Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Resolution 2461 (2022)[1]

Safe third countries for asylum seekers

Parliamentary Assembly

1. Recalling the right to apply for and seek asylum under the 1951 United Nations Convention relating to the Status of Refugees (the 1951 Refugee Convention) and, for member States of the European Union, under Article 18 of the European Union Charter of Fundamental Rights, the Parliamentary Assembly notes with concern a tendency to return or transfer asylum seekers to third countries without clearly establishing the safety of the respective third country, the legality of the return and the existence and availability of certain objective standards of protection.

2. The Assembly emphasises that Article 31, paragraph 1, of the 1951 Refugee Convention stipulates only that penalties shall not be imposed on account of the illegal entry or presence of refugees or asylum seekers who came directly from a territory where their life or freedom was threatened. It is not permissible to effectively deprive asylum seekers of access to a fair and efficient determination and treatment of their asylum claim, in line with international standards, as it may expose them to the risk of *refoulement* and other rights violations. Hence, asylum seekers are not required to apply for protection in the first safe country of arrival and cannot be penalised for not doing so.

3. Referring to Conclusion No. 58 (XL) of the Executive Committee of the United Nations High Commissioner's Programme, the Assembly recognises the importance of clarifying the legal status and protection of refugees and asylum seekers who move in an irregular manner from countries in which they have already found protection to seek asylum or permanent resettlement elsewhere.

4. Whereas it is important for asylum seekers and member States of the Council of Europe alike to clarify in a timely manner which State is responsible for processing an asylum application, the Assembly is aware that the safe third country principle under Article 33 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), according to which a European Union member State can declare inadmissible an application for international protection if a country which is not a member State is considered to be a safe third country for the applicant, does not apply among States which are not members of the European Union. This situation may cause legal uncertainty, to the detriment of asylum seekers.

5. The Assembly recalls Recommendation No. R (97) 22 of the Committee of Ministers of the Council of Europe to member States, which contains guidelines on the application of the safe third country concept and enumerates the criteria for assessing whether a country can be considered as safe, including "observance by the third country of international human rights standards relevant to asylum as established in universal and regional instruments" and "the third country will provide effective protection against *refoulement* and the possibility to seek and enjoy asylum". Since adoption of that recommendation, there have been many legal developments.

6. Welcoming the relevant jurisprudence of the Court of Justice of the European Union (Case No. C-564/18 and Nos. C-924/19 and C-925/19), the Assembly reaffirms that the return of an asylum seeker to a safe third country requires a connection to that country beyond the mere transit by the person concerned.

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1. *Assembly debate* on 12 October 2022 (31st sitting) (see Doc. 15592, report of the Committee on Migration, Refugees and Displaced Persons, rapporteur: Ms Stephanie Krisper). *Text adopted by the Assembly* on 12 October 2022 (31st sitting).
See also Recommendation 2238 (2022).

7. Welcoming the relevant jurisprudence of the European Court of Human Rights (the Court) in the cases *Ilias and Ahmed v. Hungary* (Application No. 47287/15), *M.K. and Others v. Poland* (Application Nos. 40503/17, 42902/17 and 43643/17) and *M.S.S. v. Belgium and Greece* (Application No. 30696/09), the Assembly emphasises that competent authorities in member States of the Council of Europe must analyse, before returning or expelling an asylum seeker to a third country, whether this person would have proper access to an effective asylum procedure in the country concerned without being exposed to the risk of inhuman and degrading treatment or torture in violation of Article 3 of the European Convention on Human Rights (ETS No. 5) or of being subjected to "chain *refoulement*".

8. Welcoming the work of the European Union Agency for Asylum towards a co-ordinated approach within the European Union to evaluate the safety of third countries, the Assembly believes that co-ordinated efforts should also be taken at the level of the Council of Europe. Therefore, building on this work and taking into consideration recent jurisprudence from the European Court of Human Rights, the Assembly encourages the development of new and up-to-date criteria at the level of the Council of Europe to assess the safety of third countries.

9. The Assembly also emphasises that no absolute presumption of safety can be made, as the situation in a safe country can deteriorate to a standard that renders the country in question unsafe. In this respect, the European Court of Human Rights clarified in *M.S.S. v. Belgium and Greece* (Grand Chamber judgment of 21 January 2011, Application No. 30696/09) that applicants must be able to challenge the presumption that a country is safe in his or her particular circumstances without bearing the entire burden of proof. In the Chamber judgment *Ilias and Ahmed v. Hungary* (Application No. 47287/15), the Court stated that the burden of proof must not, in light of Article 13 of the European Convention on Human Rights (right to an effective remedy), be reversed to the applicants' detriment. Therefore, referring to considerations by the European Court of Human Rights, the Assembly encourages the development of procedural requirements at the level of the Council of Europe in order for asylum seekers to have a fair possibility to rebut the presumption of safety.

10. The Assembly recognises that the monitoring of decisions on safe third country is essential to improve Council of Europe member States' practice and to strengthen the rights of asylum seekers and refugees. Therefore, the Assembly encourages Council of Europe member States to establish objective and independent monitoring mechanisms to monitor national law and practice in this regard.

11. Recalling its Resolution 2409 (2021) "Voluntary relocation of migrants in need of humanitarian protection and voluntary resettlement of refugees", the Assembly welcomes the current discussion on relocation and resettlement of asylum seekers among European Union member States and beyond, while encouraging Council of Europe member States to make further efforts in this regard. Such action would prioritise solidarity over recourse to the safe third country concept.

12. The Assembly invites the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees to support greater co-ordination and co-operation among member States in applying the safe third country concept in the context of asylum.