is a list of countries with whom the Netherlands has entered in to readmission agreements. This list is used for the application of the imperative ground for refusal of asylum laid down in the above-mentioned article 30 (d) Aliens Act. There is no individual legal remedy to challenge the mere fact that the Netherlands has entered in to a readmission agreement with a certain country. However, in some cases the text of the law opens the possibility challenging the safety of a particular country.

As to the question whether the designation as a safe country is subject to review by higher administrative authorities and/or courts, see the comments above regarding evidence and burden of proof.

(b) Countries of origin

There is no list of safe countries of origin.

Question 3 a) and b)

Lists of safe third countries and safe countries of origin are no longer used. However, the Netherlands has entered in to readmission agreements with the following countries:

- Belgium and Luxembourg (Benelux)
- Bulgaria

\(^{181}\) Application number 45/1990/236/302-306, par. 120 – 125.
• Germany
• Estonia
• France
• Croatia
• Latvia
• Lithuania
• Austria
• Poland
• Romania
• Slovenia
• Switzerland

**Question 4 a) and b)**

The country reports of the Ministry of Foreign Affairs are the basis for determining whether a country complies with its international obligations and for the examination of individual asylum requests.

**Question 5 a) and b)**

There is no provision for examining the situation of returnees in the countries in question *in situ*.

As has been explained above, the third countries playing the role of a safe third country are described in separate articles of the Aliens Act in clear and formal criteria. According this system, countries may change, but not the legal criteria for designating them.

**Question 6**

(a) Third countries

As to the link required between the applicant and the third country, the chances of readmission and eventual verification mechanisms to ensure that the applicant is not subject to persecution in place will be dealt with in considering the various legal provisions.

Article 30 (a):
The criteria on the link between asylum applicant and a member state for designating the state responsible for processing the asylum application are laid down in the Dublin Convention. All member states are deemed safe countries, but this does not affect the responsibility of the member states under the ECHR to ensure that the applicants are not exposed to treatment contrary to article 3 ECHR. See the judgment of the European Court of Human Rights in the case of *T.I. v the United Kingdom*, 7 March 2000, application number 43844/98.

As to whether there are verification mechanisms, the country reports of the Ministry of Foreign Affairs form the basis for determining whether a country complies with its international obligations and for the examination of individual asylum requests. In these reports, information from other sources such as reports from UN-bodies, reports from NGO’s, papers, magazines is used and taken into account. Secondly, the IND examines and (if necessary) verifies information of the asylum seeker that refutes the presumption of safety.

The presumption is that the Dublin countries do comply with their obligations under the Geneva Convention and the ECHR unless the asylum seeker is able to put forward an argument that is not manifestly unfounded that in his case facts and circumstances exist that refute this presumption. If so, the Minister has to collect adequate information enabling him to assess whether the asylum seeker’s argument is not manifestly unfounded.

By accepting the claim, the chance of readmission is given. According to case law of the Division for Administrative Jurisdiction of the Council of State, the Minister may expect from
the asylum seeker that he adduces arguments and fact which make a case that is not manifestly unfounded that the member state concerned will not comply with its international obligations as far he is concerned. Further, the Division appears to limit the applicability of *T.I. v the United Kingdom* (in accordance with the Dutch Aliens Circular) to situations in which the asylum seeker already applied for asylum in vain in the member state at issue.

**Article 30 (d):**

If the third country accepts the claim for readmission this presupposes an earlier stay on the territory of that third country. Criteria for the link between the asylum applicant and the readmitting country must be sought from the relevant readmission agreement. According to the criteria in this provision, the guarantee that the applicant will not be subject to ‘*refoulement*’ is found in the circumstance that this country is obligated to comply with the 1951 Geneva Convention, the European Convention on Human Rights and Fundamental Freedoms and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.

**Article 31:1 (h):**

To apply this article, the link between the applicant and the third country must be that the applicant has stayed there. This country must be a party to the 1951 Geneva Convention and the European Convention on Human Rights and Fundamental Freedoms or the 1984 Convention against torture and Other Cruel, Inhuman or Degrading Treatment and Punishment. This is the primary guarantee laid down by law that the applicant will not be subject to “*refoulement*” in that country. However, this article will not be applied if the applicant makes a claim that is not manifestly unfounded that the country is not complying with those obligations as far as he is concerned.

The Aliens Circular contains more specific rules for the manner in which this provision of the Aliens Act must be implemented. In particular, the principles of safe third country/safe country of origin are not applied when it appears from generally known facts that a country does not comply with its international obligations. This would concern: countries for which a categorical protection policy is in force; countries for which a moratorium on decisions has been instituted; and countries that - according to information of the Ministry of Foreign Affairs – violate fundamental human rights.

This provision will only be applied if the asylum seeker has stayed for a certain period in the third country. It will not be applied to asylum seekers who just were passing through. Whether the asylum seeker had the intention to travel on to the Netherlands is of great importance. When he stayed for two weeks or more in the third country, it will be assumed he had no intention to travel on, unless from objective facts or circumstances the opposite appears. This provision can be applied if it is clear that the asylum seeker will be readmitted to the third country. The application will not be rejected before there is a “laissez-passer”, guaranteeing the readmission.

As to whether there are verification mechanisms, as above, the country reports of the Ministry of Foreign Affairs are the basis for determining whether a country complies with its international obligations and for the examination of individual asylum requests. In these reports, information from other sources such as reports from UN-bodies, reports from NGO’s, papers, magazines is used and taken into account. Secondly, the IND examines and (if necessary) verifies information of the asylum seeker that refutes the presumption of safety.

**Article 31:1 (i):**

The Aliens Circular contains some specific rules for the manner in which this provision of the Aliens Act must be implemented.

This provision will only be applied if the asylum seeker has stayed during a certain period in the third country. It can be applied if:

a) the asylum seeker did not come directly from his country of origin to the Netherlands;
b) he did not have the intention to travel to the Netherlands (when he stayed for two or more weeks in the third country, it will be assumed he had not the intention to travel on, unless from objective facts or circumstances the opposite appears); and

c) the asylum seeker stayed in the third country, or could have stayed there under conditions that are not considered abnormal to local standards.

In case the third country is a party to the 1951 Geneva Convention and complies with its obligations from this Convention in good faith, this is the main guarantee laid down in law that the applicant will not be subject to **refoulement** in that country. Regarding readmission, in this case it is sufficient the asylum seeker will be readmitted (a permit to stay in the country concerned is not a necessary condition. This must be evident from a written document. But general information that he will be readmitted and may stay can also be sufficient.

In case the third country is not a party to the 1951 Geneva Convention or does not comply with its obligations from this Convention in good faith a permit to stay for the third country is a necessary condition, both guaranteeing readmission and protection against **refoulement**.

**Article 31:1 (j):**

Here the link required between the applicant and the third country is fairly loose. It is only required that the applicant had stayed in another country and, consequently, has an “alternative” place to stay. As has been explained above, this provision is only applied when it has been established in the asylum procedure that the applicant has no well-founded fear for persecution or a treatment contrary to article 3 ECHR or article 3 CAT. So, the guarantee that the applicant will not be subject to persecution must be found in the fact that his claim has been denied.

The Aliens Circular contains more specific rules for the manner in which this provision of the Aliens Act must be implemented.

According to the Circular there is no fixed period of time. The length of the stay can be less than two weeks but it could in special cases also be more than two weeks.

Readmission must not be unlikely. In principle it is the asylum seeker who has to show that in his case readmission is not likely.

Case law has supplemented these principles from the Circular as follows: the period an asylum seeker has stayed in the third country should be considered, as should personal conditions and the nature of the applicant’s stay. Regarding the likelihood of readmission the court has ruled that in special circumstances the Minister has a duty to verify if his assumption of likeness is still valid.

**b) Countries of origin**

The conditions for designating a country of origin as a safe country are set out by law. There is no list-based system.

In article 31:1(g), the only description of the link between the applicant and the country is, that he originates from the country. The guarantee that he is not subject to persecution is primarily sought from the fact that the country is party to the 1951 Geneva Convention and the European Human Rights Convention or the 1984 Convention against torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.

However, the article explicitly provides that it will not be applied if the applicant makes a claim that is not manifestly unfounded (though does not have to prove) that the country does not comply with its obligations under these treaties as far as he is concerned.
Question 7 a) and b)

The Immigration and Naturalisation Department (IND) decides on all asylum applications. As has been explained above, precise and formal criteria are laid down in the relevant laws. The examination of the applicability of those provisions normally is of a purely legal nature, although the Ministry of Justice Immigration Policy Department maintains that the IND does look into the facts and circumstances of the individual asylum seeker.

No distinction is made as to whether an applicant is an unaccompanied minor or belongs to a vulnerable group. Officials of the IND may have received special training on dealing with unaccompanied minors or members of other vulnerable groups. Unaccompanied minors may receive a residence permit while there is no proper reception for them in the country of origin in their individual case. But in assessing whether the application can be refused on the basis of the safe country principle, those aspects play no particular role. All provisions deal with criteria for refusing asylum on the merits, with the exception of articles 30(a) and (d) under which there is no obligation to examine the contents of an asylum request. In the present Aliens Act, there are no grounds for declaring an asylum application inadmissible.

In principle, no form of evidence is excluded in the asylum procedure. However, oral witnesses are hardly used. According to standing practice, written statements of witnesses who are in some way connected to the asylum seeker are normally disqualified as not being objective. Official documents are only accepted as proof if the originals are produced.

The accelerated asylum procedure is applied increasingly often. Presently the vast majority of applications are dealt with this way. The main difference between the accelerated procedure and the "normal" procedure is the speed: in theory at least there should be no difference in the diligence of the assessment of the claim. However, it is clear that the very short time schedule may be of paramount importance for the possibilities the applicants have to effectively challenge the presumed safe character of the third country or country of origin. Nonetheless, the asylum seeker may still appeal to the district court, thus helping to ensure against relevant facts and circumstances being overlooked. Moreover, the growing percentage of asylum seekers that are dealt with in the 48 hrs procedure has to be seen in the context of a low percentage of IND decisions being overturned by the district courts.

A special accelerated procedure is applied when the IND intends to reject the application while another country is responsible according to the Dublin Convention (article 30 (a)).

Question 8 a) and b)

Please refer to the introductory comments.

The review procedures concerning the safe country principle do not differ from those procedures relating to other grounds for refusing asylum.

There is no difference between the application of safe country principles in the airport procedure (AC Schiphol) or in the procedure concerning the other application centres (AC Rijsbergen, AC Ter Apel and AC Zevenaar).

Whilst true that in the airport procedure an asylum seeker can be detained under article 6 Aliens Act 2000, this detention has nothing to do with the application of safe country principles. Rather, it is a consequence of the special position accorded to Schiphol: Schiphol is a Schengen external border, and accordingly, at external borders entry can be refused. Article 6 makes detention possible only in such cases of refusal of entry.

This position may be contrasted with that of the other application centres at which entry cannot be refused. The reason being that the asylum seeker will have already gained entry into the Schengenarea (Schengen internal borders).

In general there is a right to appeal from abroad, whatever the basis for the rejection of an asylum claim.
Efficiency: There does not seem to be a backlog in the system at all. In practice, the rejection of an asylum request on the basis of the safe (third) country principle is faced with difficulties. It is not clear in all cases whether the presumption of safety is fully applicable. The result is that article 31(1)(g) and (h) do not play a significant role in the decisions. The application of article 30 (a) is nonetheless important.

(Accurate figures are not available)

Fairness: There may be many reasons to criticise fairness of Dutch asylum procedures, especially when the accelerated version is concerned. But these have nothing to do with the safe country principle.

At the time the proposed new Dutch Aliens Act 2000 was discussed and commented there were some criticisms regarding the formulation of the provisions that were based on the safe (third) country principles. These criticisms came from NGO's including Amnesty International, the UNHCR, and Refugee Aid but also from academics and the Dutch Parliament.

The criticism regarding the formulation of article 30 (a) was that it would be better to make an explicit reservation in this provision, that the Netherlands would judge an asylum application itself if there exists a risk of indirect *refoulement* by the third country. The Minister’s response however was that if there were concrete indications of a risk of indirect *refoulement* by the responsible state, the Netherlands was bound by these international obligations to judge the application itself. In practice (on basis of very scarce case law regarding this item since the introduction of the Aliens Act 2000 at April the 1st 2001) it seems to work this way. See however the above comments concerning the applicability of *T.I. v the United Kingdom* according the Aliens Circular and the Division for Administrative Jurisdiction of the Council of State.

Effectiveness: The same may be said concerning the effectiveness of remedies in Dutch asylum proceeding s. It is easier to reject an asylum-application on other grounds. The Dutch authorities do not really need the safe (third) country principle provisions, perhaps except for the provision regarding the Dublin-Convention.
SWEDEN

Definitions

"Aliens Act" refers to the Aliens Act no. 529 of 1989, entry into force 1 July 1989 plus amendments

"Aliens Ordinance" refers to the Aliens Ordinance no. 547 of 1989, entry into force 8 June 1989

"APB" means the Aliens Appeals Board - the supreme decision-making body in most individual aliens' cases

"COI" means Country of Origin

"SMB" means the Swedish Migration Board - the central authority dealing with asylum affairs

Question 1

(a) Third countries

According to the Aliens Act chapter 3, Section 4(4) a "safe third country" is one in which the asylum seeker:

"will be protected from persecution or, as the case may be, from being sent to a theatre of war or to his country of origin and also from being sent on to another country where he does not have corresponding protection..."

The SMB uses the following criteria for determining whether a third country is safe.

The following international standards are taken into account:
- Art.33(1) of the Geneva Convention (the principle of non-refoulement)
- Art.3 of the UN Convention against Torture
- Art.3 of the UN Convention on Human Rights
- UNHCRs Executive Committee Conclusion No 85 (1998); Conclusion on International Protection
- EU Resolution on a harmonized approach to questions concerning host third countries (the London Conclusions')
- EU Resolution on minimum guarantees for asylum procedures (Brussels, 21 June 1995)

In practical terms this means that the SMB first considers if the country fulfils in general its international legal obligations for the protection of refugees and, in addition, whether it observes basic standards for the protection of human rights. Furthermore, it means that the country should have signed the Geneva Convention and/or must at least observe its provisions, in particular Art.33(1).

There must also be in place a legally proscribed asylum procedure which is objective and adheres to the criteria laid down in the 1951 Refugee Convention. The applicant must have access to the procedure as well as the right to remain in the country during it. The applicant must have the right to a personal interview and the right to contact UNHCR or other supporting organisations. Finally, there must be the possibility of appealing a negative decision.

The assessment of whether a country is meeting these criteria is continuously followed up through several different sources of information. The UNHCR is one such source and the SMB maintains close personal contacts with most of the UNHCR offices. In addition, the SMB makes use of Swedish embassy reports and it undertakes fact-finding missions abroad.
Finally, the SMB undertakes extensive migration support activities in several countries which provide up-to-date country information. To date, these activities have been undertaken in most of the EU candidate countries as well as Russia, the Ukraine, Belarus, Moldova and Turkey. The SMB has also participated in the collective evaluation working group in EU where reports have been written about all candidate countries asylum systems.

Swedish refugee law requires the SMB to judge the possibility of returning a rejected applicant and so in a sense there is a statutory obligation to continuously follow up whether the above criteria are being fulfilled.

According to the Swedish Aliens Act Chapter 8 Sections 1 and 2, an alien cannot be sent to a country where he risks capital or corporal punishment or being subjected to torture or other inhuman or degrading treatment or punishment (thereby complying with Article 3 of the Convention Against Torture), and furthermore he must not be sent to a country where he risks persecution in the sense of the 1951 Convention. The alien may not be sent to a country where he is not protected from subsequent *refoulement*.

There are exceptions to these provisions in cases where public order and safety is 'seriously endangered' if the alien remains in Sweden, and the persecution threatening him in the other country does not imply danger to his life or is of a particularly grave nature, and where his activities endanger the national security of Sweden.

Thus in each individual case the asylum officer has to consider if there has been any change in the country's situation. This information is readily accessible on the computerised COI system.

*Agents of persecution*

In 1996 the EU Justice and Home Affairs ministers agreed a ‘Joint Position’ on the harmonised application of the term ‘refugee’. Sweden added a declaration stating that the Refugee Convention should also apply where a state is incapable of protecting a person from persecution by other parties. The Aliens Act was amended in 1997 to reflect this position more clearly. However, it is widely argued that the case of *Goldstein v Sweden* casts doubt on the application of this provision. The case involved an American who had claimed asylum in Sweden alleging severe police persecution against him. The Swedish asylum authorities declined to grant him international protection on the basis that the alleged persecution was the result of criminal acts committed by individuals and not attributable to the state. Further, the SMB stated that US is "an internationally recognised democracy and constitutional state", in other words, a "safe country of origin".

(b) Countries of origin

The SMB follows the same international standards as with third countries. In particular, the requirements laid down in the 1992 London Conclusions. Furthermore, the country must be open for monitoring by international human rights organisations, the rule of law must be upheld, civil and political rights must be meaningful and there must be effective remedies against their violation.

The SMB uses the same sources as above for establishing if the country could be considered a safe country of origin.

**Question 2 a) and b)**

Sweden does not maintain any list of safe third countries or safe countries of origin.

It might be said that a *de facto* list of safe third countries has been established through practice, including EU Member States (covered by the Dublin Convention), other Western
countries, Bulgaria, the Czech Republic, Romania and Slovakia. In 1999, Sweden removed Jordan, which is not a signatory to the UN Refugee Convention, from its list after the UNHCR and NGOs repeatedly protested its designation as a safe third country.

The SMB continually follow the developments and changes in all relevant countries and make judgements on a case-by-case basis. The SMB has a central department (the Legal Practice Department) located at its Head Office. This department is responsible for steering, coordinating and evaluating asylum practice at all SMB regional offices, on behalf of the General Director. It is also responsible for collecting all COI information and for maintaining the COI computerised system. This entails that it regularly follows changes and developments in all relevant countries and makes the analysis for the regional offices throughout Sweden.

If there is a change in country information, the central department can either pass on relevant information to its regional offices, or it can take a decision itself and instruct regional offices accordingly. If this decision is appealed against, then the APB must decide whether or not to accept the central department's decision. If not, the department is obliged to follow the APB's decision and the Board's judgment of the situation in the relevant country. However, since the SMB and the APB cooperate closely and share the same normative framework for assessing "safety", the central department's decision will not normally be disputed.

The advantage of not using a list-based system is that the SMB can react immediately to any change in a country's situation, rather than having to wait for a statutory order or court decision. One example where changes in designations have occurred is the Baltic countries which are now considered safe.

**Question 3 a) and b)**

Whereas Sweden does not maintain a list of safe third countries or safe countries of origin, asylum officers have ready access to the COI system providing them with a judgment on the safety of a country. The SMB recognises the necessity of having to follow other EU countries closely. Sweden maintains close cooperation and exchange of information particularly within the A-8 group of countries. A-8 is a cluster of countries brought together through mutual similarities in systems and in problems, whose purpose is to exchange experiences in all asylum related matters and to discuss development of asylum processes. This might include questions concerning COI, management, quality control, return activities. A-8 began 6 years ago with Holland, Sweden, Germany and Switzerland and, since 2001, UK and Belgium.

Two representatives from each country meet and maintain frequent contact.

**Question 4 a) and b)**

As explained above, there is a continuing follow up through the Legal Practice Department which not only makes an assessment of the safety of the country, but in addition follows up all political situations and collects all necessary COI.

**Question 5 a) and b)**

In applying Chapter 3, section 4(4), the Swedish authorities do not usually consider whether the "safe third country" maintains an adequate asylum determination procedure and this omission has been highly criticised. Furthermore, the authorities do not consider whether the asylum seeker will have access to such a system, if it does exist.

Definitely, there is no formal mechanism for monitoring the situation of returnees in the countries in question in situ. Embassies are consulted on a regular basis not only to obtain general country information, but also to verify information where specific incidents have occurred, and to verify alleged court decisions.

**Question 6 a) and b)**
Consideration of whether safe third countries or safe countries of origin principles apply in an applicant’s case is made during the initial phase of the asylum procedure. Either principle will apply to an applicant where he/she has a close family member in Sweden. “Close family member” is defined in case law to include the mother, father, children under 18, and dependants who have lived in the same household.

Sweden has readmission agreements with most of those countries it considers safe third countries in order to facilitate the return of applicants to these countries, including Poland.

In certain situations, in order to be sure that the country fulfils the criteria described in (1), the SMB may request UNHCR personnel to monitor the arrival of returned asylum seekers into the country. There is no formal mechanism governing this procedure, rather a decision is made on a case-by-case basis to determine whether it is necessary to ensure that the receiving authority properly discharges its obligations. In most cases it will not be necessary to ensure this.

Mere transit

Swedish authorities can apply the safe third country rule in cases of ‘mere transit’ through a third country, but individual circumstances are assessed in each separate case. The applicant must have ‘stayed’ in the third transit country, but no specific timeframe is applied. More specifically, the “mere transit” rule is as follows: if the asylum seeker arrives in Sweden by car but has not stopped for any reason en route, he/she will be admitted to the asylum determination procedure (the “en route” rule). The application of the “en route” rule depends on the circumstances, and no specific timeframes are applied. Unnecessary stops in third countries are not accepted in principle, although different circumstances can be taken into consideration, e.g. it can be reasonable for a family with children to make some stops during the trip. In airport cases, if the asylum seeker entered the country at the airport, he/she will be returned there.

The decision-making process

In applying Chapter 3, section 4(4), the Swedish authorities do not usually consider whether the “safe third country” maintains an adequate asylum determination procedure and this omission has been highly criticised. Furthermore, the authorities do not consider whether the asylum seeker will have access to such a system, if it does exist.

Many cases are rejected at the admissibility level because the Court is inclined to attach most weight to the governments’ assessment of the situation and thus does not undertake an examination of the merits of the case. In some cases the absence of procedural safeguards in the expelling country will play an important role. *Hassanpour-Omrani v. Sweden*[^184] concerned a woman who feared stoning on return to Iran because of adultery. The Swedish case was declared inadmissible by the Commission.

In some cases the role of other treaty bodies can be important. In *Paez v. Sweden*,[^185] two brothers had applied for asylum in Sweden. Both were refused on similar grounds (Article 1(f) Geneva Convention). One brother then made an application to the European Commission of Human Rights, the other to the United Nations Committee Against Torture. The Commission found in December 1996 that the applicant would not be at risk if returned to Peru. The United Nations Committee Against Torture found in April 1997 that the return of the applicant’s brother would expose him to prohibited treatment and underlined the absolute nature of the protection. The Swedish Government then granted the applicant to the Strasbourg institutions a residence permit. The Court held that the case could be struck off without deciding whether or not the proposed expulsion would have been a violation of the Convention.

[^184]: Appl. No. 36863/97, 19 October 1998
[^185]: Judgment of 30 October 1997
In *Hatami v. Sweden* (Appl. No. 32448/96, Report of 23 April 1998) the Commission also substituted its own evaluation of the evidence for that of the Swedish authorities, finding that the applicant’s claim to have been tortured was credible, that the Swedish authorities had placed reliance on a ten minute interview conducted without effective interpretation, and that they had reached their decision on an incorrect interpretation of the available facts. In *Hatami* the Commission for the first time echoed (without express reference) the case-law of the United Nations Torture Committee to the effect that “complete accuracy is seldom to be expected from victims of torture”.

**Question 7 a) and b)**

The SMB is the central authority for asylum affairs with overall responsibility for the proper management of cases coming under Swedish aliens legislation and EEA agreements. The SMB makes the decision on the application of safe country principles in the first instance during the initial procedure. During this procedure, all necessary registrations are completed and there is a short interview in order to get an overview of the applicant’s case and to decide whether the case should be put through the accelerated procedure or the ordinary procedure.

When the SMB examines an application for asylum it has to decide if the alien has a right to a residence permit as a refugee (according to the Geneva Convention) and is not otherwise in need of protection under the Aliens Act or is entitled to stay because of humanitarian reasons. There is a second in-depth interview and legal aid is granted in all cases.

However, in accordance with Chapter 8, section 8, of the Aliens Act, the SMB may ordain that a refusal-of-entry order made by the SMB is to be put in effect even if it has not entered into legal force (immediate enforcement), where it is obvious that there are no grounds for asylum and that a residence permit is not to be awarded on any other grounds either. This would be in cases that are manifestly unfounded, safe third country cases and safe country of origin cases. An immediate enforcement may not be issued more than three months after the applicant’s first application for a residence permit after arrival in Sweden unless there are exceptional grounds for doing so. The accelerated procedure normally takes one or two weeks, entails no in-depth interview and legal aid is not normally granted.

**Detention**

An asylum seeker may be held for up to six hours without a formal detention order whilst under investigation. Thereafter, by order of the SMB, s/he may be detained for up to 48 hours during further investigation. In addition, if the asylum seeker’s identity is in doubt, or if s/he is likely to be deported and might abscond or engage in criminal activity, s/he may be detained for two weeks or longer under exceptional circumstances. Finally, if a decision on refusal of entry has been made, the asylum seeker may be detained up to two months, and longer if there are exceptional grounds.

In practice, asylum seekers are often detained in Sweden as soon as they arrive, whilst those processed under the accelerated procedures may be detained for the entire duration of their stay. As far as detention is concerned, the Aliens Act treats children aged sixteen or above as adults.

**Vulnerable groups**

In cases concerning vulnerable cases or unaccompanied minors, the SMB has special educated officers and a public council will be appointed to help the child with the asylum claim. Furthermore, as a rule, unaccompanied minors are housed in group centres or in youth accommodation, unless they have relatives in Sweden they can live with. Ultimate responsibility for the child’s welfare is with the municipal social services committee in the area concerned.
Question 8 a) and b)

The presumption of safety is rebuttable both as regards safe third countries and safe countries of origin: the asylum-seeker can present additional information showing that there is a danger of persecution in his particular case.

The case of Goldstein v Sweden\textsuperscript{186} is again worth mentioning. Of the safeguards prescribed by the London Conclusions and the UNHCR Executive Committee conclusions, the most significant omission in the Goldstein case was that neither the initial decision of the SMB of 24 September 1997 nor that of the Aliens Appeals Board of 30 January 1998 examined whether the general presumption of the US being a safe country was inapplicable in the circumstances of the applicant. It can therefore be doubted whether the national authorities fully complied with Swedish law or with the safeguards in the London Conclusions and the UNHCR Executive Committee Conclusions, since they did not allow Mr. Goldstein to rebut the presumption of the US as a safe country by showing that it was not safe for him.

Negative decisions by the SMB may be appealed to the Aliens Appeals Board within three weeks from notification.

The Aliens Appeals Board is the supreme decision-making body in virtually all individual aliens' cases. This means that its rulings are not subject to appeal. It reviews SMB decisions relating to residence permits, refusals of entry, expulsion and Swedish citizenship, etc., and also "new applications"\textsuperscript{187}. The Government only reviews cases involving normative principles passed on to it by the APB or the SMB.

Under the ordinary procedure, an appeal will normally have suspensive effect, i.e. the APB's decision must be obtained before the decision being appealed from is enforced. In contrast, under the accelerated procedure, an appeal can be lodged requesting that the immediate enforcement decision is stopped, provided the order has not yet been enforced. The APB will subsequently give such requests the highest priority and if possible are considered before an order is enforced. However, the enforcement authorities will not wait for an APB decision and will enforce the order if the APB decision is not forthcoming.

Applicants can however apply separately for a suspension of enforcement of the expulsion measure in particular in cases where the applicant has a close family connection in Sweden or when there are strong humanitarian grounds. (According to Chapter 7 Article 1 in the Aliens Ordinance a deportation to a third country shall not be executed if the asylum seeker has a link to Sweden e.g. spouse, children or parents conceived in Sweden and therefore does not have the same connection to the third country). However, such applications are rarely granted.\textsuperscript{188}

In cases where an applicant has been refused entry under the accelerated procedure, there is nothing to prevent him/her appealing from abroad.

In cases where the designated "safe third country" will not accept the asylum seeker, s/he can appeal the decision to the Aliens Appeals Board, which usually refers the case back to the SMB for a new examination and decision.

Question 9 a) and b)

Today, because of the extensive misuse of the asylum system, where around 70% of applicants are abusing the system, it is necessary to strengthen the initial procedure in order

\textsuperscript{186} OJ L063, 13.03.1996.
\textsuperscript{187} If a decision on refusal of entry or expulsion is no longer subject to appeal and circumstances come to light that have not previously been taken into account, the foreign citizen concerned may submit a new application to the APB. If the APB finds that the new circumstances are grounds enough for the person to be granted asylum, or that refusing him/her entry would constitute a breach of humanity, a permit may be granted.
to root out those cases which should not be given the right to access the ordinary asylum procedure. In order to diminish the abuse of the ordinary procedure, the use of the safe country principles and the principle of manifestly unfounded claims must be extended. The harmonisation within Europe of practice and procedures will be one of the most important tools aimed at the protection of the asylum system.
THE UNITED KINGDOM

Definitions

“AIA” means the Asylum and Immigration Act 1996

“IAA” means the Immigration and Asylum Act 1999

“Dublin Convention” means the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities. The Convention was signed in Dublin in June 1990 and entered into force in the UK on 1 September 1997.

“ICCPR” means the International Covenant on Civil and Political Rights 1966, plus its protocols

“ICESR” means the International Covenant on Economic and Social Rights 1966, plus its protocols

“Immigration Rules” means the Immigration and Asylum Appeals (Procedure) Rules 2000

“NIAA” means Nationality, Immigration and Asylum Act (2002).

All statute citations in this UK report refer to that Act unless indicated otherwise.


Question 1

(a) Third countries

Section 80 NIAA substitutes section 11 of the IAA. Section 80(1) NIAA (Removal of asylum-seeker to third country) provides that in determining whether a person in relation to whom a certificate has been issued under s80(2) may be removed from the United Kingdom, a member State is to be regarded as-

(a) a place where a person’s life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and
(b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.

Under section 80(5), “standing arrangements” means arrangements in force between two or more member States for determining which State is responsible for considering applications for asylum”.

The standing arrangements in section 11 of the IAA refer only to removals to European Union Member States under the Dublin Convention. However, the “standing arrangements” referred to in section 80 apply specifically when the member state with whom an arrangement has been made has accepted that it is the responsible state in relation to the claimant’s claim for asylum (section 80(2)(a)). Section 80 clarifies these standing arrangements to ensure that any other bilateral agreements on asylum returns with Member States outside of the Dublin Convention to which section 11 already applied, also will fall under this provision.

Safe third country practice outside the amended provisions in section 11 IAA is set out in section 12 IAA. In terms of an assessment of safety of the third country for the applicant the test set out in s12(7) has to be met, specifically:

• the applicant is not a national or citizen of the country to which he is to be sent;
• his life and liberty would not be threatened there by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and

• the government of that country would not send him to another country otherwise than in accordance with the Refugee Convention.

Further guidance on the UK approach to safe third country cases in respect of non-Dublin Convention cases, is set out in paragraph 345 of the Immigration Rules:

A safe country is one in which the life or freedom of the asylum applicant would not be threatened (within the meaning of Article 33 of the Refugee Convention) and the government of which would not send the applicant elsewhere in a manner contrary to the principles of the Refugee Convention.

As to the question of administrative practice, the mechanisms for transferring cases has been considered too slow and uncertain and, in a number of cases, it has proved difficult to identify the appropriate country, or the country requested has declined to take responsibility.

In Adan and Aitsegur, the Court of Appeal held that unless the Secretary of State was satisfied that the third country would apply the Refugee Convention’s “international meaning” or “core values” then he could not return asylum seekers to that country as a safe country. Furthermore, the Secretary of State owed a duty under the then section 2(2)(c) of the AIA to examine the practice in the third country to ensure that it was consistent with the Convention’s true interpretation. There was a margin of discretion by the signatory States in their application of the Refugee Convention, but a signatory had to apply the Refugee Convention, whose very purpose was to offer international protection to people falling within objectively defined classes.

Adan and Aitsegur considered the situation which prevailed under section 2 of the AIA and under current legislation continues to apply to the test set out in s12(7) IAA. Under s11 (originally in the IAA and as now set out in section 80 NIAA) France and Germany are as a matter of law safe in terms of their application of the Refugee Convention.

Furthermore since 2 October 2000 applicants have been able to raise issues of human rights (ECHR) obligations in connection with their transfers.

As regards the meaning of persecution, the UK views the context and purpose of the Refugee Convention as ensuring surrogate protection for those with a well-founded fear of persecution where the state of origin is unwilling or unable to provide protection; a fortiori where no state exists and non-state actors inflict harm for reasons of race, religion, nationality, political opinion or membership of a particular social group, a person is entitled to recognition as a refugee.

In cases of persecution by State agents, the application of a practical standard of protection requires that fact-finding Tribunals demand convincing evidence that the State not only possesses mechanisms for controlling its officials but operates them to real effect.

In this respect the standard differs from the standard of protection from persecution by non-State agents as in Horvath v Secretary of State for the Home Department. This means that in cases of persecution by State agents, the second limb of the protection test in Art 1A(2) Refugee Convention, which applies to a person whose fear of persecution for a Convention reason is well-founded and who “owing to such fear is unwilling to avail himself of the protection of his country”, (emphasis added) is capable of mattering so that, even through the home State may be able to provide protection, the fear now justifiably felt by the individual may be such that he is unwilling to rely on the State to protect him. Thus a State which, however anxious to halt abuse, does not act promptly and effectively to stop its officials persecuting citizens on Convention grounds will not be affording protection of which the victim is able, or in view of his fear, willing to avail himself. Thus a higher, and different standard of

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189 [1999] 3 WLR 1569
190 [2000] WLR 379
protection is required in cases where the persecutors are State agents and not non-State agents.

The information taken into account in order for the third country to be considered “safe” is from international and other reputable sources, including those described below in the context of safe countries of origin. In some cases, particularly as a result of legal challenges (e.g. the case of Adan and Aitsegur and the case of T.I v the United Kingdom academic reports have been considered, as well as expert opinion from lawyers in the third country plus statistical evidence of success rates in the third country.

(b) Countries of origin

In October 2002, the Justice and Home Affairs Council adopted a declaration to the effect that member States should start from the presumption that any asylum application from a national of one of the 10 EU accession state countries is clearly unfounded.

The NIAA introduced a presumption, which applicants for asylum would have to rebut, that the ten states about to join the EU are safe countries where people do not have a well-founded fear of persecution on the grounds set out in Article 1A(2) Refugee Convention. That is, “for reasons of race, religion, nationality, membership of a particular social group or political opinion” and who “owing to such fear, is unwilling to avail himself of the protection of [his] country”

Under section 94(5) the Secretary may by order add a State, or part of a State, to the list in subsection (4). However, there are two strong constraints on this power:

(1) The order-making power to add countries to the list is subject to the affirmative procedure laid down in section 112(4), whereby any order under section 94(5) must (a) be made by statutory instrument, and (b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament, and (c) may include transitional provision.

(2) Under section 94(5) the Secretary of State will have to be satisfied of two things before making an order. The first is that the state, or part of a state, being added is one where there is in general no serious risk of persecution of persons entitled to reside in that country. That test mirrors the 1993 Act provision. Secondly, Secretary of State must be satisfied that removal to that country of persons entitled to reside there would not in general contravene the United Kingdom’s obligations under the European Convention on Human Rights.

It is because there is always the possibility in an individual case of a person making out an arguable asylum or human rights claim that individual consideration of such claims is retained and there is no provision for automatic refusal of cases from the list of safe countries. The corollary of that is that the condition for a state to be designated should be one relating to general rather than absolute safety.

There has not always been a consistent approach to the issue of safe countries of origin. The 1992 “London Resolutions”, led to legislation that allowed for a designated list of countries where, in the British Government’s view, there was no serious risk of persecution (section 1 of the AIA). Claimants from this “White List” of countries were admitted to the asylum procedures but their cases were deemed to be ill-founded and were subject to accelerated appeals. The important safeguard of allowing claimants to appeal to the Immigration Appeals Tribunal, a second-stage appeal, was removed. The Government ultimately included seven countries on its “White List” in the AIA in 1996: India, Pakistan, Ghana, Cyprus, Bulgaria, Poland and Romania. This list included countries with notorious records of human rights abuse in particular in relation to women – the cases of Islam and Shah demonstrated that the House of Lords shared this view. This list was subsequently discredited and withdrawn, but the practice of “certifying” cases for accelerated

191 [1999] 3 WLR 1569
192 European Court of Human Rights, 1999
193 Islam v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and another ex parte Shah (conjoined appeals) 25 March 1999
appeals on this basis remains in place in respect of the new list of safe countries of origin in the NIAA.

It is unclear as to what international standards are taken into account in order to consider a country of origin as safe. In respect of the ten accession states to the EU, deemed to be safe countries of origin in the NIAA, the “Copenhagen criteria”\textsuperscript{194} may be cited as setting out the criteria for accession to the EU. The Criteria are a list of numerous stringent requirements which those countries listed in the NIAA must have satisfied in order to reach that point. \textit{Inter alia}, the Criteria require-

“…stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.

Further, that “Countries wishing to become members of the EU are expected not just to subscribe to the principles of democracy and the rule of law, but actually to put them into practice in daily life”.

To this end, the Criteria lay particular emphasis on the Framework Convention for the Protection of National Minorities and the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, and the Protocol which allows citizens to take cases to the European Court of Human Rights.

However, it cannot be extrapolated from this that any additional safe countries of origin must comply with the Copenhagen Criteria. The point is made by the announcement of the Secretary of State on 7 February 2003 that seven other countries will be added to the list, including Macedonia, Albania and Jamaica, which, said the Secretary of State, are “…all democracies with effective criminal justice systems, from which it is frankly not credible to suggest people routinely fear for their lives.”

It is more than apparent therefore, that adherence to the Copenhagen criteria has nothing to do with these countries being on the safe country of origin list.

In terms of the evidence that is required in order for the country of origin to be considered “safe”, of primary consideration are the Country Assessments of the 35 countries that produce the largest numbers of asylum applicants in the UK, which are published twice yearly by the Country Information and Policy Unit (CIPU). (CIPU is established by the Immigration and Nationality Directorate (IND) of the Home Office). The Country Assessments are the product of CIPU’s gathering and summarizing secondary source material (outlined below) on key political, economic and human rights issues. Additional versions may be issued as key circumstances change or relevant new information becomes available.

The purpose of the Country Assessments is to inform decision-making on asylum applications by Home Office caseworkers and to assist other officials involved in the asylum determination process. For this reason, each country assessment concentrates on the main issues that are most likely to arise in that process.

The information contained in the Country Assessments is not exhaustive, nor does it catalogue all human rights violations. They are compiled from a wide variety of sources, listed at the end of each country assessment, which caseworkers are also encouraged to consult.

\textit{Court Judgments}

Court judgments that support the view that the country of origin is not one where inadequate protection is available.

In \textit{Horvath v Secretary of State for the Home Department},\textsuperscript{195} for example, the Immigration Appeal Tribunal determination that the Slovakian authorities were able and willing to provide protection to the required standard and that Roma, as a class, are not exempt from that protection was upheld.

\textsuperscript{194} The Copenhagen Criteria were laid down by the Copenhagen European Council in June 1993

\textsuperscript{195} 2000) Imm AR 205
Other evidence

There is no exhaustive list of the other types or sources of information used in evidence. Instead, evidence is sought of concrete facts that give an objective picture of a country’s conditions. Since it will always be possible to point to unsafe incidents, evidence is not sought to show that a country is 100% perfect. That is not the issue. The issue is whether the country of origin is country from which very few asylum and human rights claims will be well founded.

Country reports of the Committee on Human Rights, compiled in accordance with the ICCPR and the ICESR.

International reports are likely to provide a key source of evidence, in particular those emanating from Amnesty International, and the United States’ Department of State.

The sort of evidence that would be looked for in these reports would include:

- Fulfilment of the Copenhagen criteria;
- A general respect for the human rights of its citizens;
- A constitutional prohibition on torture and other cruel, inhumane or degrading treatment or punishment;
- A judiciary that is independent, impartial and separate from other branches of government;
- Whether the constitution contains an anti-discrimination clause guaranteeing human rights and freedoms regardless, inter alia, of race, nationality or ethnic origin;
- Whether the country has ratified the European Convention on Human Rights;
- The existence of an office of the ombudsman; and
- Whether human rights groups operate without government restriction and government are generally co-operative and responsive to their view.

Question 2

(a) Third countries

The Third Country Unit (TCU) of the Immigration and Nationality Directorate (IND) of the Home Office does not maintain a definitive list of safe third countries. In practice, the TCU only considers as safe the signatory states to the Dublin Convention and designated cases.

Safe third countries are designated as such in the Dublin Convention which provides a mechanism for determining which EU Member State is responsible for any non-EU national claiming asylum in the EU. As for returns to non-EU countries, “special agreements” may be concluded between non-EU countries and EU Member States as a result of which, third country cases involving such non-EU countries are to be considered against the Dublin Convention criteria e.g. the parallel Agreement with between Norway and Iceland and the EU. If the country that the asylum applicant is to be transferred to is an EU Member State or a State designated by Parliament then the appeal right to the Immigration Appellate Authority against the transfer decision on safe third country grounds is exercisable only after the applicant has left the UK (section 93 NIAA). Norway, Switzerland, Canada, and the USA are the countries so far designated as safe third countries (for the purposes of appeal rights) under section 12(1)(b) of the IAA. 196

The designation of a third country as safe is a rebuttable presumption, but is only challengeable by way of judicial review. It is notoriously difficult to mount such a claim as judicial review grounds are only Wednesbury unreasonableness, irrationality and breach of human rights. Section 80 of the NIAA does not allow for the possibility to challenge transfer to a state which operates the Dublin Convention mechanism on the basis that it is not a safe

196 The designation was made by Statutory Instrument 2000 No.2245.
third country for asylum applicants. The individual transfer decision may, however, be challenged on human rights grounds.

For transfers under s.12 IAA the Secretary of Sate has to be satisfied that the s.12(7) “safety” test has been met, as stated earlier. This can be challenged by the applicant on the grounds of his/her individual circumstances, perhaps through relying on similar grounds to those set out in Adan and Aitsegur e.g. Country X is not a safe third country because it does not interpret the 1951 Convention in an acceptable manner. In addition “safety” arguments could be raised through reference to an alleged breach of human rights, subject to s.93 NIAA.

(b) Countries of origin

A list of safe countries of origin is set out by law in section 94(4). Under section 94(5) the Secretary of State may by order add a country to this list. This order must be contained in a statutory instrument (section 112(4)).

There is no way to challenge the inclusion of a particular country in the list. A country may only be removed from the list by order of the Secretary of State contained in a Statutory Instrument (section 112(5)).

That a person is entitled to reside in one of the countries of origin listed will not foreclose any consideration of the merits of his individual application. The corollary of this is that there is a rebuttable presumption that those States listed in section 94(4) are safe. This means that these states are presumed to be safe unless the claimant can satisfy the Secretary of State that the claim to have no safe place to go to was not clearly unfounded in the claimant’s particular case. There is always the possibility in an individual case of a person making out an arguable asylum or human rights claim. But again this is only challengeable by way of judicial review. No case so far has succeeding in challenging a certificate.

Question 3

(a) Third countries

Those third countries considered as safe are EU Member States deemed safe in terms of their application of the Refugee Convention. In addition, the Asylum (Designated Safe Third Countries) Order 2000\(^{197}\) lists the following countries for the purposes of s.12(1)b of the IAA (designation of countries other than EU Member States for the purposes of appeal rights): Canada, Norway, Switzerland and the USA.

There are no formal mechanisms in place that allow the exchange of information with other member States as to the third countries that are on the list.

Since 1 April 2001, Iceland and Norway are to be considered against the Dublin Convention criteria. This is by virtue of a “special agreement” between those countries and the member States of the EU. The need to conclude this “Parallel Agreement” was linked to the removal of internal frontier controls between Norway, Iceland and the Schengen States.

The Asylum (Designated Safe Third Countries) Order 2000 designated Norway, the USA, Canada and Switzerland as safe for the purposes of appeal rights, as of 2 October 2000. The list was not introduced for the first time in 2000, rather this Order simply repeated provisions previously in the Asylum (Designated Countries of Destination and Designated Safe Third Countries) Order 1996.

There is no possibility of a region being deemed safe that lies within a third country not designated as safe.

\(^{197}\) Statutory Instrument 2000 No.2245.
b) Countries of origin

Under section 94(4) NIAA, those countries of origin considered as safe are-

(a) the Republic of Cyprus,
(b) the Czech Republic,
(c) the Republic of Estonia,
(d) the Republic of Hungary,
(e) the Republic of Latvia,
(f) the Republic of Lithuania,
(g) the Republic of Malta,
(h) the Republic of Poland,
(i) the Slovak Republic, and
(j) the Republic of Slovenia.

There are no formal mechanisms in place that allow the exchange of information with other member States as to the countries of origin that are on the list.

The inclusion of the 10 EU accession states is in line with the Justice and Home Affairs Council declaration of October 2002. Since the list was announced by the Home Secretary on 7 October, David Blunkett made known on 7 February 2003 his intention to add the following seven countries to the list:

Albania, Bulgaria, Jamaica, Macedonia, Moldova, Romania, and Serbia and Montenegro (formerly the Federal Republic of Yugoslavia)

The basis for designating part of a country as safe is the same as that for designating a country as safe. (See above).

Question 4

(a) Third countries

There are no periodic review mechanisms, nor is there any mechanism for removing a third country from the list. In theory, the Secretary of State maintains awareness of developments in the countries concerned and would look for something as significant as a suspension or renouncing of a major international Convention in order to remove a country from the list. Renouncing the Refugee Convention, for example, would mean that the provisions of section 12(7) IAA could no longer be met.

(b) Countries of origin

Following concerns over the independence of CIPU Country Assessments by such organisations as Asylum Aid, section 142 of the NIAA aims to establish an Advisory Panel on Country Information, whose function is to consider and make recommendations to the Secretary of State about the overall content of CIPU’s Country Assessments. It is hoped to set up the Panel in the second Quarter of 2003, which should comprise no fewer than ten members, and not more than twenty. The Panel is likely to comprise representatives as follows:

Leading researcher/academic (Chair)
UNHCR
Human Rights Watch
A senior immigration lawyer, to be nominated by the Immigration Law Practitioners Association (ILPA)
Voluntary Services Overseas
International Committee of the Red Cross
Foreign and Commonwealth Office

198 Press notice 267/20020
It is recognised that the Country Assessments would also benefit from more detailed scrutiny by country experts and others with relevant knowledge and experience. CIPU therefore plans to establish a similar timescale a Consultation Group that will act as a second tier, and will take an active part in the process of producing the Country Assessments. Well-respected country experts, as well as NGOs and other organisations with knowledge and experience of asylum and human rights issues, will be invited to comment on and contribute to the main CIPU bi-annual reports. This group may include representatives from:

The World Health Organisation
International Social Services
Amnesty International
Immigration Advisory Service
Immigration Appellate Authority
Refugee Legal Service
Refugee Council
Medical Foundation for the Care of Victims of Torture.
Save the Children
Refugee Women's Research Project
Individuals with expert country knowledge of the main asylum producing countries.

Whilst unlikely that a country would ever be removed from the list, section 94(6) allows for the possibility. Under this section, the Secretary of State may by order remove from the list in subsection (4) a State or part added under subsection (5). In accordance with section 112(5), any order under section 94(6) must (a) be made by statutory instrument, and (b) shall be subject to annulment in pursuance of a resolution of either House of Parliament, and (c) may include transitional provision.

The evidence required leading up to a removal of a country from the list is not laid down although it may be reasoned that a country is to be removed when it no longer satisfies either of the conditions for adding a country to the list (laid down in section 94(5)). This means that a country may be removed either (1) where there is evidence that in general there is a serious risk of persecution of persons entitled to reside in that country, or (2) where the Secretary of State is no longer satisfied that removal to that country of persons entitled to reside there would not in general contravene the United Kingdom’s obligations under the European Convention on Human Rights.

It may be presumed that the type and sources of such evidence will be the same as are used in the determination of whether the country of origin is safe.

Question 5

There are no formal mechanisms to examine the situation of returnees in either third countries or in countries of origin. Instead, their situation may be subject to ad hoc review, most likely either by their legal representative or by family members.

Question 6

(a) Third countries

The general premise behind the Dublin Convention is that the Member State responsible for an applicant's presence on the territory of the EU will be the state responsible for dealing with the asylum claim. In order to achieve this the Dublin Convention contains a number of specific
The criteria used to identify the competent Member State, enabling the transfer of an asylum seeker once responsibility has been agreed.199

Section 80(2) NIAA provides that nothing in section 77 (No removal while claim for asylum pending) prevents an asylum-seeker from being removed from the UK to a member State if the Secretary of State has certified that:

(a) the member State has accepted that, under standing arrangements, it is the responsible State in relation to the claimant's claim for asylum; and

(b) in his opinion, the claimant is not a national or citizen of the member State to which he is to be sent199.

Under s80(5), “standing arrangements” means arrangements in force between two or more member States for determining which State is responsible for considering applications for asylum.

As to the extent to which the circumstances of each particular case are taken into account, in respect of those states party to the Dublin Convention, the Dublin Convention precludes an examination of the merits of a claim. For those countries outside the Dublin Convention, paragraph 345 of the Immigration Rules applies whereby if the Secretary of State is satisfied that there is a safe third country to which an asylum applicant can be sent, his application will normally be refused without substantive consideration of his claim for refugee status.

In terms of the link required between the applicant and the third country, the first criterion for determining responsibility is laid down in Article 4 of the Dublin convention and clarified by Beverley Hughes as follows:200

Potential third country cases would normally have their asylum claims considered substantively in the United Kingdom where:

(a) an applicant's spouse is in the UK;
(b) the applicant is an unmarried minor and a parent is in the UK;
(c) the applicant has an unmarried minor child in the UK

The policy in (a) would not be applied in cases where a marriage was contracted after the applicant’s arrival in the UK. In all cases “in the United Kingdom” means with leave to enter or remain or on temporary admission to this country as an asylum seeker prior to an initial decision on their application.

Discretion may be exercised according to the merits of the case where:

(a) a married minor was involved but the criteria in (b) or (c) above were otherwise fulfilled.
(b) the applicant was an elderly or otherwise dependent parent;
(c) the family link was not one which would normally be considered but there was clear evidence that the applicant was wholly or mainly dependent on the relative in the United Kingdom and there was an absence of similar support elsewhere.

Factors which might influence the exercise of discretion in these cases, such as language, cultural links or the number of family members in the United Kingdom may have a bearing, but there would need to be a compelling combination of such factors to ensure the exercise of discretion in favour of an applicant.

Cases citing family ties which would not normally be considered and which did not display any of the features, which engaged the exercise of discretion, would not normally be considered

199 See the criteria set out in Articles 4 to 8 which apply in the order in which they appear
200 Parliamentary Question, 22 July 2002, Hansard Written Answers Column 860W
substantively. This means that a brother, who was not dependent on his sibling(s) would not normally have his case considered here, no matter how strong his cultural or linguistic links with the United Kingdom.

The intention of the policy is to re-unite members of an existing family unit who through circumstances outside their control had become fragmented. However, where the relationship did not exist prior to the person’s arrival in the United Kingdom, the policy would only be applied in the most exceptionally compelling cases.

Paragraph 345 of the Immigration Rules provides further guidance on the link required between the applicant and the third country. Specifically, the Secretary of State shall not remove an asylum applicant without substantive consideration of his claim unless:

(a) the asylum applicant has not arrived in the United Kingdom directly from the country in which he claims to fear persecution and has had an opportunity at the border or within the territory of a third country to make contact with that country’s authorities in order to seek their protection; or

(b) there is other clear evidence of his admissibility to a third country.

The chances of readmission to the third country are taken into account. For Dublin Convention cases the agreement of the other Member States to accept the case has to be given. Otherwise the provisions in paragraph 345 of the Immigration Rules (set out above) apply. In recent decisions the Court of Appeal has recognised that it may be difficult to distinguish between interpretation and application of the Refugee Convention, but what is at stake is whether there is a disregard of what the national court considers the core values of the Convention. Where the UK has to consider return under Art 8 of the Dublin Convention to another Member State that has already rejected the applicant, if the core values are adhered to then the national court will only intervene in the case of decisions that are wholly unreasonable in their conclusions.

In Adan and Aitsegur, the Court of Appeal held that “the Convention is apt unequivocally to offer protection against non-State agent persecution, where for whatever cause the State is unwilling or unable to offer protection itself”. In response to this case, a new section 11(2) of the IAA 1999 was inserted whereby an asylum claimant may be removed where a certificate is issued on the grounds that another Member State has acted responsibly. Thus, in the event of a challenge to such a certificate by judicial review, section 11(1) provides that: “A Member State is to be regarded as a place where a person will not be sent to another country otherwise than in accordance with the Refugee Convention.”

In terms of the non-Dublin Convention cases, the Secretary of State is under no obligation to consult the authorities of the third country before the removal of an asylum applicant. However, the provisions of paragraph 345 of the Immigration Rules must first be met, i.e. the applicant must have had the opportunity to contact the authorities there, or there is other clear evidence of the applicant’s admissibility to the safe third country. Nonetheless, a person can be lawfully sent to a safe third country even if he has exhausted the asylum procedures there and been refused.

The TCU is responsible for ensuring the re-admission of an asylum seeker to a third country. It performs this responsibility in accordance with Article 15 of the Decision of the Committee

201 R v Secretary of State for the Home Department, ex parte Altun (unreported) 28 January 2000
202 R v Secretary of State for the Home Department, ex parte Dahmas (unreported) 17 November 1999, CA where a decision of the Danish Refugee Board rejecting an Algerian asylum claim was considered to be unreasonable, precluding a return to that country. The Home Office policy was described as being that “the Secretary of State will determine whether a decision is flawed by reason of some manifest irrationality or serious procedural irregularity, such that it might not be appropriate to issue a certificate in the particular case”. See also R v Secretary of State for the Home Department, ex parte Gashi [1999]INLR 276 for a decision quashing a return to Germany because of an inexplicably high refusal rate for Kosovan Albanian claimants.
203 [1999] 3 WLR 1569
204 No 1/97 of 9 September 1997
set up by Article 18 of the Dublin Convention 1990 concerning provisions for the implementation of the Convention (97/662/CMS). The process involves the TCU submitting a Standard Form for determining the state responsible.

In its decision in *Musisi* the House of Lords concluded that, where the right to life was at stake, a high degree of scrutiny of administrative decisions was called for to ensure that the decision was “in no way flawed”. The consequences of *Musisi* were twofold. First, it confirmed that the prohibition on refoulement under Art 33(1) of the Refugee Convention encompassed indirect as well as direct return. Secondly, detailed examination of Home Office expulsion decisions was called for by the High Court in judicial review, both in cases of rejection of claims and in cases of removal to third countries. In *Turgut*, the Court of Appeal declared itself satisfied that its enhanced standards complied with the requirements of Art.13 of the ECHR with respect to Art.3 claims.

As regards whether there is any cooperation and/or communication with the authorities of the country of origin when seeking to return the rejected asylum seeker, it is important to note that, traditionally, the UK does not enter into official readmission agreements of any type. However, the tide may be turning.

**(b) Countries of origin**

Under section 90(3) NIAA, “If the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is clearly unfounded.” The term “clearly unfounded” is not defined as its general meaning is well understood by the courts as meaning wholly lacking in any substance or merit. Moreover, it is the view of parliamentary counsel that the words “clearly” and “manifestly” have the same meaning. (See for example, the House of Lords judgment in *Thangarasa*).

As to the “serious risk of persecution” required, the courts have noted the difference between a mere speculative risk that a person may face mistreatment if returned to their country and a “real” or “serious” risk that such mistreatment will occur. In the former case, a person will not have made out a well-founded fear of persecution; whereas in the latter case they will have done so, provided that the feared mistreatment amounts to persecution. So the word “serious” does not set as high a threshold as it may first appear. Rather, it distinguishes between speculative and concrete risk. A serious risk need not be a probability but it must be a reasonable possibility.

The meaning of “entitled to reside” is discussed below.

The consideration of an asylum or human rights claim involves a forward-looking assessment of risk based on present-day country information and the experiences the applicant has faced in the past and may face in the future. Evidence of past torture is an important part of this consideration but it is not the only or decisive factor in all cases.

At Reception Centres such as Oakington, the on-site medical team investigates cases of possible past torture, although they are not proactive in this role. There is also an on-site legal team that is available to advise applicants. That team, along with the medical team, are theoretically in a position to seek to draw from applicants enough of the history of such experiences to establish whether or not there may be an issue that is worth investigating. If
so, then either the legal or the medical representative can send a referral form to the medical foundation. Once the representatives produce a copy of the referral form to the Medical Foundation, the applicant is moved out of Oakington or similar facility, provided they have been accepted by the Medical Foundation, to enable the Medical Foundation to carry out its examination. A decision on the claim is not taken until after the Medical Foundation has completed its assessment. However, there are problems with referral as the Oakington process takes 7 to 10 days and the Medical Foundation is only operational 5 days a week.

If the Medical Foundation finds that there is evidence of past torture, it would normally mean that the claim was not one that merited certification as being “clearly unfounded”.

As to the link required between the applicant and the country of origin, an “entitlement to reside” is the test laid down in the NIAA for the certification of a claim from one of the states as “clearly unfounded”. The Home Office’s view of what constitutes an “entitlement to reside” right was considered in the case of Ahmadi.210 In consonance with the judgment in this case, the right approach is to look for someone who is ordinarily resident in these countries. That would normally mean a national, but some people will be ordinarily resident full time without having acquired citizenship of it. One example is Estonia where, although residents legally living there may apply for and acquire Estonian citizenship, not all do so. Such people are included since Estonia is their home country.

However, “entitled to reside” does not include those who are “temporarily” entitled to reside in a country. That could embrace people who are, for example, simply visitors or students there. Nor does it require a person to be entitled to reside “permanently” in a listed country. Use of that term could cause difficulties. For example, in the United Kingdom there are people who do not have British citizenship but have indefinite leave to remain here. But they can be removed in extreme cases where deportation action is taken. Instead, the term remains unqualified.

As regards there being any cooperation and/or communication with the authorities of the country of origin when seeking to return the rejected asylum seeker, as above, the UK has not usually entered into readmission agreements in the past, although this may be changing. In this context it is worth mentioning the joint Cabinet Office – Home Office policy document, disclosed on 5 February 2003, by which it is proposed to return asylum seekers to “regional protection areas”, where their applications would be processed. Among locations mentioned for the regional protection areas, as part of a “new global asylum system”, are Turkey, Iran and Iraqi Kurdistan for Iraqi refugees; northern Somalia for refugees from southern Somalia; and Morocco for Algerians. Ukraine or Russia are also suggested to stem the flow of economic migrants from the east of the new enlarged EU border.

Asylum seekers would stay in the UN special protection areas for six months while the position in their home country stabilised. The scheme envisages that those in need of longer-term protection could be resettled in Britain and other European countries under a burden-sharing quota scheme determined by each country’s population.

Under the policy, the UNHCR would be responsible for the regional protection areas and, if it agrees to take on the role, the detailed plans for the first pilot schemes could be ready this summer. Initially it could be taken forward by a coalition of five EU states willing to fund the scheme.

**Question 7**

(a) Third countries

The IND is responsible for all decisions relating to asylum claims, whether made on arrival or after entry into the country, including the granting of refugee status. The IND’s purpose, as set out in Home Office Aim Six, is “to regulate entry to, and settlement in, the UK effectively in

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210 R (on the application of Ahmadi) v the Secretary of State for the Home Department, Administrative Reports [2002] EWHC 1897
the interests of sustainable growth, and social inclusion”. Asylum seekers can file their application either with an immigration service officer at a port, or with the screening unit of the IND in London, if they apply after entering the country. The IND or the immigration service screens asylum seekers to establish their identity and nationality, and takes their fingerprints.

The TCU is responsible for all decisions to refuse an applicant on third country grounds.

It is the responsibility of the IND to ensure that (1) all unaccompanied minors applying for asylum and (2) age-disputed persons, are referred to the Department for Social Services, as well as to the Children’s Panel of the Refugee Council.

However, in practice, the widely held practitioners’ opinion is that where there is any element of doubt, the IND will generally treat applicants as neither unaccompanied, nor minors, nor vulnerable in some other way. The Home Office refuse to bring in medical professionals in age dispute cases since medical estimates at ageing are notoriously inaccurate.

UK asylum applicants are now given a single screening interview. The purpose is to establish the nationality and identity of the applicant, where they have arrived from and the route by which they have travelled from the country of claimed persecution to the UK. There is no longer a separate “third country interview” or “Dublin Screening Interview”. Following the screening interview, the port authorities will decide which route the application should follow. The route will be either (a) third country action, following a determination that the asylum claim falls into one of the Dublin Convention’s criteria (b) detention (c) full substantive procedure.

Whilst the decision to apply the safe third country principle is a substantive refusal of the asylum claim, the decision is taken without consideration of the substance of the claim. Rather, it is akin to an admissibility procedure, i.e. the asylum claim will not be admitted to the full substantive procedure since the claimant will be the responsibility of another state.

Paragraph 345 of the Immigration Rules provides clear guidance on the consequences of the Secretary of State being satisfied that there is a safe third country to which an asylum applicant can be sent, i.e. his application will normally be refused without substantive consideration of his claim for refugee status.

(b) Countries of origin

The Immigration and Nationality Directorate (IND) of the Home Office is the authority that makes the decision on the application of the safe country of origin principle in the first instance.

In terms of whether the authorities have legal training and specific skills pertaining to unaccompanied minors and other vulnerable groups, see 7(a). In addition, caseworkers at Oakington and other detention centres have guidance available to them on dealing with potential torture cases. A rolling programme of seminars from the medical foundation, the UNHCR and the Red Cross has been launched to equip caseworkers to deal fairly and sensitively with those applicants who have suffered torture or other forms of trauma. However, such schemes are widely viewed amongst practitioners with deep cynicism. The Home Office rarely calls on the expertise of any medical professionals.

The nature of the examination of the facts in the process leading to a decision on the application of the safe country of origin principle is described in 7(a). Therefore, whilst the decision to apply the safe country of origin principle is a substantive refusal of the asylum claim, the decision is taken without consideration of the substance of the claim. Rather, since there is a presumption that safe countries of origin are countries where people do not have a well-founded fear of persecution, the procedure is really akin to an admissibility procedure. I.e. the asylum claim will not be admitted to the full substantive procedure since the claimant will be detained and put through the accelerated procedure.
The detention procedure is designed as an administrative convenience to determine whether claims have an arguable case for there being a well-founded fear of prosecution. A decision is made on the asylum claim within 7 to 10 days. Once detained at Oakington, those applicants who are not already represented are offered advice from either the Refugee Legal Centre or the Immigration Advisory Service. These organisations have caseworkers on site to advise, be present at interviews and to make representations about the application. After 3 days the applicants are interviewed about their claim and two further days are allowed for further representations to be made. Following this 5-day period, the case papers are given to a Home Office official for a determination of the claim. Decisions granting or refusing asylum are given to the applicants whilst they are at Oakington.

Question 8

(a) Third countries

In-country appeals:

Asylum claims

Under section 93 of the NIAA, whilst a person is in the UK, he cannot appeal to an adjudicator against an immigration decision to remove him to a 'safe third country', on the ground that his removal would violate one of his Refugee Convention rights, provided the Secretary of State has issued a certificate under section 11(2) or 12(2) of the IAA 1999. Under section 11(2) of the IAA 1999, any such certificate must state (a) the member State has accepted that, under standing arrangements, it is the responsible State in relation to the claimant's claim for asylum; and (b) in his [the Secretary of State’s] opinion, the claimant is not a national or citizen of the member State to which he is to be sent. Under section 12(2) of the IAA 1999, any such certificate must confirm that, in the Secretary of State's opinion (a) the claimant is not a national or citizen of the country to which he is to be sent; (b) his life and liberty would not be threatened there by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and (c) the government of that country would not send him to another country otherwise than in accordance with the Refugee Convention.

The provision, “in his opinion”, makes it clear that the decision to certify, or not certify, is based on the Secretary of State’s opinion. The Secretary of State cannot make a claim clearly unfounded just by certifying it. All he can do in a certificate is state “in his opinion” on the basis of the materials available to him that it is clearly unfounded.

Where the Secretary of State has issued such a certificate, the person would have to leave the UK before being entitled to appeal.

Human rights claims

However, where the appellant has made a human rights claim and the Secretary of State has not certified as clearly unfounded, the person can appeal while in the UK (Section 93(2)).

Unfounded human rights or asylum claims

Where the human rights or asylum claim is clearly unfounded, section 94(7) provides that a person may not appeal from within the UK provided the Secretary of State has certified that-

(a) it is proposed to remove the person to a country of which is not a national or citizen, and
(b) there is no reason to believe that the person’s rights under the Human Rights Convention will be breached in that country.

94(8) provides that a country which is named in the certificate to which it is intended to remove an applicant under 94(7), is to be regarded as one where the applicant's rights under

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211 In accordance with s113 NIAA, “asylum claim” means “a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom’s obligations under the Refugee Convention”.

212 In accordance with s113 NIAA, “human rights claim” means a claim that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act (c.42) (Public Authority not to act contrary to the Convention) as being incompatible with his Convention rights.
the Refugee Convention will be observed and from where he will not be sent to another country other than in accordance with the Convention.

Under section 94(9), where a person is appealing a certification that his asylum claim and/or human rights claim is/are clearly unfounded, and that appeal is brought while outside the UK, the appeal shall be considered as if he had not been removed from the UK.

The wording of section 94(9) means that the general bar in section 95 (see below) on making an appeal from outside the United Kingdom on asylum or human rights grounds does not apply where the person has been issued a certificate under section 94. Nor, as some may fear, does section 94(2) prevent any appeal being made on asylum or human rights grounds. It prevents an appeal being made “in reliance on section 92(4)” i.e. on the grounds that they have made an asylum or human rights claim. This thereby prevents an in-country appeal only. A person is not prevented appealing from outside the United Kingdom, if a certificate issued under section 92 has removed their in-country appeal right.

This non-suspensive appeal process would not remove the possibility of the person seeking judicial scrutiny of the Secretary of State’s certificate by applying for judicial review. If an application is made, such a person would not be removed until the application was determined. If the application were approved, they would not be removed pending the determination of the judicial review itself.

**Appeal to Tribunal**

Section 101 provides an appeal with permission to the Tribunal against the adjudicator's decision on a point of law. Thereafter, under section 101(2) a party to an application to the Tribunal for permission to appeal may apply to the High Court or, in Scotland, to the Court of Session, for a review of the Tribunal's decision on the ground that the Tribunal made an error of law. Under section 101(3), the application shall be determined by a single judge by reference only to written submissions. The judge’s decision is final. Section 101(4) allows the Lord Chancellor to make an order to repeal the statutory review process set out in subsections (2) and (3). The order is subject to affirmative resolution.

Rejected asylum applicants who have not had their claims certified as clearly unfounded, except those who are rejected on safe third country or safe country of origin grounds, have the right to appeal their denials in the United Kingdom in several stages. They have seven working days to lodge an appeal with an independent special appeal adjudicator, who must decide the appeal within 42 days. (This time limit is often extended in practice, however.) If the adjudicator decides that the case is not unfounded, the rejected claimant may appeal to the Immigration Appeal Tribunal or the Court of Appeal. The Court of Appeal may review the Tribunal’s decision.

In 2000, the government adopted the UN Human Rights Convention into domestic legislation—the Human Rights Act. Under the IAA, appellants may appeal on grounds arising directly from the European Convention on Human Rights, and have ten days to appeal to an independent adjudicator. If that appeal is unsuccessful, they have another ten days to appeal to the Immigration Appeal Tribunal or the Court of Appeal.

The Immigration Appellate Authority is responsible for making arrangements for appeals to be heard. Hearings for the first non-suspensive appeals are due shortly.

Under section 80(3) NIAA, where a person is the subject of a certificate directing his removal to a third country and:

(a) has instituted or could institute an appeal…and;
(b) has made a human rights claim…

(4) the person may not be removed from the UK unless-

(a) the appeal is finally determined, withdrawn or abandoned…or can no longer be brought (ignoring any possibility of an appeal out of time with permission), or
(b) the Secretary of State has issued a certificate in relation to the human rights claim under section 93(2)(b) of that Act (clearly unfounded claim).

The type of appeal available depends on the application that has been made. An application for asylum that did not involve the safe third country principle would attract a right of appeal in the UK on the grounds that removal from the UK would be in breach of obligations under the Refugee Convention, Section 83(3). An application which is certified as being manifestly unfounded would not attract an in country right of appeal, Section 94 NIAA.

Section 95 prevents an appeal being lodged on asylum grounds (i.e. that his removal would breach the UK’s obligations under the Convention or would be unlawful under section 6 HRA 1998 as being incompatible with his Convention rights) by a person who is outside the United Kingdom. It does not apply when a person has been removed on the basis that their asylum claim has been certified under section 94 as clearly unfounded: in that case the asylum appeal must necessarily be made from abroad.

(b) Countries of origin

Under section 94(2), whilst a person is in the UK he may not appeal under section 82(1) where the appellant has made an asylum claim or human rights claim (or both), if the Secretary of State certifies that the claim or claims is or are clearly unfounded. Under section 94(3), if the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a state listed in subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded.

The application of sections 94(9) and 94(2) is identical as to countries of origin as it is to third countries (see above). Equally, the application of the provisions in sections 101 and 103, (described above) apply to safe country of origin cases as well.

The non-suspensive appeal process would not remove the possibility of the person seeking judicial scrutiny of the Secretary of State’s certificate by applying for judicial review. From the date on which the applicant informs the IND of his intention to seek judicial review, the applicant has three days to provide an administrative court reference confirming that judicial review proceedings have been lodged. On receipt of this, the Secretary of State will then agree to defer removal directions pending a decision on permission to appeal to the High Court. If permission is granted, the Secretary of State will agree to defer removal directions pending the outcome of a full hearing.

An applicant for asylum who makes a clearly unfounded claim would be notified under Section 94 that he had a non-suspensive right to appeal against the refusal of his asylum application. He would be removed from the UK following the decision. Other asylum applicants, with the exception of safe third country applicants, would have a right to appeal in country against the refusal of their application in accordance with Section 82 of the NIAA. Leave to remain would not be granted to an applicant pending the determination of the appeal, although he would not be required to leave until the appeal processes had been completed.

On the question of whether there is a right to appeal from abroad, the same provision applies as for third countries considered in 8(a)

Question 9: Further comments.

Non suspensive appeals

There is significant concern over whether individuals can meaningfully pursue appeals from the very countries in which they fear persecution. In particular, the following points have commonly been raised:

a) How are individuals (who may well be on the run or in hiding to avoid further persecution) able to instruct their representatives in the UK? Will the government
pay for representatives to fly out to interview their clients and gather relevant evidence in support of their cases?

b) Most appeals turn on the credibility of the appellant’s evidence: these individuals will not be able to give evidence, and Adjudicators will be placed in the invidious position of having to assess paper claims only.

c) The government has not explained how successful appellants would be brought back to the UK, as they clearly could not pass through national airports and expose themselves to further risk. The clandestine removal of nationals from their own country would give rise to serious diplomatic and practical difficulties.

d) The Government will face substantial damages claims from those individuals who do manage to appeal successfully from their country of persecution.

In response to the concerns raised in (a), (b) and (c), the Appeals and Judicial Review Unit (AJRU)\textsuperscript{213} of the IND point to the fact that by the time the applicant has been returned he will have been through a rigorous decision-making process where the decision will have been approved by a senior officer. Further, that he will have had access to legal advice throughout this process. Once abroad, appellants will be able to access legal advice through, for instance, the Refugee Legal Centre and the Immigration Advisory Service (IAS), in pursuing their appeal. For the IAS this is no different from the function they already perform in respect of Entry Clearance Appeals where the appeal is an out of country one where the appellant remains in the country of origin.

Specifically addressing the concern raised in (b), the AJRU sees no need for oral evidence since credibility is not an issue in these cases – there is a presumption that these countries are safe. Further, these appellants can provide statements and evidence, and have representatives attend hearings and make submissions on their behalf. Moreover, they access to statutory appeal rights both at the Adjudicator, Immigration Appeal Tribunal and Statutory Review levels and to the Court of Appeal. At each stage they will be able to access legal advice where they meet the merits test applied by the Legal Services Commission.

These appeals are at an early stage but the experience so far suggests that appellants have been able to lodge their appeals and that these are being actively pursued. It is too early in this process to reflect on the efficacy of the appeals process since only a few have actually been heard having been heard.

In the recent case of \textit{ZL and VL v Secretary of State and the Lord Chancellor's Department},\textsuperscript{214} the Court of Appeal held that the fast-track procedure for determining claims which were certified by the Secretary of State to be clearly unfounded, afforded adequate opportunity for asylum claimants to demonstrate that they had an arguable case.

During the passage of the AIA the House of Lords voted to ensure special protection from accelerated appeals procedures to survivors of torture. This protection was retained in the IAA. It was recognised that these cases require the most anxious scrutiny and are ill suited to accelerated procedures. The arguments that prevailed in 1996 and 1999 become overwhelming where one is faced with the possibility of a person being returned to the country in which s/he has been tortured before any appeal whatsoever is heard.

\textit{Judicial review of the adjudicator and the Immigration and Appeals Tribunal (IAT)}

The narrowing of the IAT’s factual jurisdiction in section 101(1) was borne out of the government’s view that applicants and their advisers abuse the appeal system and the availability of judicial review by making unfounded judicial review applications to delay removal. The AJRU considers that in the interest of maintaining immigration control, balanced against the necessity to properly process applications for asylum, the IAT’s newly

\textsuperscript{213} Personal correspondence, 7 February 2003
\textsuperscript{214} 24\textsuperscript{th} January 2003, Court of Appeal
defined jurisdiction in section 101(1) is a sufficient safeguard to ensure that individual asylum appeals are given adequate consideration. However, the provision has been widely condemned amongst practitioners and groups such as the Refugee Council as unnecessary, flawed, and counter-productive. Their argument is the IAT is a specialist body with experience of examining factual considerations relating to asylum or human rights claims. There was no reason to argue that a factual jurisdiction clogged up the IAT. There are already procedural hurdles for obtaining leave to appeal to the IAT. Its power to grant leave on questions of fact and law is not a wide one, rather is limited to cases which have:

“a real prospect of success; or [where] there is some other compelling reason why the appeal should be heard” 215

Moreover, the IAT was widely trusted to take independent decisions about when to grant leave where matters of fact are in dispute.

The decision of an adjudicator, who sits as a single judge in these matters, should be reviewed by the IAT not only on the law but on the facts. There are significant numbers of cases where an adjudicator is likely to be seen to have gone wrong on the facts. If the only ground of appeal is on a point of law, it becomes much more difficult, because not only must the IAT disagree with the views expressed by the adjudicator, but it must reach the conclusion that that decision is not only wrong but perverse.

(a) Third countries

It is generally accepted by the UK Government that the Dublin Convention simply does not work – hence Dublin II. It has made accelerated removals of asylum seekers under “safe” third country rules a more complex and lengthy process, and, as the figures below show, has had very little impact on numbers of asylum seekers.

In 2001, the UK government made 119,015 decisions. Of these 87,990 were refusals. Of these 700 (or 0.8%) were on safe third country grounds. During the first three quarters of 2002, the UK government made 63,145 decisions. Of these 41,320 were refusals. Of these 940 (or 2.3%) were on safe third country grounds. This cannot therefore be considered as a significant number. It is therefore also likely that the revised arrangements of Dublin II will be of only marginal effect. The only countries outside the EU currently formally designated as safe are those so designated under the 1996 Asylum and Immigration Act – Canada, the USA, Norway and Switzerland.

The safe third country concept poses a serious risk to the institution of asylum and to the fundamental principle of non-refoulement. A State which returns an asylum seeker to a “safe third country” runs the risk of violating the principle of non-refoulement, directly or indirectly, if the third State returns the refugee to a country of persecution. Furthermore, the concept results in responsibility shifting, with the end result that States neighbouring countries of origin bear the overwhelming responsibility for refugees.

Sangatte is a prime illustration of the inequity of existing third country arrangements, where thousands of people, many with links to the UK, found themselves stuck in a sort of limbo. There needs to be agreement on sharing responsibility for asylum claims fairly, and on recognising legitimate links.

(b) Countries of origin

The decision as to whether a person meets the legal definition of a refugee should clearly be made impartially on objective factual information. However, there is some contention as to whether this actually happens. The Refugee Council contends that the credibility of country information and decisions themselves are undermined as those responsible may be vulnerable to political pressures. CIPU’s position, however, is that the Country of Origin

215 Rule 18(7) Immigration Rules.
Information Unit Assessments do not contain Home Office opinion or policy, rather that the Assessments are based on information which is publicly available, and largely drawn from disclosures by Amnesty International and the US’ Department of State.

Whilst individuals’ claims continue to be fully considered on their merits, it may be very hard for applicants to rebut the presumption of the safety of their country of origin. This is particularly so given the severe time constraints under which this concept usually operates and possibly from a situation of detention. This increases the likelihood of the risk of refoulement. In particular, it is widely known amongst immigration practitioners and groups such as the Refugee Council that asylum seekers are unlikely to want to make allegations of past torture to unknown officials in unfamiliar surroundings, virtually as soon as they arrive at Oakington. Commonly, allegations of past torture will only come to light at a later date, following after a period of time in which the applicant comes to feel secure.

Practitioners’ widely held view is that all appeal rights should be suspensive, and yet decisions are to be made and acted upon without any in-country review mechanism. Two countries so designated, Poland and the Czech Republic, have confirmed records of human rights abuse in relation to their Roma populations that remain a cause of concern.

It remains as yet unclear how the principle of safe countries of origin will be extended to additional countries, yet it clearly has potential for “creeping arbitrariness and with no guarantee that people will be adequately represented to present their own individual claim”.216

There is concern from the Refugee Council over the potential ease with which additional States may be added to the list of safe countries. Those countries which generate the majority of asylum applications are manifestly unsafe – countries such as Iraq, Zimbabwe, Afghanistan, Somalia, the former Yugoslavia and Sri Lanka – and, the Refugee Council argues, it can never be appropriate to apply accelerated procedures with non-suspensive appeals to any such cases. However, as the CIPU points out, the fact that a country may be manifestly unsafe does not mean that conditions in that country will never improve.

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216 Correspondence with the Refugee Council, 24 January 2003.
DENMARK

Under the Aliens Act No. 226 of 8 June 1983 (plus amendments), only those countries that have ratified the UN Refugee Convention, and observe it in practice, are considered safe countries. This means that where, according to the information available to the Danish Immigration Service, the alien runs no risk of persecution for the reasons mentioned in the Geneva Convention nor risks *refoulement*, a country will be designated as safe.

Case law emanating from the Danish Refugee Appeals Board explicitly acknowledges persecution by non-state agents as grounds for granting 1951 Convention refugee status.

**Safe third countries**

According to administrative practice, the following states are considered to be "safe third countries": Canada, USA, Iceland, Norway (Iceland and Norway have become associated parties to the Dublin Convention system) Switzerland, Hungary (with regard to European asylum seekers) and Poland.

The list does not appear in any statute. The designation of a third country as safe is rebuttable.

The designation of a third country as safe does not allow for consideration of the safety of the country in relation to the particular applicant. Under the Aliens Act s.48(a), if an asylum seeker has entered Denmark via a safe third country, the Danish Immigration Service reserves the right in certain cases to determine that the applicant must be sent back to that country. The return will occur with the Immigration Service only having made a general evaluation of the asylum application, i.e. an assessment of whether the third country is safe (as above). The evaluation will not include a detailed consideration of his/her motive for seeking asylum.

**Safe countries of origin**

A special "white list" of safe countries of origin - again, which does not appear in any statute - has been drawn up of countries from which citizens are unlikely to be granted refugee status. The list includes the Baltic states, Bulgaria, Romania, Russia, the Czech Republic, Slovakia, Poland, all Western European countries, USA, Canada, Australia, New Zealand, Japan and some African states.

In September 1994, a special fast-track procedure was introduced within the manifestly unfounded procedure for certain categories of asylum seekers. This is an administrative measure, based on an agreement between the Central Police, the Immigration Service and the Danish Refugee Council. It is aimed at reducing the processing time in asylum cases where - due to the general situation in the country of origin - there is a presumption that the applicant will eventually be rejected under the manifestly unfounded procedure.

Applicants coming from a "safe country of origin" maintain their right to a substantive examination of their asylum claim, and for consideration of the safety of the country in relation to the particular applicant. It is however a fast-track procedure which excludes the possibility of filling in an application form in writing. Apart from this difference, the procedural steps are similar to those followed in the ordinary manifestly unfounded procedure. In other words, there will be an asylum interview with the Immigration Service followed by an interview with the Danish Refugee Council (DRC), provided the Immigration Service continue to view the case as manifestly unfounded.

The time limits for processing the case under the fast-track procedure are shorter than under the normal procedure - normally taking between two to three days and one week to make a decision. Applicants may be detained during the entire procedure, although for no longer than seven days.

*Unaccompanied minors and other vulnerable groups*
Dealing with cases of unaccompanied minors and other vulnerable groups is covered in the general training of Danish Immigration Service personnel. It may therefore be regarded as limited.

**The right to appeal and the right to request leave to remain pending appeal:**

*Safe third countries*

There is a right of appeal to the Ministry of Integration, Immigrants and Refugees that, in principle, offers the applicant an opportunity to rebut the presumption of safety. There is no right to request leave to remain pending this appeal, and normally expulsion will take place prior to examination of the appeal.

*Safe countries of origin*

If the case is channeled through the fast-track procedure there is no right of appeal. If, however, following the interviews with the Danish Immigration Service and then the DRC, the DRC disagrees with the Immigration Service and does not consider the case to be manifestly unfounded, the case will be transferred to the normal procedure which includes the right of appeal to the Refugee Appeals Board and the right for leave to remain.
FRANCE

In accordance with France’s constitution, the safe third country concept does not apply in France, nor will it apply in the future. Whilst the safe country of origin concept does not apply at present, it is presently being debated in a bill before Parliament on 4 June 2003. The Ministry of Foreign Affairs hopes that following the adoption of the Directive on minimum standards on procedures, the EU will establish a common list of countries presumed to be safe, which can be easily revised to take into account changing international situations. It would be based on the model establishing a list of countries whose nationals are required to obtain visas.

In place of the safe country concept, France relies on the Cessation Clause of the Geneva Convention in applying the so-called priority (accelerated) procedure of Art 10 of the 25 July 1952 Law on Asylum.

Citizens of countries for which the Cessation Clause has been applied, according to the OFPRA,217 (Benin, Cape Verde, Chile, Hungary, Poland, Czech Republic, Slovakia, Romania and Bulgaria) no longer benefit from the right to asylum normally granted to asylum-seekers. Instead, their request for asylum is dealt with by a fast-track procedure. The applications of these claimants are examined on their merits, but the claimants are not given access to the resources ordinarily made available to other asylum-seekers.

There is no special procedure for "manifestly unfounded" cases. The only reference to such cases is in Art 35 of the Order of 2 November 1945 which concerns the procedure for dealing with people seeking asylum at borders. This is not an asylum procedure per se, but is simply a procedure to determine if an individual has the right to enter France. In practice, 95% of such cases are dealt with at Roissy-Charles de Gaulle airport.

As to the consequences of the application of the cessation clause, the asylum seeker cannot formally be granted a right to remain but may nonetheless remain within the territory until such a time as the OFPRA decides. Furthermore, appeal to the Commission des Recours des Réfugiés (Commission of Appeal in Refugee Matters) is not suspensive in such a case. In other words, the asylum seeker may be expelled as soon as the OFPRA has decided on to reject him/her. Naturally the asylum seeker can always contest the expulsion order that the authorities may issue against him/her before the tribunal administratif (tribunal dealing with internal disputes in the French civil service). Disputes concerning asylum and those concerning expulsion are dealt with separately.

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217 French Office of Protection for Refugees and Stateless Persons
IRELAND

The body responsible for determining asylum claims in Ireland is the Office of the Refugee Applications Commissioner, and on appeal the Refugee Appeals Tribunal. Both were established under the 1996 Refugee Act (as amended), which incorporates the 1951 Convention into domestic Irish law.

Under section 12(4) of the 1996 Act, a manifestly unfounded application means an application which, *inter alia*:

(i) prior to which the applicant had made an application for a declaration or an application for recognition as a refugee in a state party to the Geneva Convention, and the Commissioner is satisfied that his or her application was properly considered and rejected and the applicant has failed to show a material change of circumstances,

(j) by an applicant who is a national of or who has a right of residence in a state party to the Geneva Convention in respect of which the applicant has failed to adduce evidence of persecution...

Safe third country

Whilst the Refugee Act 1996 does not explicitly mention the safe third country concept, the principle may be said to have been indirectly incorporated by section 12(4)(i). In addition, section 22 of the Act gives effect to the Dublin Convention, and the majority of applicants arriving in Ireland would, in any case, have travelled through another EU Member State. It may be argued, based on the judgments in *Anisimova v Minister for Justice*, that the safe third country principle is a general principle of international law and, therefore, part of the domestic law of Ireland by virtue of Article 29.3 of the Constitution.

Safe country of origin

Nor does the 1996 Refugee Act explicitly refer to the concept of safe country of origin. However, section 12(4)(j) could be interpreted as incorporating this concept into Irish law. In 21% of cases reviewed for research undertaken by the Irish Refugee Council in September 2001, section 12(4)(j) was invoked to support a determination of manifestly unfounded. In addition, conclusions as to the safety of a country of origin were frequently made on the basis of incomplete country of origin information.

Unaccompanied minors

Section 8(5) of the Refugee Act 1996 provides that where an unaccompanied minor presents him or herself, the immigration officer shall, as soon as practicable, inform the Health Board of the relevant area. Moreover, the provisions of the Child Care Act 1991 shall apply to all minors in the State regardless of nationality. The Refugee Act contains no provision regulating the determination of an asylum application lodged by an unaccompanied minor. Paragraph 26 of the Resolution on Minimum Guarantees for Asylum Procedures\(^\text{218}\) states:

\(^{218}\) Resolution 5585/95
Provisions must be made for unaccompanied minors seeking asylum to be represented by a specially appointed adult or institution if they do not have capacity under national law. During the interview, unaccompanied minors may be accompanied by that adult or representatives of that institution...

The Irish Refugee Council recommends that more detailed statutory provisions should be put in place regulating the manner in which applications of unaccompanied minors should be lodged and determined.

In practice, legal practitioners are of the opinion that despite some level of improvement in the interviewing of separated children, there is still little distinction drawn in the methods of interviewing adults and child applicants. Separated children continued to be interviewed without the presence of legal representatives, legal guardians or care workers. Little special consideration is given to the fact that the interviewee is a minor and further there is no clear evidence to show that the “benefit of the doubt” principle is strongly applied as is recommended by the UNHCR and Save the Children Alliance.

**Appeal**

Asylum-seekers whose cases are deemed manifestly unfounded are entitled to a written appeal only, instead of the normal oral hearing.

**A proposed “white list”**

Recently proposed amendments to the Immigration Bill 2002 to introduce a “white list” of safe countries have so far been rejected. At the time of writing, the Bill is currently under discussion in the Dáil, and yet proposals to introduce a white list have not been tabled. The Irish Refugee Council does not therefore expect there to be any change in this position for at least a year.
CONCLUSION

In light of the information contained in the country reports, the following paragraphs examine
the extent to which member states’ practice is compliant with certain key provisions in the
draft Directive. The points are structured in the order in which they appear in the draft
Directive.

Minors (Article 10)

Article 10 of the draft Directive introduces procedural guarantees for unaccompanied minors.
This study has indicated that all member states have in place some form of protection for
minors.

In Germany, whilst there are no special provisions with regard to special training for the
interview of unaccompanied minors, a 1996 Constitutional Court ruling on special airport-
procedures explicitly requires special training and experience when dealing with vulnerable
groups (BVerfG EuGRZ 96, 271/282). This ruling is now applied to all procedures and leaflets
are normally handed out informing about the availability of specially trained and same-sex
interviewers and interpreters.

In Sweden, the Swedish Migration Board has specially educated officers to deal with
vulnerable groups and unaccompanied children, as does the Immigration and Naturalisation
Department in Sweden, and the Directorate of Immigration in Finland. However, in Finland,
interviews in accelerated procedures are generally conducted by police officers who do not
receive any special training.

In the UK, the Immigration and Nationality Directorate is mandated to ensure that (1) all
unaccompanied minors applying for asylum and (2) age-disputed persons are referred to the
Department for Social Services, as well as to the Children’s Panel of the Refugee Council. In
practice, however, the widely held practitioners’ opinion is that where there is any element of
doubt, the IND will generally treat applicants as neither unaccompanied nor minors.

In Austria too there is much criticism from practitioners. While the relevant authority claims to
hold regular seminars, interviews are regarded as being inadequately carried out and training
as insufficient.

Inadmissibility (Article 18)

Article 18 of the draft Directive provides that an application for asylum may, in certain
circumstances, be dismissed as inadmissible (amongst others, based on the concept of safe
third country and safe country of origin). In this case, there will be no substantive
consideration of the asylum claim. There is no coherent approach towards this issue among
those member states examined in this study.

In Austria, in cases where the safe third country principle applies the application will be
refused as inadmissible, without examining the merits of the case. As regards safe countries
of origin, the application will be dismissed as manifestly unfounded (i.e. considered on the
merits). In Sweden, no in-depth review takes place; the decision is one of admissibility.

In the United Kingdom a substantive decision is taken although in reality it is akin to an
admissibility decision. Similarly, in Germany decisions are still qualified as decisions on the
merits, notwithstanding that an individual assessment is not made. The substance of the case
will be dealt with “in advance” by the legislator. In the Netherlands, the decision is taken on
the merits and only in exceptional cases will there be no obligation to do so. In Finland too,
the decision is taken on the merits.
Defining safe third countries (Annex I)

The requisite link between the applicant and the third country

In order for a country to be considered a safe third country, a link between the applicant and this country must exist. The member states reviewed in this study set varying standards regarding such a link.

In Germany, the criteria for a ‘sufficient link’ are to be found in case law: It is not necessary to prove from which particular country the applicant came from, as long as the third country is a listed country. The main criterion in this respect seems to be whether there is a reasonable opportunity to submit the case to the third country.

Austria similarly does not require the applicant to have passed through a third country, thus the question of sufficient contact does not arise. The Austrian concept also requires that protection is available elsewhere at the time of the application in Austria. In practice, readmission agreements (containing a set of requirements) are necessary to carry out the deportation to a third country.

In other countries (Netherlands, Finland) the applicant must have stayed in the third country for a certain period. In the Dutch case, passing through the country is not sufficient, especially if the applicant had the intention to travel on to the Netherlands. It was assumed that a period of two to three weeks meant that the applicant did not have the intention to travel on. Finnish practice reveals that even in cases where the applicant spent only a few hours in the third country, this was held to be sufficient.

Finally, the intention of the UK’s policy is to re-unite members of an existing family. If the applicant has a member of family residing in another Member State as a recognised refugee, that Member State is responsible for examining the application, provided that the persons concerned so desire. Paragraph 345 of the Immigration Rules provides further guidance where the applicant has not arrived in the United Kingdom directly from the country in which he claims to fear persecution. In such cases, the applicant must have had an opportunity to contact that country’s authorities in order to seek their protection, or there is other clear evidence of the applicant’s admissibility to the safe third country.

Assessing the likelihood of readmission into a third country

Member states adopt different approaches regarding the consideration as to whether and how a particular applicant will be readmitted to a third country.

The United Kingdom distinguishes between Dublin and non-Dublin Convention case. For Dublin cases, the agreement of the other Member States to accept the case has to be given. For non-Dublin Convention cases, the Secretary of State is under no obligation to consult the authorities of the third country before the removal of an asylum applicant. However, paragraph 345 of the Immigration Rules applies.

Austria, Sweden and Finland have readmission agreements with countries they consider safe, in particular neighbouring countries, in order to facilitate the return of applicants to these third countries.

As regards Germany, the question of readmission is irrelevant for the application of the safe third country principle. However, the subsequent deportation order, enforcing this regime, requires the readmission that is therefore assessed in this context. The applicant may also be sent to a country different from the one he transited (in which case the safety of that country would have to be assessed in each case).

Assessments of the third country’s safety in individual circumstances

A safe third country may, in individual circumstances, not be considered safe for the applicant. All member states reviewed in this study take such factors into account. Applicants generally face a rebuttable presumption where a country is designated as safe (cf. Finland, Netherlands or Austria, each with varying degrees of burden of proof).
Where the UK has to consider return under Art 8 of the Dublin Convention to another Member State that has already rejected the applicant, and, if the core values are adhered to, then the national court will only intervene in the case of decisions that are wholly unreasonable in their conclusions. In the UK, in the case of Musisi\(^{219}\) the House of Lords concluded that, where the right to life was at stake, a high degree of scrutiny of administrative decisions was called for to ensure that the decision was “in no way flawed”.

In the list-based German concept individual circumstances are not taken into account. The 1996 Constitutional Court rulings, however, provide for certain situations in which the individual case needs to be assessed when applying the deportation rules. The latter enforce the safe third country-based denial of asylum, although the non-rebuttable presumption of safety normally affects the deportation regime, allowing enforcement without further examination. Individual assessment regarding the destination of the deportation, possibly the country of origin, therefore takes place in the following cases: travel routes are uncertain or the third country is otherwise unwilling to readmit the applicant; imminent death penalty; imminent severe crime against the applicant; the safe third country itself becomes a persecuting state in respect of the particular applicant (e.g. because it has close ties with the country of origin); rapid and unpredictable changes and other factors that by their nature cannot be anticipated by a list based system, nor dealt with through a list-amending order; and additionally “personal or humanitarian reasons” in the sense of § 55 AuslG such as severe illness or pregnancy.

The material requirements for designation

There are varying material requirements for the designation of safe third countries which, as put forward in the draft, include (1) the ratification of international agreements and (2) the observance of the standards contained therein.

International standards which are relied on by Sweden are the Geneva Convention, the UN Convention against Torture, the UN Convention on Human Rights, the UNHCR Executive Committee conclusion No 85, the London Conclusions, the EU Resolution on minimum guarantees for asylum procedures. The Swedish Migration Board considers whether the third country fulfils its international obligations towards the protection of refugees and whether it observes basic standards for the protection of human rights.

A similar approach is taken by Finland: safe third countries are those countries that have acceded to and comply with the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In Austria, a third country is safe where the applicant is protected from persecution. Protection is granted (1) where there is no threat to life, of torture, death penalty etc (which would constitute an infringement of certain provisions of the ECHR, the Convention on the Abolition of Death Penalty, or the Geneva Convention), (2) a procedure for the assessment of the status of the refugee is provided, and (3) there is a temporary right of stay and a protection from expulsion. The Austrian legislation (§ 4 (3) AsylG) provides for a rebuttable presumption, according to which the requirements set out above are generally met where the country in question ratified the Geneva Convention, has established procedures implementing the Convention’s basic principles, and has ratified the ECHR (one should note that this presumption is not used in practice).

As regards the Netherlands, the fact that another country is party to the Dublin Convention is sufficient to assume that the country is safe. In addition, the other country needs to be a party to the Geneva Convention. In all other cases, the third country has to be party to the 1951 Geneva Convention, the ECHR and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (or the country otherwise abides by the obligations deriving from these international agreements). Generally, formal ratification of international agreements and actual compliance with these obligations is necessary for countries to be considered safe.

\(^{219}\) [1987] AC 514
In the UK, it has been held by the Court of Appeal in *Adan and Aitsegur*\(^\text{220}\) that unless the Secretary of State was satisfied that the third country would apply the Refugee Convention’s “international meaning” or “core values” then he could not return asylum seekers to that country as a safe country. Furthermore, the Secretary of State owed a duty under the then section 2(2)(c) of the AIA to examine the practice in the third country to ensure that it was consistent with the Convention’s true interpretation. There was a margin of discretion by the signatory States in their application of the Refugee Convention, but a signatory had to apply the Refugee Convention, whose very purpose was to offer international protection to people falling within objectively defined classes.

Finally, Germany requires the safe third country to ratify and “observe” the Geneva Convention and the ECHR. It is not clear how far the provisions of the conventions mentioned above need to be observed. Hence it is unclear whether the German approach is in line with “general observance of [basic] standards” required by Annex I A/B of the draft Directive.

**Effective remedies**
The draft Directive requires the safe third countries to have in place an effective system of remedies against violations of rights provided by international agreements.

Sweden similarly requires that the applicant has access to a legally proscribed asylum procedure, including the right to remain in the country during the procedure, the right to a personal interview and the right to contact UNHCR or other supporting organisations.

§ 4 of the Austrian *Asylgesetz* explicitly requires the existence of an asylum procedure assessing the status of a refugee in accordance with the Geneva Convention. Compliance with the draft Directive is questionable, insofar as the detailed requirements set out in Annex I is not explicitly listed in the Austrian provision. Yet they might be interpreted as implying those detailed requirements. It is further questionable whether the Austrian regime complies with the draft Directive by introducing the option that not the third, but a possible fourth or further country provides for an equivalent procedure instead (as long as it will be carried out somewhere). Remedies in regard to Art. 2 ECHR are required in accordance with Annex I B.

Concerning the German requirements vis-à-vis the asylum procedure, one can assume that the German regime implicitly requires an adequate procedure for the implementation of the Geneva Convention and remedies safeguarding the application of the ECHR. This is not explicitly spelled out by the law. Insofar as compliance with the draft Directive is *prima facie* questionable, it is possible to interpret Art 16a German *Grundgesetz* in accordance with Annex I, as long as the latter does not require the conditions to be explicitly laid down in an act of parliament.

**Procedure for designation**
Turning to the “procedure for designation” provision in Annex I Part II of the Draft Directive, it is clear that each of the countries do indeed base their assessment of the safety of the third country on a range of information. It is not useful to list here the significant sources of information used, suffice it to say that this list would include reports from diplomatic missions, international and non-governmental organisations and press reports, as highlighted in the Draft Directive.

**Defining safe countries of origin (Annex II)**

*The material requirements for designation*
As to material requirements for designating a country of origin as safe, laid down in Annex II Part I, there is some divergence within domestic legislation.

In Sweden, the requirements are the same as for safe third countries. The country must also be open for monitoring by international human rights organisations, the rule of law must be

\(^{220}\) [1999] 3 WLR 1569
upheld, civil and political rights must be meaningful and there must be effective remedies against their violation.

Similarly, in Finland, there must be no risk of persecution or severe violation of human rights. The authorities assessing safe third countries are to take into account the political and judicial system, the guarantee of a fair trial, and whether the state has acceded to the principal international conventions on human rights and there have been no serious violations of human rights.

In the UK, in respect of the ten accession states to the EU, deemed to be safe countries of origin in the NIAA, the “Copenhagen criteria” may have been cited as setting out the criteria for accession to the EU. However, the recent addition of, *inter alia*, Macedonia, Albania and Jamaica, as safe countries of origin casts doubt on whether the Copenhagen criteria must still apply.

In the Netherlands, the country of origin must be a party to the Refugee Convention, the ECHR and the 1984 Torture Convention.

Finally, in Austria, the requirement is that there is no well-founded fear of persecution for the reasons set out in Art. 1 Section A (2) of the Geneva Convention.

*Procedure for designation*
In respect of the “procedure for designation” provision in Annex II Part II of the Draft Directive, each of the countries base their assessment of the safety of the country of origin on a range of information virtually identical to that relating to safe third countries.

*The requisite link between the applicant and the third country*
As to the necessary link required between the applicant and the safe country of origin, referred to in Article 31 of the Draft, the national provisions do vary slightly. In Austria, the requisite link is either the applicant’s citizenship or, if he is a stateless person, the habitual residence. This may be contrasted with Germany, where citizenship is the only requirement, and with the Netherlands, where the applicant must originate from the country of origin. In the UK, the applicant must have an “entitlement to reside” which denotes that he/she is ordinarily resident in a country.

*Appeals and suspensive effect (Article 33)*
Turning to Article 33 and the requirement that the appeal shall have suspensive effect, it is necessary to consider this requirement separately in relation to safe third countries and safe countries of origin. In respect of third countries, national procedures display significant differences.

In Austria, appeals do have suspensive effect, yet appeal decisions of the Unabhängiger Bundesasylsenat (UBAS) ordinarily only take 10 days (extension of this period is possible). In the Netherlands appeals generally do not have suspensive effect. In Finland too, the accelerated procedure lacks suspensive effect. It is interesting to note here that the Constitutional Law Committee of the Finnish Parliament has suggested amending Art 33 (3) of the draft Directive and introducing a phrase that suspensive effect may not be extended to a person who is returned to a safe country, unless the applicant has made a well-founded claim that the removal would violate his human rights.

In the UK, the procedure turns on whether the applicant is making an asylum claim or a human rights claim. In case of the former, whilst a person is in the UK, he cannot appeal to an adjudicator to remove him to a ‘safe third country’, on the ground that his removal would violate one of his Refugee Convention rights. That is, provided the Secretary of State has issued a certificate which, *inter alia*, states that the third country has accepted that it is the responsible State, and it must confirm that the applicant’s life and liberty would not be threatened and that there is no risk of *refoulement*. (The non-suspensive appeal process

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221 See s113 Nationality Immigration and Asylum Act 2002 for definitions.
would not remove the possibility of the person seeking judicial scrutiny of the certificate. If an application is made, such a person would not be removed until the application was determined. If the application were approved, they would not be removed pending the determination of the judicial review itself).

In case of the latter, provided the Secretary of State has not certified the human rights claim as clearly unfounded, the person can appeal while in the UK.

In Germany, there is no suspensive effect or leave to remain following an appeal of the asylum decision. The actual deportation may be challenged by provisional court order resulting in exceptional leave to remain in a limited number of cases. Examples are where there are serious doubts that the applicant actually transited the third country, or where s/he claims personal or humanitarian reasons (such as severe illness or pregnancy), or where there are concerns not covered by within the list based framework (such as a rapid worsening of the political situation in a country or where there are indications that the third country itself in a particular case will persecute the applicant).

In respect of safe countries of origin, in Austria, the appeal to the Unabhängiger Bundesasylsenat (UBAS) has suspensive effect. The UBAS shall then decide within 10 days (extension of this period is possible). In Sweden and Finland and the UK, appeals within the accelerated procedure lack suspensive effect. In the Netherlands too, appeals do generally not have suspensive effect, unless the asylum claim is not dealt with within 48 hours. In Germany, in manifestly unfounded cases the asylum seeker will be served with a deportation order requiring him/her to leave the country in one week. The applicant may seek judicial review of this decision but this has no suspensive effect.

The right to further appeal (Article 38(1) and (2))

Turning finally to Art.38(1) and (2) of the Draft Directive and the questions of whether there is a right to further appeal (i.e. against decisions of the reviewing body), in Germany, appeal is limited to one instance only (Administrative Court of First Instance, VG).

In the Netherlands, there is a right of further appeal against the decisions of a District Court with the Council of State. In Sweden too there is a further right of appeal against decisions of the Swedish Migration Board to the Aliens Appeals Board.

In Finland decisions of the Country Administrative Court may be further appealed to the Supreme Administrative Court. (The latter grants a leave to appeal only in limited, narrowly defined circumstances).

In Austria, further appeal against decisions of the UBAS can be lodged with the Administrative Court of Justice and the Constitutional Court.

In the UK, applicants have a right to appeal to the Immigration Appeals Tribunal. Thereafter, there is a right to further appeal to the High Court or, in Scotland, to the Court of Session.
ANNEX 1: SPAIN

The analysis in Part I of this Annex has been compiled with the assistance of the European Commission. Points (1-8) below correspond to those in the questionnaire above (pp.6-11) according to which the national reports have been compiled. This is with the exception of question 5 of the questionnaire that has been omitted in the following analysis. Consequently, point 5 below now corresponds to question 6 in the questionnaire; point 6 to question 7; point 7 to question 8, and point 8 to question 9.

Part II of this Annex provides additional information which has been gathered under the sole responsibility of the British Institute of International and Comparative Law and which has not been subject to verification by or consultation with the Spanish authorities.

Part I

Question 1.
In the asylum context, Spain has not designated as safe any third countries or countries of origin.

(a) Safe Third countries

Section 5.6 of Law 9/1994 of 19 May 1994 amending the 1984 Law regulating the right of asylum and the status of refugees, which is based on the 1992 London Resolutions on a harmonised approach to questions concerning host third countries, states that an asylum application may be declared inadmissible under the following circumstances:

“f) if the applicant has been recognised as a refugee or has the right to reside or obtain asylum in a third country, or if he has come from a third country where he could have applied for protection. In either case, there must be no risk to his life or liberty in the said third country, nor must he be exposed to the risk of torture or inhuman or degrading treatment, and he must, pursuant to the Geneva Convention, enjoy effective protection against a return to the country where he is at risk of persecution.”

(b) Countries of origin

Spanish law contains no specific rules concerning safe countries of origin.

Question 2.

(a) Third countries

There is no list of safe third countries.

(b) Countries of origin

There is no list of safe countries of origin.

Question 3.

(a) Third countries

In practice, the issue of whether a third country is safe is examined on from the point of view of the individual, i.e. whether it is safe for a particular person or a particular group of people. This applies without prejudice to the application of the Dublin Convention between the Member States.
(b) Countries of origin

Without prejudice to the reply in 1.b), an asylum application may be declared inadmissible under Section 5.6.b) of the Spanish Asylum Law if it is based on manifestly false or improbable facts or improbable facts, information or claims which have been individually shown to be false or implausible.

Question 4.

There are no mechanisms to review such designation because it is not practised. As stated above, all asylum applications are examined individually, both during the preliminary admissibility procedure (a filtering procedure) and during the procedure for determining refugee status.

Question 5.

(a) Third countries

The conditions governing the application of Section 5.6.f) of Asylum Law are those enshrined in that provision, provided that it has been unequivocally established that they obtain. It is administrative practice never to declare an asylum application inadmissible for this reason alone, but only where there are other grounds under Spanish law for deeming an asylum application to be manifestly unfounded.

(b) Countries of origin

Not applicable.

Question 6.

(a) Third countries

- All decisions on asylum matters are taken by a single central institution: the Ministry of Home Affairs, after the files have been examined by the Asylum and Refugees Office, a centralised and specialised administrative body which is the only section of the Spanish administration responsible for this field. This includes the application of Section 5.6.f) of the Asylum Law.

- All the public servants working at the Asylum and Refugees Office are specialists on asylum as their sole task is to apply asylum regulations.

- All asylum applications go through an initial stage in which it is decided whether or not they are admissible (the filtering stage). Manifestly unfounded applications, which may include those covered by Section 5.6.f), referred to above, can be rejected at this stage.

- As stated above, Section 5.6.f) has not been applied in isolation, but in conjunction with other grounds for deeming an application to be manifestly unfounded.

(b) Countries of origin

Not applicable.

Question 7.

(a) Third countries

- Appeals against decisions to declare an application inadmissible can be brought before a court of law, the Supreme Court’s Chamber for Judicial Review of the Central
Administration. The same action may be taken in respect of all administrative decisions on asylum which bring the procedure to a close.

- The general principle applying to appeals is that the court’s decision is not automatically held in abeyance. Only courts of law, at the request of one of the parties, can declare that the suspensive effect applies on a case-by-case basis, providing supporting evidence.

(b) Countries of origin

Not applicable. If this were applicable, the situation would be the same as that applying to safe third countries.

Question 8.

(a) Third countries

It is administrative practice never to declare an asylum application inadmissible for this sole reason, but only where there are other grounds present which are recognised under Spanish law for deeming an asylum application to be manifestly unfounded.

(b) Countries of origin

Not applicable.

Madrid, 31 March 2003

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Part II

The Spanish asylum procedure outlined above may be elaborated in the following areas:-

Admissibility procedure

The Asylum Act provides that an asylum seeker shall not be returned without having his case examined or declared inadmissible. This admissibility phase is the initial phase regardless of whether an immigrant has requested asylum at a port or within the territory of Spain. Only after this preliminary procedure is an immigrant deemed admissible and he/she considered an asylum seeker.222

Under the Act, an applicant is deemed inadmissible if one of the following applies:
- The asylum application is manifestly unfounded;
- The applicant has previously applied and been refused asylum;
- The applicant has got refugee status in another country;
- The asylum application is based on false facts or false allegations;
- The applicant has travelled via a third country in which protection could have been sought;
- The applicant falls under the exclusion clause at 1(F) of the 1951 Geneva Convention.

Therefore, when an applicant is determined to have accessed a third country within parameters established by Article 5.6, his/her application will be inadmissible. If there is a presumption that the applicant’s country of origin is safe, his case may be deemed “manifestly unfounded” and his case rejected as inadmissible.

The admissibility procedure consists of a standard questionnaire interpreted according to any country information that office might have. Country information comes largely from reports

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provided by Spanish embassies abroad and includes generalised information about the risk of persecution in a given country. The questionnaire is administered at a provincial level, by the Aliens Office, the Aliens Division of the National Police or by the Asylum and Refugee Office (OAR). The OAR then investigates whether the applicant has transited or is from a safe country. It then makes a determination with the assistance of an opinion by the UNHCR and then makes a recommendation to the Ministry of the Interior that makes the final decision on whether the application should be approved.

**Apell procedure**

Under Article 25 Asylum Act, if an applicant is determined inadmissible according to Article 5.6(f) that state which is deemed responsible must respond within 72 hours, otherwise the authorities will authorise the applicant’s entry into the territory of Spain to await a response by the government of the responsible state. Once the determination has been made, the applicant then has recourse to appeal to the Ministry of the Interior within 24 hours of being notified (if his/her original application was made at a border). The UNHCR is consulted on the individual case and submits an opinion to the Ministry. If that appeal fails the applicant may lodge a judicial appeal to the National Audience within 2 months.

There is no administrative appeal when s/he has applied in country. However, the applicant may appeal judicially to the Audiencia Nacional within two months of the first determination.

Once deemed inadmissible, such migrants are then considered illegal entrants. They thereby fall under the terms of the Aliens Act, which is applicable to immigrants generally, and are issued with a deportation order to be sent back to their home countries or to a third country, and requiring them to leave the territory of Spain within 15 days.

**The ordinary determination process**

Where the applicant’s appeal is successful, s/he is then permitted to the regular refugee determination process. A new law on the Rights of Foreigners was introduced in December 2000. The new regulation established that submitting an asylum application only halts the process of deportation until an initial decision is taken.223

The Spanish government recognises those persons whose persecution emanates from non-state agents. An asylum seeker does not qualify for refugee status however, where the authorities in the applicant’s country of origin have demonstrated their willingness to provide protection and have in place a system to investigate and prevent crime.

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### AUSTRIA:

<table>
<thead>
<tr>
<th>Safe third countries</th>
<th>Safe countries of origin</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CRITERIA OF SAFETY</strong></td>
<td></td>
</tr>
<tr>
<td>2. International standards taken into account</td>
<td>Art. 2, 3 ECHR, Protocol Nr 6 to the ECHR; Art 33 (1) Geneva Convention; Geneva Convention</td>
</tr>
<tr>
<td>3. Relevant case law</td>
<td>VfGH 24.6.1998, G 31/98 (VfG Slg15369); VfGH 24.2.2000, 99/20/0246: minimum of seven days to exercise right of appeal. VwGH 11.11.1998, 98/01/0284: Required temporary right to remain in third country during assessment may be granted on the grounds of a mere court order “usually issued in such cases”. VwGH 23.7.1998, 98/20/0175: The rebuttable presumption under § 4 (3) does not refer to the general assessment as safe, but only to the question whether the Conventions mentioned are effectively implemented.</td>
</tr>
</tbody>
</table>

#### LEGAL CHARACTER OF SAFETY

<table>
<thead>
<tr>
<th>Safe third countries</th>
<th>Safe countries of origin</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. By list or otherwise</td>
<td>Abstract criteria to be applied on each individual case</td>
</tr>
<tr>
<td>5. Rebuttable or non-rebuttable presumption</td>
<td>§ 4 (3) Asylum Act 1997 contains a rebuttable presumption for the question whether the actual criteria set out in § 4 (2) are effectively implemented – it is however of no practical importance</td>
</tr>
<tr>
<td>7. Link required between country and applicant</td>
<td>No link required</td>
</tr>
<tr>
<td>Safe third countries</td>
<td>Safe countries of origin</td>
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<tr>
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<tr>
<td><strong>PROCEDURES AT FIRST INSTANCE</strong></td>
<td></td>
</tr>
<tr>
<td><strong>8. Decision-making authority</strong></td>
<td>Bundesasylamt (BAA)</td>
</tr>
<tr>
<td><strong>9. Special procedure (e.g. accelerated)</strong></td>
<td>Accelerated procedure in the first instance (BAA level). In land border cases: Assessment of prospects of an application in regard to subsequent application of § 4 regularly results in rejection as a physical act without legally issuing any decision at all (not even an assessment as inadmissible) – rarely practised. The regular procedure from within the country results in a decision on admissability only (§ 4 (1) Asylum Act 1997). The dismissal of applications at the airport requires consent of the UN High Commissioner.</td>
</tr>
<tr>
<td><strong>10. Decision on admissibility or on merits</strong></td>
<td>The regular procedure from within the country results in a decision on admissibility. In land border cases also no decision on the merits is made (and cannot even be qualified as one on admissibility – although challengeable as such)</td>
</tr>
<tr>
<td><strong>APPEAL</strong></td>
<td></td>
</tr>
<tr>
<td><strong>11. Mechanisms (e.g. tribunal/administrative court)</strong></td>
<td>Judicial review by special administrative court (<em>Unabhängiger Bundesasylsenat, UBAS</em>); Second “exceptional” recourse in regard to fundamental violations / violations of constitutional rights at the Federal Administrative Court (<em>Verwaltungsgerichtshof, VwGH</em>) / Constitutional Court (<em>Verfassungsgerichtshof, VfGH</em>)</td>
</tr>
<tr>
<td><strong>12. Time limits</strong></td>
<td>Reduced time period to issue an appeal (10 instead of 14 days); 10 (max. 20) days for the UBAS to decide</td>
</tr>
</tbody>
</table>
### FINLAND:

<table>
<thead>
<tr>
<th>Safe third countries</th>
<th>Safe countries of origin</th>
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</thead>
<tbody>
<tr>
<td><strong>CRITERIA OF SAFETY</strong></td>
<td></td>
</tr>
<tr>
<td>2. International standards taken into account</td>
<td>International Covenant on Civil and Political Rights, International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>3. Relevant case law</td>
<td>E.g. Helsinki Administrative Court (27 February 2002, no. 02/0187/7), ECHR (20 December 2001, Application no. 78063/01, A. v. Finland)</td>
</tr>
<tr>
<td><strong>LEGAL CHARACTER OF SAFETY</strong></td>
<td></td>
</tr>
<tr>
<td>4. By list or otherwise</td>
<td>Individual assessment on the basis of definitions laid down by law. Unofficial, non-exhaustive list of countries that are “presumed safe”</td>
</tr>
<tr>
<td>5. Rebuttable or non-rebuttable presumption</td>
<td>Rebuttable (in this case the application will be referred to an ordinary procedure, but difficult to carry out in practice)</td>
</tr>
<tr>
<td>7. Link required between country and applicant</td>
<td>“Safe country of asylum” is defined as country through which an asylum seeker has entered Finland and where he could have received adequate protection. Transit was considered sufficient in some cases</td>
</tr>
</tbody>
</table>
### PROCEDURES AT FIRST INSTANCE

<table>
<thead>
<tr>
<th>Safe third countries</th>
<th>Safe countries of origin</th>
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</thead>
<tbody>
<tr>
<td><strong>8. Decision-making authority</strong></td>
<td>Directorate of Immigration</td>
</tr>
<tr>
<td><strong>9. Special procedure (e.g. accelerated)</strong></td>
<td>Accelerated</td>
</tr>
<tr>
<td><strong>10. Decision on admissibility or on merits</strong></td>
<td>Single procedure. The merits of a case are examined during the individual interview</td>
</tr>
</tbody>
</table>

### APPEAL

<table>
<thead>
<tr>
<th>Safe third countries</th>
<th>Safe countries of origin</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>11. Mechanisms (e.g. tribunal/administrative court)</strong></td>
<td>Country Administrative Court; Further appeal to the Supreme Administrative court (only in limited circumstances)</td>
</tr>
<tr>
<td><strong>12. Time limits</strong></td>
<td>The time limit is 30 days from the passing of the decision on the applicant. However, decisions on refusal of entry can be enforced within eight days unless the Helsinki Administrative Court grants a suspension order.</td>
</tr>
<tr>
<td><strong>13. Procedure</strong></td>
<td>Accelerated procedure. No suspensive effect (unless suspension order granted by Helsinki Administrative Court). Legal safeguards in the normal asylum procedure are wider (automatic suspensive effect and oral hearing)</td>
</tr>
</tbody>
</table>
### GERMANY:

<table>
<thead>
<tr>
<th></th>
<th>Safe third countries</th>
<th>Safe countries of origin</th>
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<tbody>
<tr>
<td><strong>CRITERIA OF SAFETY</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Instruments of designation</td>
<td>Art. 16a (2) GG (Constitution) and § 26a (2) Asylum Procedure Act referring to its Annex I containing a list</td>
<td>Art. 16a (3) GG (Constitution), § 29a (2) Asylum Procedure Act referring to its Annex II containing a list</td>
</tr>
<tr>
<td><strong>LEGAL CHARACTER OF SAFETY</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. By list or otherwise</td>
<td>list</td>
<td>list</td>
</tr>
<tr>
<td>5. Rebuttable or non-rebuttable presumption</td>
<td>Non-rebuttable presumption (but considerable exceptions, see BVerfGE 94, 49)</td>
<td>Rebuttable presumption</td>
</tr>
<tr>
<td>6. Removal from list</td>
<td>Via amending Act or temporarily via Governmental order</td>
<td>Via amending Act or temporarily via Governmental order</td>
</tr>
<tr>
<td>7. Link required between country and applicant</td>
<td>Yes. <em>Inter alia</em>, reasonable opportunity to use transit for an application; Whether behaviour appears as abuse/circumvention. Not necessary to prove from which particular country (but limited effect in practice, see BVerfGE 49, 94)</td>
<td>Citizenship</td>
</tr>
<tr>
<td>Safe third countries</td>
<td>Safe countries of origin</td>
<td></td>
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<td>--------------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td><strong>PROCEDURES AT FIRST INSTANCE</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>8. Decision-making authority</strong></td>
<td>BAFI. (Bundesamt für die Anerkennung ausländischer Flüchtlinge)</td>
<td></td>
</tr>
<tr>
<td><strong>BAFl. (Bundesamt für die Anerkennung ausländischer Flüchtlinge)</strong></td>
<td>BAFI. (Bundesamt für die Anerkennung ausländischer Flüchtlinge)</td>
<td></td>
</tr>
<tr>
<td><strong>9. Special procedure (e.g. accelerated)</strong></td>
<td>List-based decision-making process (see STC)</td>
<td></td>
</tr>
<tr>
<td>When it is clear that the applicant has transited a safe third country, no substantive individual decision is made. Where the applicant admits to having transited a safe third country, there need not even be a hearing. Procedure in this case is thus reduced to a quick internal administrative procedure, akin to an accelerated procedure. Where it is not clear, there is a duty to cooperate which limits the effect of doctrine of investigation ex officio, de facto placing the onus on the applicant to a certain degree.</td>
<td>But as first stage rebuttal procedure, although conducted with increased onus on the applicant to at least shaken the presumption before a regular hearing takes place, if previously successful. Special accelerated procedure when entering via airports. If denied, an application is “manifestly” unfounded.</td>
<td></td>
</tr>
<tr>
<td><strong>10. Decision on admissibility or on merits</strong></td>
<td>On the merits (but list based, i.e. no individual assessment unless presumption shaken in rebuttal-procedure)</td>
<td></td>
</tr>
<tr>
<td>Technically on the merits (but list based, i.e. no individual assessment)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>11. Mechanisms (e.g. tribunal/administrative court)</strong></td>
<td>Judicial review by an administrative court of first instance (VG); limited to one instance. Provisional court orders barred by law, but based on Constitutional Court judgment available as an exception where the case is not covered by the “safe-third-country” concept (in this case subject to “serious doubts” and an accelerated procedure without oral hearing).</td>
<td></td>
</tr>
<tr>
<td>Judicial review by an administrative court of first instance (VG); limited to one instance. Provisional court orders are available, but subject to “serious doubts” and an accelerated procedure without oral hearing.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>12. Time limits</strong></td>
<td>Shorter time limits.</td>
<td></td>
</tr>
<tr>
<td>Shorter time limits.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>13. Procedure</strong></td>
<td>Route of appeal restricted to one instance, without suspensive effect. Provisional court orders only as an exception (as above) and subject to “serious doubts” and an accelerated procedure without oral hearing. Review may be submitted from within the country but outcome may have to be awaited from outside, subject to success of application for provisional court order.</td>
<td></td>
</tr>
<tr>
<td>Route of appeal restricted to one instance, without suspensive effect. Provisional court orders, subject to “serious doubts” and an accelerated procedure without oral hearing. Review may be submitted from within the country but outcome may have to be awaited from outside, subject to success of application for provisional court order possibly resulting in a provisional leave to remain (max. 1 week).</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
**THE NETHERLANDS:**

<table>
<thead>
<tr>
<th>Safe third countries</th>
<th>Safe countries of origin</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CRITERIA OF SAFETY</strong></td>
<td></td>
</tr>
<tr>
<td>1. Instruments of designation</td>
<td>There are no lists. Whether a third country is regarded as safe depends on formal legal criteria</td>
</tr>
<tr>
<td>3. Relevant case law</td>
<td>None</td>
</tr>
</tbody>
</table>

**LEGAL CHARACTER OF SAFETY**

<table>
<thead>
<tr>
<th>4. By list or otherwise</th>
<th>Otherwise</th>
<th>Otherwise</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Rebuttable or non-rebuttable presumption</td>
<td>Rebuttable. The burden of proof is on the asylum-seeker.</td>
<td>Rebuttable. The burden of proof is on the asylum-seeker.</td>
</tr>
<tr>
<td>7. Link required between country and applicant</td>
<td>The asylum-seeker has stayed for a certain period in the third country (if he stayed for two weeks or more it will be assumed he did not have the intention to travel to the Netherlands, unless he can make plausible otherwise) and readmission is certain.</td>
<td>The asylum-seeker originates from the country.</td>
</tr>
<tr>
<td>Safe third countries</td>
<td>Safe countries of origin</td>
<td></td>
</tr>
<tr>
<td>----------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td><strong>PROCEDURES AT FIRST INSTANCE</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8. Decision-making authority</td>
<td>Immigration and Naturalisation Department</td>
<td></td>
</tr>
<tr>
<td>9. Special procedure (e.g. accelerated)</td>
<td>Only regarding the application of article 30 (a) (‘Dublin Convention): accelerated procedure</td>
<td></td>
</tr>
<tr>
<td>10. Decision on admissibility or on merits</td>
<td>Article 30 (a) and (d): no obligation to examine the contents. Article 31: 2 (h), (i) and (j): decision on merits</td>
<td></td>
</tr>
<tr>
<td>11. Mechanisms (e.g. tribunal/administrative court)</td>
<td>Appeal with the District Court from the decision of the IND. Appeal with the Division for Administrative Jurisdiction of the Council of State from the decision of the District Court (both the asylum-seeker and the Minister may lodge an appeal)</td>
<td></td>
</tr>
<tr>
<td>12. Time limits</td>
<td>Where an appeal concerns a 48-hours procedure, the time limits for lodging an appeal are shorter. Courts deal with these cases rather expediently. Where an appeal concerns a 48-hours procedure, the time limits for lodging an appeal are shorter. Courts deal with these cases rather expediently.</td>
<td></td>
</tr>
<tr>
<td>13. Procedure</td>
<td>No special procedure, except for the application of article 30 (a) at AC Schiphol: no suspension of expulsion without asking for a preliminary decision to bar expulsion at the District Court within 24 ours after the decision of the IND.</td>
<td></td>
</tr>
</tbody>
</table>
**SPAIN:**

<table>
<thead>
<tr>
<th>safe third countries</th>
<th>Safe countries of origin</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CRITERIA OF SAFETY</strong></td>
<td></td>
</tr>
<tr>
<td>1. Instruments of designation</td>
<td>Article 5.6 Law 9/1994</td>
</tr>
<tr>
<td>2. International standards taken into account</td>
<td>Geneva Convention</td>
</tr>
<tr>
<td>3. Relevant case law</td>
<td>N.a.</td>
</tr>
<tr>
<td>4. By list or otherwise</td>
<td>No list</td>
</tr>
<tr>
<td>5. Rebuttable or non-rebuttable presumption</td>
<td>Examination on a case-by-case basis</td>
</tr>
<tr>
<td>6. Removal from list</td>
<td>-</td>
</tr>
<tr>
<td>7. Link required between country and applicant</td>
<td>N.a.</td>
</tr>
<tr>
<td>Safe third countries</td>
<td>Safe country of origin</td>
</tr>
<tr>
<td>----------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td><strong>PROCEDURES AT FIRST INSTANCE</strong></td>
<td></td>
</tr>
<tr>
<td>8. Decision-making authority</td>
<td>Ministry of the Interior takes decisions. They are subject to the study of the proceedings by the Office for Asylum and Refuge</td>
</tr>
<tr>
<td>9. Special procedure (e.g. accelerated)</td>
<td>N.a.</td>
</tr>
<tr>
<td>10. Decision on admissibility or on merits</td>
<td>Decision on inadmissibility</td>
</tr>
<tr>
<td><strong>APPEAL</strong></td>
<td></td>
</tr>
<tr>
<td>11. Mechanisms (e.g. tribunal/administrative court)</td>
<td>Courts of Justice: Court for Administrative Disputes within the Central Criminal Court</td>
</tr>
<tr>
<td>12. Time limits</td>
<td>2 months</td>
</tr>
<tr>
<td>13. Procedure</td>
<td>Lack of automatic suspensive effect. Courts may declare suspensive effect on a case-by-case basis and with good reasons</td>
</tr>
<tr>
<td>Safe third countries</td>
<td>Safe countries of origin</td>
</tr>
<tr>
<td>----------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td><strong>CRITERIA OF SAFETY</strong></td>
<td></td>
</tr>
<tr>
<td>1. Instruments of designation</td>
<td></td>
</tr>
<tr>
<td>2. International standards taken into account</td>
<td>Geneva Con. Art 33, EU Directive (minim norms) 2000/0238, etc.</td>
</tr>
<tr>
<td><strong>LEGAL CHARACTER OF SAFETY</strong></td>
<td></td>
</tr>
<tr>
<td>4. By list or otherwise</td>
<td>No list. Judgements on a case-by-case basis. Sweden can therefore react flexibly to any change of circumstances</td>
</tr>
<tr>
<td>5. Rebuttable or non-rebuttable presumption</td>
<td>Rebuttable</td>
</tr>
<tr>
<td>7. Link required between country and applicant</td>
<td>Not necessary</td>
</tr>
<tr>
<td>Procedures at first instance</td>
<td>Safe third countries</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-----------------------------------------------------------</td>
</tr>
<tr>
<td>8. Decision-making authority</td>
<td>Swedish Migration Board (central authority)</td>
</tr>
<tr>
<td>9. Special procedure (e.g. accelerated)</td>
<td>Accelerated (no in-depth review)</td>
</tr>
<tr>
<td>10. Decision on admissibility or on merits</td>
<td>Both</td>
</tr>
<tr>
<td><strong>APPEAL</strong></td>
<td></td>
</tr>
<tr>
<td>11. Mechanisms (e.g. tribunal/administrative court)</td>
<td>Aliens Appeal Board (supreme decision-making body, no further appeal)</td>
</tr>
<tr>
<td>12. Time limits</td>
<td>Three weeks</td>
</tr>
<tr>
<td>13. Procedure</td>
<td>Ordinary procedure. No suspensive effect. Possible to apply for suspension of enforcement of the expulsion measure</td>
</tr>
</tbody>
</table>
UNITED KINGDOM:

<table>
<thead>
<tr>
<th>Safe third countries</th>
<th>Safe countries of origin</th>
</tr>
</thead>
<tbody>
<tr>
<td>CRITERIA OF SAFETY</td>
<td></td>
</tr>
<tr>
<td>1. Instruments of designation</td>
<td>Section 80(1) Nationality Immigration and Asylum Act 2002; section 12(7) Immigration and Asylum Act 1999; paragraph 345 Immigration Rules; Asylum (Designated Safe Third Countries) Order 2000</td>
</tr>
<tr>
<td>3. Relevant case law</td>
<td>Adan and Aitsegur224 (third country must apply Refugee Convention's “core values”)</td>
</tr>
</tbody>
</table>

LEGAL CHARACTER OF SAFETY

<table>
<thead>
<tr>
<th>4. By list or otherwise</th>
<th>Designated states.</th>
<th>List</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Rebuttable or non-rebuttable presumption</td>
<td>Rebuttable, though only challengeable by judicial review</td>
<td>Rebuttable, though only challengeable by judicial review</td>
</tr>
<tr>
<td>6. Removal from list</td>
<td>Requires significant event such that 12(7) IAA could no longer be met.</td>
<td>By Order of the Secretary of State in accordance with section 94(6) NIAA</td>
</tr>
<tr>
<td>7. Link required between country and applicant</td>
<td>Member of family residing as a recognised refugee; opportunity to contact country’s authorities; other clear evidence of applicant’s admissibility to third country</td>
<td>An “entitlement to reside” (i.e. must be ordinarily resident in the country of origin).</td>
</tr>
</tbody>
</table>

224 [1999] 3 WLR 1569
225 24th January 2003, Court of Appeal
<table>
<thead>
<tr>
<th>safe third countries</th>
<th>Safe countries of origin</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PROCEDURES AT FIRST INSTANCE</strong></td>
<td></td>
</tr>
<tr>
<td>8. Decision-making authority</td>
<td>Immigration and Nationality Directorate of the Home Office</td>
</tr>
<tr>
<td>9. Special procedure (e.g. accelerated)</td>
<td>Third country action</td>
</tr>
<tr>
<td>10. Decision on admissibility or on merits</td>
<td>Substantive decision though really akin to an admissibility decision</td>
</tr>
<tr>
<td><strong>APPEAL</strong></td>
<td></td>
</tr>
<tr>
<td>11. Mechanisms (e.g. tribunal/administrative court)</td>
<td>Independent Special Appeal Adjudicator, in the first instance; Immigration Appeal Tribunal, in the second instance; Court of Appeal, in the final instance</td>
</tr>
<tr>
<td>13. Procedure</td>
<td>Ordinary procedure. Where the human rights or asylum claim is clearly unfounded, section 94(7) NIAA provides that a person may not appeal from within the UK provided the Secretary of State has certified that- (a) it is proposed to remove the person to a country of which is not a national or citizen, and (b) there is no reason to believe that the person’s rights under the Human Rights Convention will be breached in that country. However, where the appellant has made a human rights claim and the Secretary of State has not certified as clearly unfounded, the person can appeal while in the UK (section 93(2)(b) NIAA). This non-suspensive appeal process would not remove the possibility of the person seeking judicial scrutiny of the Secretary of State’s certificate by applying for judicial review.</td>
</tr>
<tr>
<td>Country</td>
<td>International standards taken into account</td>
</tr>
<tr>
<td>-----------</td>
<td>----------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Austria</td>
<td>Art 2 and 3 ECHR; Protocol Nr 6 to the ECHR; Art 33 (1) Geneva Convention. Rebuttable presumption which is of no practical importance.</td>
</tr>
<tr>
<td>Germany</td>
<td>Geneva Convention; ECHR. Non-rebuttable presumption, but considerable exceptions.</td>
</tr>
<tr>
<td>Finland</td>
<td>International Covenant on Civil and Political Rights, International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Rebuttable presumption, but difficult to carry out in practice.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Geneva Convention; ECHR; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment. Rebuttable presumption with the burden of proof on asylum-seeker.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Geneva Convention. Rebuttable presumption, though only challengeable by judicial review.</td>
</tr>
<tr>
<td>Denmark</td>
<td>Art. 33 Geneva Convention; Art. 3 ECHR Non-rebuttable presumption.</td>
</tr>
<tr>
<td>Sweden</td>
<td>Art 33 Geneva Convention; EU Directive (minim norms) 2000/0238; etc.</td>
</tr>
<tr>
<td>Spain</td>
<td>Geneva Convention Examination on a case-by-case basis.</td>
</tr>
</tbody>
</table>
### Safe countries of origin:

<table>
<thead>
<tr>
<th>Country</th>
<th>International standards taken into account</th>
<th>Link required between applicant and country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Geneva Convention; Art 2 and 3 ECHR; Protocol Nr 6 to the ECHR; Rebuttable presumption (normally not applied).</td>
<td>Citizenship / habitual residence.</td>
</tr>
<tr>
<td>Finland</td>
<td>1992 London Conclusions</td>
<td>Rebuttable, but difficult to carry out in practice.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Geneva Convention; ECHR; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.</td>
<td>Rebuttable, the burden of proof is on the asylum-seeker.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Geneva Convention; European Framework Convention for the Protection of National Minorities; Convention for the Protection of Human Rights and Fundamental Freedoms.</td>
<td>“Entitlement to reside”, i.e. the asylum seeker must be ordinarily resident in the country of origin.</td>
</tr>
<tr>
<td>Denmark</td>
<td>E.g. UNHCR ExCom Conclusions.</td>
<td>Rebuttable, though only challengeable by judicial review.</td>
</tr>
<tr>
<td>Sweden</td>
<td>Rebuttable presumption.</td>
<td>Yes.</td>
</tr>
<tr>
<td>Spain</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Appeal procedure:

<table>
<thead>
<tr>
<th>Country</th>
<th>Time limit &amp; Authority</th>
<th>Nature of appeal</th>
<th>Removal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Appeals to a special administrative court within 10 days.</td>
<td>Accelerated procedure under § 32 Asylum Act 1997. Suspensive effect of appeals (not for land border cases)</td>
<td>Review may be submitted from within the country but outcome will regularly have to be awaited from outside, subject to success of application for provisional court order.</td>
</tr>
<tr>
<td>Germany</td>
<td>Appeals to a administrative court of first instance with shorter time limits than in the ordinary procedure</td>
<td>Appeal without suspensive effect. Provisional court orders only as an exception (subject to “serious doubts”) and accelerated procedure without oral hearing</td>
<td></td>
</tr>
<tr>
<td>Finland</td>
<td>Appeals to the Country Administrative Court within 30 days from the passing of the decision on the applicant.</td>
<td>Accelerated procedure. Less legal safeguards than in the normal asylum procedure. No automatic suspensive effect and oral hearing</td>
<td>Decisions on refusal of entry can be enforced within eight days unless the Helsinki Administrative Court grants a suspension order.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Appeals to the District Court. If an appeal concerns a 48-hours procedure, the time limits for lodging an appeal are shorter.</td>
<td>No special procedure.</td>
<td>No suspension of expulsion without asking for a preliminary decision to bar expulsion at the District Court within 24 ours after the decision of the IND.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Independent Special Appeal Adjudicator (first instance); Immigration Appeal Tribunal (second instance); Court of Appeal (final instance)</td>
<td>Ordinary procedure. No suspensive effect.</td>
<td>Where the human rights or asylum claim is clearly unfounded, a person may, under certain circumstances, not appeal from within the UK.</td>
</tr>
<tr>
<td>Denmark</td>
<td>Administrative recourse to the Ministry of Refugees, Immigrants and Integration</td>
<td>Fast-track procedure</td>
<td>Appeals do not have suspensive effect on the order to leave the country, and the applicant will be returned to the safe third country.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The Aliens Appeal Board is the supreme decision-making body with no further appeal. Appeals within three weeks.</td>
<td>Ordinary procedure. No suspensive effect.</td>
<td>Possible to apply for a suspension of enforcement of expulsion measure.</td>
</tr>
<tr>
<td>Spain</td>
<td>Appeal to the Court for Administrative Disputes within 2 months.</td>
<td>Lack of automatic suspensive effect. Courts may declare suspensive effect on a case-by-case basis and with good reasons.</td>
<td></td>
</tr>
</tbody>
</table>