Asylum Procedures Working Party – interim report

November 2017

The World Conferences of the IARLJ occur every two to three years. In 2011, we met in Bled. In that year, there were 14000 people displaced every day by conflict, around the world. We met in Tunis at a time of great hope there, just before the 23 November 2014 Tunisian parliamentary election, which would be the first free Presidential election since the country gained independence in 1956, and the first regular Presidential election since the 2011 Tunisian revolution, which began the Arab Spring.

The declaration of the so-called Caliphate known as ISIS or Daesh was just a few months old. The Syrian conflict was waking up again, with the worst of its effects still to come. Domestic terrorism in Europe, Canada, and in Australia remained largely theoretical. The Calais Jungle Camp was not set up until January 2015.

The huge migrations which have caused such difficulty in Europe, and affected the perception of migrants across the globe, accelerated from 2011 onwards. In 2014, 42,500 people were being displaced every day1. By 2016, the number of people displaced each day had fallen to 28,300, but UNHCR in its 'Figures at a Glance' summary2 recorded that an unprecedented 65.6 million people had been forced from their homes, of whom there were nearly 22.5 million refugees, with over half of those being children under 18 years old. In addition, 10 million stateless people do not have access to the protection of a country of nationality.

The combination of feared and actual domestic terrorist attacks, and enormous numbers of sea- and land-borne migrants has caused many countries across the world to review their asylum procedures. Normally, information about asylum procedures around the world is available in the three-yearly report of the Inter-Governmental Consultation on Migration, Asylum and Refugees (IGC) which reports on asylum procedures in 16 participating states (Australia, Belgium, Canada, Denmark, Finland, Germany, Greece, Ireland, The Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, the United Kingdom and the United States). The IGC's Report on Policies and Practices in IGC Participating States was last published in 2015, and before that in 2012 and 2009. On enquiring, we were told that there is not expected to be a Report in 2018, partly because of the instability and rapid change in asylum procedures in participating countries. EASO is preparing similar information on 19 European states but there is presently no obvious source of information on what is going on in asylum procedures around the world, and the EASO project is not publicly available yet.

As always, the question is, how can the IARLJ help? In the absence of any update to the IGC Blue Book or access to the EASO database, we considered it would be helpful to collate information about the changes since 2014, when the World Conference last convened in Tunis. Information was sought formally and informally within the IARLJ's four local groups: the Americas Chapter, the Asia-Pacific Chapter, the African Chapter and the European Chapter. When we met in 2014, there was already a

1 High Commissioner for Refugees Antonio Gutierres, 'Global conflicts and human displacement; 21st century challenges', speech given at the Ditchley Foundation, 11 July 2015.

2 http://www.unhcr.org/uk/figures-at-a-glance.html, accessed 19 November 2017

tightening of asylum procedures around the world, with most countries having had a new asylum statute in 2014 or 2013.

We have focused on the fast track and/or expedited procedures in operation around the world, on the designation of safe third countries (pays surs) and the effect that has on asylum procedures, and on any changes to the length of leave available to those who are recognised as refugees, or benefit from subsidiary protection. An enquiry as to changes in family reunion rights did not return significant results outside Europe and is not, therefore, a central part of this report.

The following report, and the information which supports it, is necessarily an interim report, and very much a work in progress, particularly as much of the information was received by the working party during November 2017.

The Working Party is grateful for the assistance offered by and received from colleagues around the world. A list of the responses received and those who provided them appears at the end of the paper. Particular thanks are due for research assistance from Khalida Azhighulova at the School of Law at Leicester University, Professor Lenni Benson at New York Law School, Laurent Dufour at CEREDOC (the research arm of the CNDA in France), Anne Staver, Programme Officer for Intergovernmental Consultations on Migration, Asylum and Refugees (IGC), Jacob van Garderen of Lawyers for Human Rights in Johannesburg, Basia Opalska and Jadwiga Maczynska at EASO, Alice Farmer, Leslie Jenkins and Colleen Cowgill of the United Nations High Commissioner for Refugees (UNHCR), US Protection Unit in Washington, DC, as well as from many judicial colleagues around the world, and from the IARLJ Chapters, including a draft of the Asia-Pacific Chapter paper prepared by Allan Mackey and Martin Treadwell.

Scope of this Report

Asylum procedures are an enormous topic and given the changes in the outside world, which influence procedure, it is not possible to cover all the procedures which have altered. Following a helpful discussion with Laurent Dufour of CEREDOC, we decided to limit the ambit of this interim Report, and to focus on the following areas of procedure, to changes in the following areas:

- Fast track and accelerated procedures;
- The designation of safe third countries (pays sur) and the effect of such designation on asylum procedures;
- The length of leave granted to recognised refugees or those benefiting from subsidiary protection (if applicable); and
- Changes to the extent of recognised family for family reunion, and to the terms of reunion.

2015: the IGC Report

In 2015, the IGC noted a massive and sustained growth in global displacement, unprecedented since the Second World War. Asylum seekers and migrants were arriving by the Mediterranean route, largely driven by the Syrian conflict, and by Eritreans fleeing their government. Nationals of sub-Saharan African countries were also on the move, some for primarily economic reasons, but some also due to unstable conditions in their countries of origin or country of first refuge.

The country with the largest number of asylum claimants in the world in 2015 was Germany, with 173,000 claims, followed by Sweden (over 81,000) and the United States (65,000). In 2016, Germany received over a million claims.

In America, by the end of 2014, at least 60,000 unaccompanied minors had crossed the Mexican border to reach the United States, a threefold increase on the 2009 figure of less than 20,0003. Most were seeking to rejoin family members in the United States; from 1 December 2014, a new programme called the Central American Minors Refugee/Parole Program (CAM) provided a limited means of legal reunion for qualified children coming from El Salvador, Guatemala and Honduras to join parents or family in the United States.

Those using the dangerous sea routes to migrate to Europe came mainly from Syria, Afghanistan, Eritrea, Nigeria, Iraq, Somalia, Sudan, Gambia, Bangladesh and Senegal. In south-east Asia, about 88,000 people had sought to migrate by boat between January 2014 and March 2015, resulting, both in Europe and elsewhere, in 'unilateral and regional responses to the challenges posed by sea crossings and boat arrivals'.

In Europe, the response to the migration crisis included new discussions both on asylum policies, and on the future of the Dublin and Schengen systems. Free movement within the European Union itself was in play, with the greatest burden of receiving migrants when they arrived in Europe falling on southern countries such as Italy and Greece, and eastern European countries, such as Hungary. Greece and Hungary reinforced their border control capacities; Austria, Denmark, France and Germany considered reintroducing border controls within the European Union free movement area. On 13 May 2015, the European Union issued a European Agenda on Migration, mixing political guidelines and practical initiatives, to try to improve migration management.

Asylum claims in Canada and Australia were declining, following reforms to their asylum systems, with the number of claims made in Canada in 2013 only 10,390, almost half the number received in 2012. In Australia4, following the introduction of offshore processing of 'illegal maritime arrivals' in Nauru and on Manus Island, with no possibility of receiving protection in Australia, the numbers also fell, but there remained a backlog of 30,000 illegal maritime arrivals to be processed.

That is a very brief summary of where we were, in 2014.

Asylum procedures in 2017: what has changed?

Fast track and accelerated procedures

Broadly, fast-track procedures can be classified into three main groups:

- Safe country of origin (pays sur) fast track procedures for 'clearly unfounded' or 'manifestly unfounded' claims. If a country is considered to be generally safe, either for all returnees, or for a specific group of returnees (for example, men) there is a rebuttable presumption that international protection is not

3 BBC News, 30 September 2014: Why are so many children trying to cross the US border? http://www.bbc.co.uk/news/world-us-canada-28203923

4 Migration Amendment (Regional Processing and Other Measures) Act 2012, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014, Migration Amendment (Protection and Other Measures) Act 2015

required. Asylum seekers from safe third countries must show individualised risk, such that for them, the country cannot be considered safe. In 2016-2017, a few states expanded their lists of safe countries of origin, including Austria, Belgium, Hungary, and Netherlands.5

- Detained fast-track procedures, to speed up the processing of detained applicants.
- 'Benign' fast-track procedures to prioritise applications from particular nationalities, whose cases are likely to be clearly well-founded eg Syrian, Sudanese, Eritrean, etc, or for groups with specific needs, such as unaccompanied minors, victims of torture, violence or trafficking.

Accelerated procedures may be applied in individual cases where an applicant:

- Abuses an asylum procedure, eg by providing false information, destroying identity documents, to postpone an expulsion procedure, and so on;
- Has withdrawn an earlier application;
- Fails (without good reason) to keep in contact with an asylum authority;
- Has made a previous asylum application in the same or another country.

Africa Chapter

South Africa's Refugees Act 1998 provides for both individual and group refugee status determination but the Department of Home Affairs has not yet used the option to apply accelerated procedures to permit the recognition of refugees on a prima facie and country-specific basis (for example, migrants from Somalia). On the contrary, the asylum process is very long, due to inefficiencies in the system, and there are massive backlogs. The DHA is now seeking to improve efficiency by introducing measures to speed up the processing of protection applications.

Americas Chapter

The United States has had an 'expedited removal' fast-track process since the Illegal Immigration Reform and Immigration Responsibility Act 1996 (IIRIRA)6, under which the Immigration and Customs Enforcement (ICE) has the discretionary authority to remove summarily ('expedited removal') certain non-US citizens from the United States to their country of origin or last country of habitual residence, without the opportunity to make a claim to an immigration judge for relief from removal, unless they make an asylum claim or assert a fear of persecution.

Persons subject to expedited removal include 'arriving aliens', that is to say, non-US citizens present at a port of entry into the United States, and aliens who arrive in, attempt to enter, or have entered the United States without having been admitted or paroled following inspection by an immigration officer at a designated port of entry, 'and who have not established to the satisfaction of the immigration officer that they

5 EMN Annual Report 3

6 Official Website of the Department of Homeland Security: Pub. L. 104-208: *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (https://www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-10948.html#0-0-0-322)

have been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility'.

If a person subject to expedited removal expresses an intention to apply for asylum or a fear of persecution, they are detained mandatorily until a 'credible fear interview' has been conducted by an asylum officer. 85%-90% of all credible fear screenings are completed within 14 days.

Asylum officers do not adjudicate on asylum applications during this preliminary screening. The purpose of the credible fear screening is to identify all potentially viable claims and prevent removal without a full hearing of anyone who is a refugee, or would be tortured. The standard of proof applied by asylum officers to the claims advanced is that of a 'significant possibility', a low threshold intended to identify all potential refugees.

If the asylum officer finds no evidence of a credible claim, the asylum seeker may request review of the negative decision by an immigration judge: if no review is sought, or the immigration judge upholds the asylum officer's assessment of the claim as not presenting a 'significant possibility' that the claimant is a refugee, they will be removed from the United States under the expedited removal order.

If the officer does consider that there is a significant possibility that the applicant has a credible claim of persecution or torture, the person usually remains detained until further proceedings can be held before an immigration court. ICE, in its discretion, may parole them from detention on a case-by-case basis. If parole is refused, and the applicant was apprehended beyond the port of entry, but within the 100 mile limit, the person may ask for an immigration judge to review their continued detention.

Until 2004, expedited removal was used only at the port of entry. Currently, following a notice published in the Federal Register in 2004, expedited removal has been extended and applies to 'arriving aliens' deemed inadmissible at the port of entry, or who are apprehended within 100 miles of a port of entry, within 2 weeks of having entered the United States without authorisation. It could, however, be extended geographically, up to and including the whole of the United States and up to two years from entry.

A similar procedure applies to non-US citizens who return illegally to the United States after being removed ('reinstatement of removal'). In reinstatement cases, if the applicant makes an asylum claim, the procedure is the same, but the standard of proof is higher: the applicant must show a 'reasonable fear' of persecution not a 'credible fear'.

Asia-Pacific Chapter

The Asia-Pacific Chapter reports no fast track or expedited procedures in Asian countries, or in New Zealand.

The position is different in Australia, which from 20147 legislated to remove explicit mention of the Refugee Convention from the Australian protection regime, replacing it with national legislation intended to codify Article 1A(2) as interpreted in Australian case law. Those migrants who arrive by plane are processed normally, with

7 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*

'fast track' procedures for those who arrived by boat ('unauthorised maritime arrivals') between 13 August 2012 and 1 January 2014.

Section 5(1) of the Migration Act 1953 (as amended)8 defines an unauthorised maritime arrival as a person who:

- entered Australia on or after 13 August 2012 and before 1 January 2014
- has not been taken to a regional processing country
- in respect of whom the Minister has waived the s.46A bar, and
- who has made a valid application for a protection visa.

The Act also permits other persons, or classes of persons, to be added to the 'fast track' by legislative instrument. In October 2017, 3 such instruments were in force9, dealing with children of unlawful maritime arrivals or those moved from an offshore processing centre (Nauru or Manus Island) to Australia.

The 'fast track' procedure has not proved particularly fast. Rolf Driver, an IARLJ member and a Judge on the Federal Circuit Court, told us that his understanding is that the IAA has so far processed around 5,000 reviews, less than a quarter of those assigned to it by the Minister, suggesting that the fast track will run for at least another five years. He considers that these applications would likely have proceeded more quickly if the regular AAT procedures for migration cases had applied.

The process is one of 'review', but circumscribed by statute and by the IAA Procedural Code, on which there is now a considerable body of procedural caselaw.

The review by the IAA is a reasonableness review, not one where the common law principles of fair hearing apply. The IAA is entitled to decide a review on reasoning which differs from the decision by the decision maker (the delegate), whether the information is 'new' or not.

Some unlawful maritime arrivals are excluded from the fast track procedure, on the basis of a Ministerial certificate (for example, migrants who have another nationality, come from a safe country of origin, have presented a bogus document, claimed asylum elsewhere, or whose claim is clearly unfounded). The IAA cannot review decisions in respect of 'excluded fast track applicants' unless the Minister has determined that such a decision should be reviewed, or applicants in respect of whom the Minister has issued a conclusive certificate.

Fast track reviewable decisions are referred to the IAA by the Minister and, subject to limited exceptions, the IAA must determine the review only on the material that was available to the primary decision-maker (the delegate). The IAA's fast track decisions are not reviewable further by the Migration and Refugee Division of the AAT, but in certain limited instances, may be subject to review in the AAT's General Division, even if the applicant is an excluded fast-track applicant.

8 Amended by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* 2013 No. 35, 2013

9 IMMI 16/010 (F2016L00377) from 24 March 2016; IMMI 16/008 (F2016L00456) from 1 April 2016; and IMMI 16/049 (F2016/00679) from 7 May 2016

The IAA needs to focus closely on what is 'new information' and what is not, because that is a jurisdictional fact: it must have regard to all material factors in considering whether to accept 'new information'. A new claim is 'new information': however, there are numerous outstanding issues on how the IAA should treat a new claim which it decides to admit, if there has been no consideration of the new issue by the delegate. An English translation of a document which (untranslated) was before the delegate in a foreign language is not 'new information'. If the Secretary of State fails to put before the IAA important evidence which *was* before the delegate, it remains to be settled whether the IAA can consider it, as the statute restricts the IAA to determining a review on the basis of the review material.

Relevant cases - *MIBP v AMA16* [2017] FCAFC 136 (Dowset, Griffiths and Charlesworth JJ, 30 August 2017; *BWF16 v MIBP* [2017] FCCA 1080 (Judge Street, 23 May 2017); *DZU16 v MIBP* [2017] FCCA 851 (Judge Driver, 22 June 2017); *BVZ16 v MIBP* [2017] FCA 958 (While J, 18 August 2017)

European Chapter

As of November 2017, practically all states in Europe have some fast-track or accelerated procedures. The 28 European Union Member States derive their asylum procedures either from the 2005 Procedures Directive10 of the Common European Asylum System (CEAS), which is still applicable in the UK, Denmark and Ireland, or the Recast Procedures Directive11, applicable in the rest of the EU from 21 July 2015. Countries outside the EU may also have fast track or expedited processes.

The EU's 2005 CEAS system and the 2013 Recast Asylum Procedures Directive both provide for special procedures for specific caseloads which may warrant swifter decisions. A useful assessment of the Recast CEAS Directives by Professor Steve Peers at the University of Essex may be found on the Statewatch website12The European Commission's Factsheet on the Common European Asylum System cites the then Commissioner for Home Affairs, Cecilia Malmström, as saying that the Recast Directives

> '...will provide better access to the asylum procedure for those who seek protection; will lead to fairer, quicker and better quality asylum decisions; will ensure that people in fear of persecution will not be returned to danger; and will provide dignified and decent conditions both for those who apply for asylum and those who are granted international protection within the European Union'.

The CEAS offers two types of international protection; refugee status based on the Refugee Convention and subsidiary protection (humanitarian protection in the United Kingdom), which is a little more widely drawn, providing protection also for persons returning to areas where the risk is caused by indiscriminate violence (violence

10 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

11 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

12 Professor Steve Peers, University of Essex: "Analysis: The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?" [April 2013] \(http://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf)

aveugle). The aim is that wherever someone claims asylum, the system and the outcome should be the same. The CEAS procedures are supported by the Dublin III process, whereby, with some exceptions, asylum seekers are returned to the country where they first entered the European Union for their asylum claim to be processed.

Under the Recast CEAS, Member States are encouraged to prioritise favourably applications from persons with manifestly well-founded claims or vulnerabilities warranting special procedural guarantees under the benign prioritised process. However, unfounded or manifestly unfounded applications can be accelerated under a less protective procedural regime, on the assumption that they will most likely be rejected.

The Recast Procedures Directive draws a normative distinction between 'prioritised procedures' and 'accelerated procedures'.

- **prioritised** procedures entail a more rapid examination of claims without derogating from normally applicable procedural time limits, principles and guarantees; but
- **accelerated** procedures differ from regular procedural rules "in particular by introducing shorter, but reasonable time limits for certain procedural steps". Accelerated procedures under EU law involve appeals subject to shorter time limits and which often have no (automatic) suspensive effect over removal decisions, thereby exposing asylum seekers to the risk of deportation before their appeal is decided.

The Recast CEAS is intended to be mandatory and coherent across Europe, ensuring that asylum decisions are made more efficiently and fairly and that all Member States examine applications to a common high standard. The stated aim of the Recast Procedures Directive is that normally an asylum procedure should not last longer than 6 months.

Protection is provided for those in need of special help, for example by reason of age, disability, illness, sexual orientation, or traumatic experiences, to give them adequate support and sufficient time to explain their claims. Unaccompanied children receive special protection.

Other provisions allow Member States to deal briskly with abusive claims, in particular with repetitive applications by the same person. Someone who does not need protection will no longer be able to prevent removal indefinitely by repeatedly making new asylum applications.

The Recast CEAS system is incomplete within the EU. The EU is not yet a federal State and each country may choose whether or not to adopt the Recast Directives, and when (within 2 years) to transpose the Directives into its national law. At present, the UK, Ireland and Denmark13 have not adopted the Recast CEAS directives and continue to apply only the original CEAS Directives. Also, not all countries geographically in Europe are Member States of the European Union14.

13 https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-Recast_October-2013.pdf

14 The European Union countries in November 2017 are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy,

The following additional observations can be made about individual countries in Europe.

Austria generally treats cases as fact-specific, but individuals from safe countries of origin are subject to expedited procedures. A challenge to such a decision may be non-suspensive (that is to say, the asylum seeker may be returned to their country of origin, even though they have challenged the decision)15

Belgium has both accelerated procedures, where a decision must be issued within 2 months and super-accelerated procedures, where a decision must be taken within 15 days. An accelerated procedure applies to an applicant on CEAS grounds, where an applicant:

- Arrived from a safe country of origin;
- Advances a claim which is clearly based on reasons totally unrelated to asylum, fraudulent or manifestly unfounded;
- Is held in a closed centre at the border or on the territory, or is subject to a security measure or is in prison,
- Voluntarily withdraws from the border asylum procedure or does not report to the designated reception centre within 15 calendar days after having tried to enter the country illegally, does not appear for the scheduled interview or fails without good reason to provide the required information;
- Obstructs the asylum procedure by providing false information or identity documents, by destroying identity or travel documents, hampering collection of fingerprints, or by refusing to make a required declaration on registration.
- Did not apply for asylum when the border police inquired about the purpose of their journey;
- Has already lodged another application in Belgium, or an application in another country; or
- Made an application for asylum in order to postpone or frustrate an immediate expulsion.

The super-accelerated procedure, when a decision must be taken within 15 days, applies to cases where:

- The applicant is in prison serving a sentence;
- The Minister or Secretary of State or the AO exercises an "injunction" and requests priority to be given to an application; or
- The applicant poses a threat to public order and national security. 16

Bulgaria: Accelerated procedures apply to applications that are considered manifestly unfounded, but not to an unaccompanied minor or foreigner who has applied for international protection and or who enjoys temporary protection.17

Croatia:

Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK.

15 IOM/EMN, 'Austria: Annual Policy Report 2016' (May 2017), 20 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/01a_austria_apr2016_part2_en.pdf>

16 ECRE Belgium

17 EMN, ' ANNUAL NATIONAL REPORT ON MIGRATION AND ASYLUM PART 2 BULGARIA' 20-21

A fast-track or prioritised procedure applies for unaccompanied minors and applicants who need special procedural or reception guarantees, and to applicants relocated from Italy and Greece.

Accelerated procedures may apply on the CEAS grounds, as in Belgium. An accelerated procedure must be completed within two months, failing which the claim is transferred to the regular procedure. The deadline for an appeal is eight days from the delivery of the first instance decision. Appeals are non-suspensive.

The accelerated procedure does not apply to an unaccompanied child except in cases when a subsequent application is admissible, when the child presents a risk to the national security or public order of the Republic of Croatia or when it is possible to apply the concept of safe country of origin.

Cyprus

Fast-track or prioritised procedures apply when there is likely to be merit in the claim, the applicant is vulnerable, or there is an Article 15(c) conflict in the country of origin, or the asylum seeker is detained.

Cyprus has provision for an accelerated procedure, but in practice, it is never used.18

Denmark

Denmark's accelerated procedure applies to manifestly unfounded cases, where the applicant originates from a country in which, according to background information, it is unlikely that they would risk persecution if returned.19

Estonia

Estonia signed the Refugee Convention in 1997, and in 2005 passed the Act on Granting International Protection to Aliens (AGIPA), bringing the provisions of the Refugee Convention into Estonian law. Amendments to AGIPA in May 2016 and December 2016 transposed into Estonian law the provisions of the Recast Reception Conditions Directive, the Recast Asylum Procedures Directive, the Seasonal Workers Directive and the Intra-Corporate Transferees Directive. The new provisions Recast the circumstances in which international protection claims can be regarded as manifestly unfounded and provide for an accelerated procedure (30 days), as well as the circumstances under which the content of an application will not be reviewed.20 Estonia launched a process to develop a list of safe countries of origin in 2016.

Finland

An asylum application may be examined under an accelerated procedure both on CEAS grounds and for unaccompanied minors and Dublin III cases 21

18 Ecre Cyprus 19, 31

19 ICG Blue Book 2015

20 EMN Annual Report

21 EUROPEAN MIGRATION NETWORK 2016 Annual Report on Migration and Asylum, 25 April 2017 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_apr2016_synthesis_report_final_en.pdf

According to section 104 of Finland's Aliens Act, where the safe country of origin or safe country of asylum principle is applicable, the Finnish Immigration Service must make a determination on the claim within 7 days of the date on which the minutes of the interview were completed and the information on their completion was entered into the Register of Aliens.

The Finnish Immigration Service may decide that an application is manifestly unfounded if the application does not raise grounds for protection related to serious human rights violations or the application has been made with an obvious misuse of the asylum process. An application may be rejected by the Finnish courts as manifestly unfounded on CEAS grounds, as in Belgium22

France

Since November 2015, benign fast-track or prioritised procedures apply to vulnerable persons having identified needs in terms of reception conditions or specific procedural needs, and also to applicants with specific nationalities e.g Syrian, Sudanese, Eritrean.

France's accelerated procedure is automatically applied where:

- The foreign national seeking asylum originates from a safe country of origin; or
- The asylum seeker's subsequent application not manifestly unfounded.

The asylum claim will be channelled into the accelerated procedure on the usual CEAS grounds. Initial decisions under the accelerated procedure by OFPRA should be made within 15 calendar days. This period is reduced to 96 hours if the asylum seeker is held in administrative detention.23

Germany

According to the Act on the Introduction of Fast-Track Asylum Procedures (Asylum Package II) (entry into force: 17 March 2016)24, a fast-track or prioritised procedure can be applied to asylum seekers on CEAS grounds.

Fast-track procedures are carried out only in special reception centres, and applicants are obliged to stay there until the fast-track procedure and any appeal are complete.

The Federal Office for Migration and Refugees is required to decide on these applications within a week. If it rejects the asylum application as manifestly unfounded or inadmissible, applicants have one week to file an urgent appeal against the decision. The Administrative Court must then decide on the appeal within a week,

22 ICG 163

23 ECRE France

24 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/11a_germany_apr_part2_en.pdf

which means that the complete procedure, including the administrative court's decision on an appeal against the rejection, takes at most three weeks.

If the Federal Office for Migration and Refugees does not decide within one week, or the application is rejected as simply 'unfounded', or temporary protection is granted, an applicant can leave the special reception centre and the application continues in the normal procedure.25

Greece

Greece has both a fast-track procedure, and a fast-track border procedure, the latter related to the EU-Turkey Agreement. Greece does not distinguish between benign prioritised processing and accelerated procedures.

Under Greece's fast-track procedure, a decision can be issued within one day if the applicant has a travel or identity document that establishes their country of origin or the country of habitual residence.26

In 2016, a total 1,000 applications for international protection were processed under Greece's fast-track procedure, out of which 913 received positive decisions.27 By Article 51(6) of Law 4375/2016, fast-track procedures apply in Greece to:

- Vulnerable groups or applicants in need of special procedural guarantees;
- Applicants from detention, at the border or from a Reception and Identification Centre;
- Applicants who are likely to fall within the Dublin III procedure;
- Applications that are reasonably believed to be well-founded;
- Applications that may be considered as manifestly unfounded;
- Applicants who represent a threat to national security or public order; or
- Applicants who file a subsequent application.
- Since September 2014, Syrian nationals and stateless persons with former habitual residence in Syria, is in place since September 2014.

The fast-track border procedure, applying the EU-Turkey statement, was introduced by Article 60(4) of Law 4375/2016 and provides an extremely truncated asylum procedure with fewer guarantees. It applies to applicants who arrived on the Greek Eastern Aegean islands after 20 March 2016 and thus remain in the RIC of Lesvos, Chios, Samos, Leros and Kos.

The statute provides that the border procedure may be applied 'exceptionally' to third-country nationals or stateless persons arriving in large numbers and applying for international protection at the border or at airport or port transit zones or in Reception and Identification Centres (RIC), following a relevant Joint Decision by the Minister of Interior and Administrative Reconstruction and the Minister of National Defence.

Article 80(26) L 4375/2016 provides that "the exceptional procedure under Article 60(4) …shall not exceed six (6) months and may be prolonged for a further 3-month period by a decision issued by the

25 ECRE Germany

26 EASO, 46

27 ECRE Greece 36

Minister of Interior and Administrative Reconstruction." But its application has continued well beyond the extended term.28

In Hungary, according to Section 35(7) of the Asylum Act, fast-track or prioritised processing applies to unaccompanied children and applications made while in detention.29

Under Hungary's accelerated procedure, a decision must be taken within 15 days. The accelerated procedure is mainly used for Moroccans and Algerians, but also Arab Iraqis.30 It applies on CEAS grounds, as in Belgium. Turkey is designated as a safe country of origin since April 2016.31

Ireland

Under section 12(1) of the Refugee Act 1996, fast track or prioritised procedures apply to applicants who arrived from a safe country of origin (only South Africa has been designated) or to an applicant in detention.

In 2015, Ireland passed the International Protection Act, incorporating the Recast CEAS Directives. In the new system, the benign fast-track procedure has been extended to nationals of Syria, Eritrea, Iraq, Afghanistan, Iran, Libya and Somalia.32 Section 73 provides that the applications may be placed in an accelerated procedure on CEAS grounds.33

Italy

Italy's fast track or prioritised procedure applies in the following, largely benign, situations:

> a. Where the application is likely to be well-founded;
> b. Where the applicant is vulnerable, in particular unaccompanied minors, victims of torture and violence, or in need of special procedural guarantees;
> c. When the application is made by the applicant placed in an administrative detention centre;
> d. If the applicant comes from one of the countries identified by the National Commission for the Right of Asylum (CNDA) that allow the omission of the personal interview when considering that there are sufficient grounds available to recognise subsidiary protection. 34

Italy's amended Procedure Decree provides for an accelerated procedure, normally within 18 days, where:

> (a) an asylum request is made by the applicant while in the Identification and Expulsion Centre. The decision should be taken within 9 days from receipt of the application.
> (b) the application is manifestly unfounded;
> (c) the applicant has made a subsequent application for international protection;

28 ECRE

29 ECRE 20

30 ECRE Hungary

31 EMN Asylum in EU, 20

32 Ibid.

33 ECRE Ireland, 21-23

34 ECRE Italy 27

(d) The application was made after the applicant was arrested for avoiding or attempting to avoid border controls or for irregular stay, merely in order to delay or frustrate the making or enforcement of an expulsion order, or an order for rejection at the border.

According to Article 28-bis of the Procedure Decree, the CTRPI may exceed the above mentioned time limits where necessary to ensure an adequate and complete examination of the application for international protection, subject to a maximum time limit of 18 months. Where an applicant is detained pending removal, the maximum period for decision is reduced to 6 months. maximum six months. An appeal should be lodged within 15 days.35

It should be noted that Italy does not maintain a list of safe third countries or safe countries of origin: asylum is considered as an individual right, with anyone having the right to apply for international protection regardless of their country of origin.

Latvia: no information available

Lithuania: no information available

Luxembourg: a fast-track or prioritised procedure applies only in cases of a safe country of origin. The list of safe countries of origin is regularly reviewed by the Ministry in charge of Immigration and Asylum.

Malta

Benign fast-track or prioritised procedures may be applied to:

- applications that are likely to be well-founded
- applicants who are vulnerable or is in need of special procedural guarantees, in particular unaccompanied minors.
- Applicants in detention centres
- In case of mass influx, applicants from countries whose nationals are, *prima facie*, more liable to be given protection.

Article 23 of the Refugees Act provides that applications should be examined under accelerated procedures where:

- The application is manifestly unfounded;
- The applicant has or could have found safe protection elsewhere under the Refugee Convention or the asylum Directives; or
- The applicant holds a travel document from a safe country.
-

An application is considered manifestly unfounded where the applicant on the Recast CEAS grounds.

Article 23(2) provides that if an application is considered to be manifestly unfounded, it should be examined within 3 working days. The decision should be immediately referred to the Refugee Appeals Board, who then also examines within 3 working days. In practice, the Refugee Commission examines all applications under the regular procedure.36

Netherlands

35 ECRE Italy 42-43

36 ECRE Malta 16, 27-28

In March 2016, the Netherlands introduced a 'multi-track asylum policy' whereby a decision is taken at the registration stage about the procedure ('track') according to which an asylum application should be handled. There are five possible tracks:

(1) Dublin Procedure;

(2) Safe country of origin or legal stay in another EU Member State;

(3) Well-documented applications with a high chance of success (Examples are properly-documented Syrians or stateless Palestinians from Syria);

(4) General Asylum Procedure;

(5) Applications with a high chance of success that require a brief investigation (Examples are insufficiently-documented Syrians); and

(6) applications that are likely to receive a negative decision.37

Also, the Netherlands expanded its list of safe countries of origin during 2016 and 2017 38

Norway

Since January 2004, Norway applies a fast-track 48-hour procedure to applicants from the national list of countries on which the RSD authorities consider that they have sufficient information regarding the general security and human rights situation, and from which the majority of applications have been found to be manifestly unfounded. Applicants in this procedure are accommodated at a transit reception centre in the Oslo area while awaiting removal. Following an examination of the claim, those applications that are not found to be manifestly unfounded will be removed from the 48-hour procedure. The list of countries to which the 48-hour procedure applies is reviewed and updated on a regular basis. In 2016 Armenia, Botswana, Ghana, India, Namibia and Tanzania were added to the list.

In June 2005, Norway introduced a 3-week accelerated procedure for applicants from the following countries: Armenia, Bangladesh, Belarus, India, Kosovo (only minorities), Nepal, Russia (ethnic Russians) and Ukraine. These are countries from which a high number of applications are rejected. Information on the security and human rights situation in these countries of origin is considered to be thorough, and little or no further investigation or verification is required following the interview.

There is also an accelerated procedure for asylum seekers with a criminal record who are not in need of protection and who can be returned to the country of origin.

Negative decisions under these procedures can be appealed. A petition for a suspensive effect can be granted unless a claim has been found manifestly unfounded. When a case is processed within the 48-hour procedure, the asylum seeker must submit a petition for a suspensive effect within three hours of

37 EUROPEAN MIGRATION NETWORK 2016 Annual Report on Migration and Asylum, 25 April 2017 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_apr2016_synthesis_report_final_en.pdf

38 EMN 10

notification of the decision. Cases processed in the 3-week procedure are given priority on appeal.39

Poland

A prioritised or fast-track procedure is available in the following cases:

- Well-founded cases (e.g. Syrians),
- Cases of persons requiring special treatment (e.g. unaccompanied minors)
- Cases of detained asylum seekers.40

Statistics obtained from the Office for Foreigners show that in 2016 the Head of the Office for Foreigners examined 228 applications in the accelerated procedure, on CEAS grounds.

The Head of the Office for Foreigners should normally issue a decision in the accelerated procedure within 30 calendar days. If a decision cannot be issued within 30 calendar days, the Head of the Office for Foreigners has to inform the applicant about the reasons for the delay and the date when a decision will be issued. There are no consequences for not respecting this time limit.

Spain

Under Article 25 of Spain's Asylum Law, a fast-track procedure with a time-limit of 3 months (instead of 6 months) is applicable as set out below. The same procedure applies both to benign cases, where the application is manifestly well founded, or concerns an individual who has special needs particularly unaccompanied minors, but also to those identified in the Recast CEAS accelerated procedure categories.

An urgent procedure is applied to applicants who have been admitted to the in-merit procedure after lodging a claim at the border or within a detention centre. 3,857 applications were processed under the urgent procedure in 2016, out of which 3,088 at the border and 769 in detention centres. 41

Sweden

The Swedish Migration Agency is developing a new approach to international protection, implemented on a small scale as of 2 May 2016.42 In this procedure, asylum cases are prioritised based on screening mechanisms:

- manifestly unfounded (asylum) applications,
- Dublin III procedure,
- Applications from specific nationalities, e.g. Syria and Eritrea; Iran, Somalia, Iraq and Afghanistan.
- Asylum cases of 17-year-old unaccompanied minors

39 ICG 316

40 ECRE Poland 19

41 ECRE Spain 19-20

42 EASO 73

The time limit for a decision under the accelerated procedure is 3 months. If the time limit has not been respected, the case returns to the normal procedure.43

Turkey

Turkey is not an European Union member state but as a candidate state, its laws are broadly in line with the Recast Directives. Under the 2013 Law on Foreigners and International Protection (LFIP), fast-track or prioritised procedures apply to 'persons with special needs' under Article 3-1-(l), which include unaccompanied minors, elderly, persons with disabilities, pregnant women, single parents with an accompanying child and victims of torture, rape and other serious psychological, physical or sexual violence44.

Article 79-1 of the LFIP lays down 7 grounds that require the implementation authorities to refer an application to the accelerated procedure for the determination of the international protection claim on Recast CEAS grounds.

The Circular for International Protection provides additional guidance that accelerated procedures may be applied in the following cases:

- Where applications were made at border locations (1.2.3).
- Applicants previously residing in Turkey legally on other grounds such as work, study, short-term visa, and who express an international protection request after the expiration of their previous residence authorisation;
- Applicants previously residing in Turkey on other legal grounds but have committed a crime and therefore a removal decision was issued for their deportation from Turkey under Article 54 LFIP, and who express an international protection request before their transfer to a removal centre;
- Applicants expressing an international protection request after having been apprehended by security forces for illegal presence in Turkey;
- Applicants previously deported from Turkey or banned from re-entry, on irregular migration grounds or after having committed a crime, who have re-entered Turkey and express an international protection request,
- Applicants expressing an international protection request after they are apprehended by security forces during an attempt to exit Turkey illegally;
- Applicants who have previously applied for international protection in Turkey but were either rejected or considered to have implicitly withdrawn their application pursuant Article 77 LFIP, and who make a subsequent international protection request;
- Applicants expressing an international protection request while being deprived of their liberty for criminal justice reasons.

The personal interview must take place within 3 days of the application, and the status decision shall be issued within 5 days of the personal interview (Art 79-2 of the LFIP). Where it is determined that the examination of the application cannot be completed within the time frame laid down in Art 79-2, the applicant may be taken out of the accelerated procedure and referred to the regular procedure (Art 79-3 of the LFIP)45

43 ECRE Sweden 30

44 ECRE Turkey, 34

45 ECRE Turkey, 53-54

Switzerland

Fast track procedures apply to manifestly unfounded claims from applicants originating from safe European countries. All claims are to be decided within a so-called 48-hour procedure if no further examination is required.

The list of safe European countries includes Bosnia-Herzegovina, the Former Yugoslav Republic of Macedonia (FYROM), Serbia, Kosovo, Georgia, Hungary.

Accelerated procedures apply to applications from countries of origin with a very low recognition. The list includes Nigeria, Gambia, Morocco and Algeria. In these cases, a decision must be taken within 20 days. Procedures are normally concluded while applicants are still in the federal reception and processing centres. Appeals in the accelerated procedures must be lodged within 5 working days.

In 2016, 4,555 cases were treated in the accelerated procedure, and 1,630 in the 48-hour procedure. Out of these cases, 19 were granted asylum in the fast-track procedure, and 15 in the 48-hour procedure. 33 persons were granted temporary protection in the accelerated procedure, 155 in the 48-hour procedure.46

United Kingdom

The United Kingdom remains in the original CEAS, having not adopted the Recast Directives. There is no established fast-track system in the UK for prioritising the cases of people who are particularly vulnerable or whose case appears at first sight well-founded, although prioritising manifestly well-founded claims has been considered.

There are two kinds of accelerated procedures in the uk the non-suspensive appeal procedure (NSA) and the (currently suspended) detained fast-track procedure (DFT).

The NSA procedure applies to applicants from a deemed safe country of origin, but cases are also certified as clearly unfounded on an individual basis. About 7% of claims were certified clearly unfounded in 2016. Albania, India, Nigeria, Pakistan and Ukraine were the most common nationalities, between them accounting for 67% of those people whose claims were certified unfounded during 2016.47

There is no time limit for a decision to be made in such a case, although the UK Home Office guidance states that the aim is to decide within 14 calendar days.

The DFT accelerated procedure operated for detained applicants where the Home Office considered that the claim was capable of being decided quickly, with the entire process, including any appeal, being completed within 3 weeks. After a series of legal challenges to the safety and fairness of the DFT process, its operation was suspended on 2 July 2015. It has not been reinstated nor abandoned.48

The Designation and procedural effect of safe third countries (pays sur)

Africa Chapter

46 ECRE Switzerland, 19-20

47 ECRE UK 20, 38-39

48 ECRE UK, 20, 38-39

South Africa's Department of Home Affairs (DHA) has repeatedly stated that it will introduce the concepts of 'country of first asylum,' and 'safe third country' into its refugee status determination procedures, and makes use of the concepts *ad hoc,* although that approach contravenes section 2 of the Refugees Act 1998 which explicitly prohibits the return of any person to a country where they may face persecution.

The South African Department of Home Affairs has not developed a clear policy on the use of the safe third country of the so-called first country of asylum. The majority of persons who have applied for asylum in South Africa are from countries outside the Southern African region. In a study by the African Centre for Migration and Society at Wits University it was found that approximately half of respondents transited other countries en route to South Africa, and only 53 percent of those entering through the Zimbabwe border were Zimbabwean nationals.

Asylum applications are routinely rejected on the basis that the applicant has passed through another country, however briefly, before reaching South Africa. For example, Case no 1159/08, decided by the Refugee Appeal Board on 7 June 2011, concerned a Congolese asylum seeker who during 2006 had spent less than two months in refugee camps in Tanzania, Malawi and Mozambique, all of which he left due to lack of adequate food in the camps, and to none of which it was established that he had a right of return or arrangements in place to return him. It was accepted that he risked harm if returned to the Democratic Republic of the Congo. His appeal failed, by reason of an interpretation of section 4(1)(e) of the Refugees Act:

> "4.(1)…(e) a person does not qualify for refugee for the purpose of the Act if there is a reason to believe that he enjoys protection of any other country in which he has taken residence."

There was no substantive assessment by the RAD of the nature of protection and basic human rights standards provided in Tanzania, Malawi or Mozambique, as required by international norms. In the absence of any arrangement for returning the applicant to any of the mentioned countries, the failure of his asylum claim in South Africa meant that the applicant was at risk of arrest and deportation to his country of origin, although the RAB had found that he was at risk of harm in the Democratic Republic of the Congo.

The courts in 2011 intervened to prevent the return of asylum seekers to a third country where their protection could not be guaranteed. In *Abdi v Minister of Home Affairs*[49], the Supreme Court of Appeal held that

> "Deportation to another state that would result in the imposition of a cruel, unusual or degrading punishment is in conflict with the fundamental values of the [South African] Constitution"

and therefore, that the deportation of Somali refugees to Namibia, was unlawful in the absence of any guarantee from the Namibian government not to harm or *refoule* them. The Supreme Court also stated that the department's approach lacked the

49 *Abdi v Minister of Home Affairs* (734/10) [2011] ZASCA 2 (15 February 2011) http://www.refugee.co.za/documents/Abdi_v_Minister_of_Home_Affairs_(734-10)_[2011]_ZASCA_2.pdf

procedural safeguards that apply to the limited number of similar practices adopted by other countries.

In 2000, the Pretoria High Court found that a policy circular instructing immigration officers to verify the good faith of asylum seekers and refuse entry to those who travelled through a 'safe third country' to be unlawful. The policy was subsequently withdrawn.

Senior politicians, including President Zuma and a former Minister of Home Affairs, have stated that international law requires asylum seekers to seek refuge in the first safe country they transit and that international law supports the department's practices of turning away asylum seekers on this basis. These practices may soon become policy when the 2017 White Paper on International Migration comes into force.

In West Africa, which has a collective population of 355 million people, in 15 countries, 70%/80% of migration is estimated to be within the region. The Economic Community of West African States (ECOWAS) in 1979 established a Protocol on the Free Movement of persons, but implementation of the Protocol is variable. All ECOWAS member countries have signed both the 1951 Refugee Convention and there is a large amount of migration between countries in the region, as well as by migrants in transit to North Africa and Europe.

Americas Chapter

United States

The provision for refugees in the United States contains an exception for migrants coming to America from 'safe third countries', identified in either a bilateral or multilateral agreement, pursuant to 8 USC §1158(a) (2) (A), who are ineligible to seek asylum in the United States and may be removed to such third country. An average of 22 safe country cases are considered by USCIS50, each year.

The only such agreement at present is the Canada-US Safe Third Country Agreement51, signed by both countries on 5 December 2002, and in force since 29 December 2004. Refugee claimants are required to seek protection in the first safe country reached, subject to several exceptions: family members, unaccompanied minors, holders of certain documents, and public interest exceptions.

The excepted groups, that is, those who will not be returned to Canada to pursue their protection appeals, may be summarised as follows:

- Citizens or habitual residents of Canada;
- Persons who have a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece or nephew who has asylum, refugee status, or other lawful status in the United States, or who has made an

50 US Citizenship and Immigration Services

51 Government of Canada: Canada-US Safe Third Country Agreement (http://www.cic.gc.ca/english/department/laws-policy/menu-safethird.asp)

asylum claim which is still pending before USCIS, EOIR52, or on appeal in Federal Court. (This exception does not apply where the relative in Canada is only a non-immigrant visitor, or a visitor under the Visa Waiver Program);

- Unmarried persons, below the age of 18, who do not have a parent or legal guardian in either Canada or the United States;

- Persons who arrived from Canada with a validly issued United States visa or admission document, other than for transit, or who, being required to hold a visa to enter Canada, do not need a visa to enter the United States; and

- The Director of USCIS or his designee, in his absolute (and unreviewable) discretion, considers that it is in the public interest to permit the alien to pursue in the United States a claim for asylum, withholding of removal, or protection under the Convention Against Torture53.

A migrant is also ineligible for asylum in the United States if they have been 'firmly resettled' in a third country before entering the United States. 'Firmly resettled' means that they entered that third country, or while in that third country received, an offer of 'permanent resident status, citizenship, or some other type of permanent resettlement'54.

Canada

The United States is also the only safe third country designated by Canada under the Canada-US Third Country Agreement, and Canada's own Immigration and Protection Act.

The Canada-US agreement does not apply to United States citizens or habitual residents seeking asylum in Canada, nor to stateless persons.

In Canada, the family members exceptions may apply to claimants whose direct ascendant or descendant relatives, uncles, aunts, nephews, nieces, spouses, common law partners or legal guardians who have a right to remain or to work in Canada, or are asylum claimants over 18, have had their claim stayed on humanitarian or compassionate grounds, or are otherwise a protected person under Canadian immigration legislation. The unaccompanied minors category is self-evident and uncontroversial.

Document holder exceptions apply to those with a valid Canadian visa, work permit, study permit, or who hold a travel document for permanent residence or refugee

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52 Executive Office for Immigration Review

53 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1985

54 USCIS : Firm Resettlement (https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/RAIO/Firm%20Resettlement%20LP%20%28RAIO%29.pdf)

status issued by Canada. There is also a document holder exception for those migrants who need a US-issued visa to enter the United States but do not need a temporary resident visa in Canada.

The final, 'public interest' category of exceptions is for those who have been charged or convicted in the United States or a third country with an offence which carries the death penalty: however, the benefit of that exception is not available where a refugee claimant 'has been found inadmissible in Canada on the grounds of security, for violating human or international rights, or for serious criminality', or where the Minister finds the person to be a danger to the public.

Asia-Pacific Chapter

In Taiwan, the Refugee Bill which passed its first reading in July 2016 and remains before the Parliament, contains very restrictive safe third country provisions. Taiwan is not a separate member of the United Nations, due to the 'One China' policy. The Bill appears stuck, with no political will from either of the major parties to advance it further.

In Australia, s.36(3) of the Migration Act 1958 (as amended) imposes a requirement that a person not have 'effective protection' in a safe third country to be recognised in Australia, expressed in terms of whether an applicant has a right to enter and reside in another country (in which they would not face persecution or other forms of harm leading to non-*refoulement*). This is a longstanding provision, aimed at ensuring 'that only those who most need [Australia's] assistance - those with no other country to turn to - are able to enter [Australia's] protection system'55. Section 36(3) removes any necessity to refer to Article 1E of the Refugee Convention, in Australian law after 16 December 2014, but Article 1E may still be relied on for earlier decisions where third country protection is in play.

In 2015, Australia's Full Federal Court provided guidance on the scope of a 'right to enter and reside' in *SZTOX v MIBP56.* The Court confirmed that the 'right' in s.36(3) is not confined to a right which is sourced in domestic law, such as a statute, regulation or other legislative instrument. Rather, the source of the right might also lie in an executive act, such as a Treaty, executive policy or other executive instrument. The Court emphasised that these examples are not exhaustive and that the proper construction of s.36(3) must accommodate the potentially wide range of laws and executive acts which could create a right or entitlement in the relevant sense. The existence and source of the right is a question of fact.

55 Commonwealth, *Parliamentary Debates*, Senate, 25 November 1999, 10668-9 (Kay Patterson, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs).

56 *SZTOX v MIBP* [2015] FCAFC 77 (Allsop CJ, Jagot and Griffiths JJ, 4 June 2015) at [42]. Contrary to the view expressed in *MZZXS v MIBP* [2015] FCA 1384 (North ACJ, 4 December 2015) at [14] that the Tribunal needs to know by what means the entry is permitted and identify the existence and source of the right, the Full Court of the Federal Court in *MIBP v SZUSU* (2016) 237 FCR 305 held that there is no requirement for the Tribunal to identify the source of the right of entry with that degree of precision: per Tracey, Flick and Katzmann JJ at [38]. For instance, where the Executive Government of a third country publishes a statement that refers to the right of citizens of other countries to enter, and no question arises as to the authenticity of that statement, there is no reason why the Tribunal would need to inquire any further.

When considering the scope of the 'liberty, permission or privilege lawfully given' test, the Federal Circuit Court in 2015 held in *SZTOG v MIBP* and in *SZTQN v MIBP*[57] that the s.36(3) 'right' includes a right to claim entry and residence, where there is a corresponding duty on the receiving state to grant such entry and residence; a privilege, liberty or permission to enter and reside, whether or not revocable; and a right that will arise on satisfaction of certain pre-conditions. Each of these appears consistent with the test endorsed by the Full Federal Court in *SZRHU*.

We have no other information regarding 'safe third country' designation in the Asia-Pacific Chapter.

European Chapter

The Common European Asylum Policy provides for the designation of safe third countries (pays sur). Most of the European States have a concept of safe third countries in their legislation as a ground of inadmissibility. In practice, the concept is not applied everywhere, or always in the same way.

This section will summarise how different states in Europe define a safe third country concept in their legislation and how they apply it in practice.

The most common criteria in designating a country as safe are: no state persecution; being a signatory to the European Convention for the Protection of Human Rights, the International Covenant on Civil and Political Rights, or the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and being a signatory to the Refugee Convention and respecting the principle of non-refoulement. The three European countries with the longest list of safe countries of origin are the Netherlands (31 countries), UK (25 countries) and Austria (20 countries). Generally, the countries which are most often found on lists of safe countries of origin are the Western Balkan countries. There is often no fixed timespan for the re-evaluation of these lists.

Austria

A safe third country concept[58] is set out in article 4 of the Federal Act Concerning the Granting of Asylum, in force since 21 July 2015. An 17 February 2016 , a revised Regulation on Countries of Origin came into force, adding Algeria, Georgia, Ghana, Morocco, Mongolia and Tunisia as 'safe countries of origin'.

If the concept is applied the application is processed and rejected as inadmissible. A country will be regarded as a safe third country for an individual appellant where[59]:

- Refugee status determination is available in accordance with the Refugee Convention;
- There is no real risk of persecution or serious harm for the asylum seeker

57 *SZTOG v MIBP* [2015] FCCA 180 (Judge Manousaridis, 30 January 2015) at [32] and *SZTQN v MIBP* [2015] FCCA 188 (Judge Manousaridis, 30 January 2015) at [25].

58 Bundesgesetz über die Gewährung von Asyl StF: BGBl. I Nr. 100/2005

59 ECRE/AIDA, 'Country Report: Austria. 2016 Update' (February 2017) <http://www.asylumineurope.org/reports/country/austria>

- The asylum seeker is entitled to reside in that country during RSD and enjoys protection against deportation to the country of origin.

There is no list of safe third countries and the concept is applied rarely.

There is a presumption that countries which have ratified the Refugee Convention and established by law an asylum procedure[60] incorporating the principles of that Convention, the ECHR and its Protocols Nos 6, 11 and 13 will meet the safe third country criteria.

The conditions for the application of the safe third country concept have been clarified by the Constitutional and Administrative High Court[61]: mere transit or stay in a third country is not sufficient to apply the safe third country concept.

Belgium

The Aliens Act[62] does not refer to the safe third country concept as a relevant factor affecting the procedure *per se*. However, under Article 74/6(1bis)(2) and (3), an applicant who has resided for over 3 months in one or more third countries, where they has no well-founded fear of persecution or faces no real risk of serious harm, may be detained and removed for that reason.

Bulgaria

A safe third country concept is defined in the Law on Asylum and Refugees, as amended in October and December 2015[63], as a country other than the country of origin where the alien who has applied for international protection has resided and:

> (a) There are no grounds for the alien to fear for his/her life or freedom due to race, religion, nationality, belonging to a particular social group or political opinions or belief;
>
> (b) The alien is protected against the refoulement to the territory of a country where there are prerequisites for persecution and risk to his/her rights;
>
> (c) The alien is not at risk persecution or serious harm, such as torture, inhuman or degrading treatment or punishment;
>
> (d) The alien has the opportunity to request refugee status and, when such status is granted, to benefit from protection as a refugee.
>
> (e) There are sufficient reasons to believe that aliens will be allowed access to the territory of such state.

The safe third country concept is a ground for inadmissibility. In practice, refusals based on the safe third country concept relate to countries where the applicant lived

60 ECRE/AIDA, 'Country Report: Austria. 2016 Update' (February 2017) <http://www.asylumineurope.org/reports/country/austria>

61 VwGH, Decision 98/01/0284, 11 November 1998; VfGH, Decision U 5/08, 8 October 2008

62 Law of 15 December 1980 regarding the entry, residence, settlement and removal of aliens (in force as of 1 June 2016) (Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers', Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen)

63 Закон за убежището и бежанците № 101/2015 11/12/2015

or resided for prolonged period of time before departure. Transit or short stay in countries are not considered as sufficient for safe third countries.[64]

Croatia

The Law on International and Temporary Protection 70/2015[65] (Article 45) defines safe third country as a country where the applicant is safe from persecution or the risk of suffering serious harm and where they enjoys the benefits of *non-refoulement*, and the possibility exists of access to an effective procedure of being granted protection, pursuant to the 1951 Convention.

The question whether a safe third country is available is fact-specific in each application. Decision makers will assess whether any country to which an appellant is to be returned meets the above conditions and whether a connection exists between that country and the applicant, on the basis of which it may reasonably be expected that they could request international protection there, taking into account all the facts and circumstances of his or her application.

The applicant can challenge the application of the concept in view of the specific characteristics of his or her personal circumstances. If the safe third country refuses to accept the foreigner, the refugee status determination will be undertaken in Croatia.

Cyprus

The definition of safe third country is found in Article 12B of the Refugee Law 2000 (6(I)/2000)[66] in force since 2016. It mirrors the provision of Article 38 of the Recast Asylum Procedures Directive. This may be used as a ground for inadmissibility and a ground for using the accelerated procedure. It is not used in practice.[67]

Denmark

Denmark has a list of safe third countries that is regularly updated. An applicant can be removed to a STC without consideration of his or her application for asylum if they has travelled to Denmark directly from one of these countries. If, in an individual case, there are reasons to believe that removal to a third country is not safe, the Danish Immigration Service will examine the application on its merits.[68]

64 Ibid, ECRE Bulgaria 2016

65 Zakon o međunarodnoj i privremenoj zaštiti NN 70/2015

66 Ο περί Προσφύγων Νόμος του 2000 (6(I)/2000) *Τροπ:* Ο περί Προσφύγων (Τροποποιητικός) Νόμος του 2016 (Αρ. 2) 106(I)/2016

67 ECRE Cyprus 43

68 ICG

Estonia

In 2016 Estonia also started to apply the safe third country concept for rejecting asylum applications lodged by the individuals who transited Russia. Several such decisions were reviewed by Estonian courts, including the Tallinn Circuit Court (appellate instance), which concluded that the Russian Federation cannot be considered a STC. With reference to different sources, Estonian courts concluded that there are serious obstacles in the Russian Federation with effective access to its asylum procedure as well as substandard protection of rights of asylum seekers, including respect of the principle of *non-refoulement* (415).[69]

Finland: the concept is not available either in law or in practice

France: the concept is not available either in law or in practice

Germany

The safe third country concept is found in Section 26a of the Asylum Act and includes:

- all Member States of the European Union
- other countries where the application of the 1951 Refugee Convention and of the European Convention on Human Rights (ECHR) is "ensured".

Currently, the list of safe third countries includes Norway and Switzerland.

Today the safe third country concept has its main impact at land borders. Border police must refuse entry if a foreigner, who has entered from a safe third country, requests asylum at the border. Furthermore, border police must immediately initiate removal to a safe third country if an asylum seeker is apprehended at the border without the necessary documents. Asylum applications may not be accepted or referred to the responsible authority by the border police if entry to the territory is denied, unless it turns out that Germany is responsible for processing the asylum procedure based on EU law, e.g. because Germany has issued a visa.[70]

Greece

The "safe third country" concept is a ground for inadmissibility. However, there is no list of safe third countries in Greece. The concept is only applied in the context of the Fast-Track Border Procedure under Article 60(4) of the Asylum Law 4375/2016 on the islands for those arrived after 20 March 2016 and subject to the EU-Turkey statement.[71] According to Article 56(1) of the Asylum Law 4375/2016, a country is to be considered as a safe third country for a specific applicant when all the following criteria are fulfilled:

> (a) The applicant's life and liberty are not threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion;

69 EASO, 101

70 ECRE Germany, 48

71 ECRE Greece, 77

(b) This country respects the principle of *non-refoulement*, in accordance with the Refugee Convention'

(c) The applicant faces no risk of suffering serious harm according to Article 15 PD 141/2013, transposing the Recast Qualification Directive;

(d) The country prohibits the removal of an applicant to a country where they risk being subject to torture or cruel, inhuman or degrading treatment or punishment, as defined in international law;

(e) The possibility to apply for refugee status exists and, if the applicant is recognised as a refugee, to receive protection in accordance with the Refugee Convention; and

(f) The applicant has a connection with that country, under which it would be reasonable for the applicant to go and live there.

Hungary

The "safe third country" concept may only be applied as an inadmissibility ground where the applicant (a) stayed or (b) travelled there and had the opportunity to request effective protection; (c) has relatives there and may enter the territory of the country; or (d) has been requested for extradition by a safe third country. In practice transit or stay is a sufficient connection, even in cases where a person was smuggled through and did not know the country at all. Section 51(2)(e) provides that an application is inadmissible where the applicant may be returned to a safe third country. Once an inadmissibility decision is issued, an applicant has only 3 days to challenge the application of the STN concept (Section 51(11) of the Asylum Act). Where the safe third country fails to take back the applicant, the refugee authority shall withdraw its decision and continue the procedure.

According to Section 2(i) of the Asylum Act 2007, safe third countries are designated on the CEAS basis as set out above for Greece. The Government includes Turkey on the national list of safe third countries, applying Government Decree (No. 191/2015. (VII. 21.)).[72]

In July 2015, Hungary adopted a National List of Safe third Countries.[73] The list includes the following countries: EU Member States, EU candidate countries, Member States of the European Economic Area, US States that do not have the death penalty, Switzerland, Turkey, Bosnia-Herzegovina, Kosovo, Serbia, Canada, Australia, and New Zealand.

Ireland

No country has been designated as a safe third country to date.
The Minister for Justice and Equality may, by order after consultation with the Minister for Foreign Affairs and Trade, designate a country with which an agreement is in place as a safe third country.

72 EMN 2016, 4

73 Government Decree 191/2015 (VII. 21.) on the national list of safe countries of origin and safe third countries.

An asylum applicant may be transferred to a safe third country to have his or her asylum application considered if they has reasonable connections with that country. 74

Italy: the safe third country concept is not available either in law or in practice.

Latvia: has the concept in Law, but does not apply in practice and there is no list of safe third counties available.

Lithuania: has the concept in Law, but does not apply in practice and there is no list of safe third coutries available.

Luxembourg: Luxembourg's current list of safe countries of origin now comprises: the Republic of Albania, Republic of Bosnia and Herzegovina, Republic of Cape Verde, Republic of Croatia, Former Yugoslav Republic of Macedonia, Republic of Montenegro, Republic of Senegal, Republic of Kosovo and the Republic of Serbia.

Malta
Under Refugees Act 2001 (Article 2), a safe third country means a country of which the applicant is not a national or citizen and on the Recast CEAS grounds. The concept does not apply in practice and there is no list of safe third counties available.

Netherlands

The Netherlands' list of safe countries of origin now includes Ghana, India, Jamaica, Morocco, Mongolia and Senegal (February 2016); Algeria, Georgia, the Ukraine, Tunisia (October 2016); and Togo (December 2016); and Brazil and Trinidad and Tobago (April 2017). Some countries are designated as generally safe except for certain groups of people, for example LGBT in Algeria, Tunisia, Brazil and Trinidad and Tobago. Other countries on the safe list include Albania, Montenegro, Serbia, the former Yugoslav Republic of Macedonia, Kosovo, Bosnia and Herzegovina.

An asylum request can be declared inadmissible where a third country is regarded a safe country for the asylum seeker (Article 30a, first paragraph, under c, Aliens Act. There is no list of safe third countries. The concept is applied on a case by case basis.

Article 3.106a, first paragraph, of the Aliens Decree stipulates the criteria for a country to be considered a safe third country. This is an implementation of Article 38 of the Asylum Procedures Directive. Article 3.37e of the Aliens Regulation stipulates that the Secretary of State's assessment, whether a third country can be considered to be safe, should be based on a number of sources of information, specifically from EASO, UNHCR, the Council of Europe and other relevant/authoritative/reputable organizations.

On the basis of paragraph 2 of Article 3.106a of the Aliens Decree a connection (band) with the third country is required on the basis of which it would be reasonable for the asylum seeker to go to that country. This has been elaborated on in Article 3.37e, third

74 ICG 240

paragraph, of the Aliens Regulations and in paragraph C2/6.3 Aliens Act Implementation Guidelines.

According to the IND[75] such a connection exists where:

- the husband/wife or partner of the asylum seeker has the nationality of the third country;
- first or direct family members reside in the third country, with whom the asylum seeker is still in contact, or
- the asylum seeker has stayed in the third country.

There is no recent jurisprudence from the Council of State on the concept of safe third country. We are not aware of cases in which mere transit through a third country was considered to be sufficient to declare the asylum request inadmissible on the basis of the concept of safe third country.[76]

Norway: In November 2015, Norway introduced a safe third country concept as a ground for inadmissibility. The list of safe third countries includes Russia and Turkey.[77]

Poland: the safe third country concept is not available either in law or in practice.[78]

Serbia considers the following as being safe third countries: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the United Kingdom, Bosnia and Herzegovina, Croatia, FYROM, Montenegro, Norway, Iceland, Liechtenstein, Switzerland, Monaco, Australia, New Zealand, Japan, Canada, the United States of America and Turkey.

In practice, a safe third country concept applies automatically to any asylum seeker who arrives from a designated safe country, even if they were merely transiting through it prior to arriving in Serbia. Given that Serbia is surrounded by safe third countries, except Albania, the majority of applications are dismissed on this basis. In 2016, the Asylum Office rendered 53 decisions dismissing the asylum applications, in 95% of these cases the safe third country concept was applied. The reasoning in these decisions relied on the Decision Determining the List of Safe Countries of Origin and Safe Third Countries.[79]

Spain

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75 C2/6.3 Aliens Act Implementation Guidelines

76 ECRE, 'Country Report 2016: Netherlands', 45

77 Eirik Christophersen, 'What is a safe third country?' (March 2016, Norwegian Refugee Council) https://www.nrc.no/news/2016/march/what-is-a-safe-third-country/

78 ECRE Poland 40

79 ECRE Country Report Serbia 2016, 28-30

The safe third country concept is available in law, with reference to Article 27 of the 2005 Asylum Procedures Directive and where appropriate with an EU list of safe third countries, as a country where the applicant does not face persecution or serious harm, has the possibility to seek recognition as a refugee and, if recognised, enjoy protection in accordance with the Refugee Convention. The law also requires the existence of links in the form of a relationship with the safe third country, which make it reasonable for the applicant to be returned to that country.

80

The concept is not applied in practice.

Serbia

A safe third country is defined in Article 2 of the Asylum Act 2007 as a country from a list established by the Government which observes international principles pertaining to the protection of refugees contained in the Refugee Convention and Protocol, and

- where an asylum seeker had resided, or through which he/she had passed, immediately before he/she arrived on the territory of the Republic of Serbia;
- where he/she had an opportunity to submit an asylum application; or
- where he/she would not be subjected to persecution, torture, inhumane or degrading treatment, or sent back to a country where his/her life, safety or freedom would be threatened.

Sweden

The safe third country concept is not a ground for inadmissibility in Sweden as there is no admissibility procedure *stricto sensu*. There is no list of safe third countries. However, following the large influx of arrivals in 2015, the Swedish government has publicly announced that it is positive to the development of common standards within the EU to this regard.

Albeit without defining a safe third country concept, the 2010 amendment to Chapter 5, Section 1b(3) of the Aliens Act 2005 provides that an application may be dismissed if the applicant can be returned to a country where they:

- Does not risk being subjected to persecution;
- Does not risk suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment;
- Is protected against being sent (*refoulement*) to a country where they do not have equivalent protection,
- Has the opportunity to apply for protection as a refugee; and
- Has such ties to the country concerned that it is reasonable for him or her to travel there.

However, in such cases, an application may not be dismissed if:

80 ECRE Spain 35

- The applicant has a spouse, a child or a parent who is resident in Sweden and the applicant does not have equally close family ties to the country to which a refusal-of-entry or expulsion order may be enforced; or
- The applicant, because of a previous extended stay in Sweden with a residence permit or right of residence, has acquired special ties to this country and lacks such ties or ties through relatives to the country to which a refusal-of-entry or expulsion order may be enforced.

Neither case law nor the *travaux préparatoires* to the 2010 amendment of the Aliens Act which introduced the provision clarify the requisite level of protection available to the individual applicant in the third country, to determine whether the person should have access to Refugee Convention status or could be granted a different form of protection.[81]

Switzerland

A safe third country is defined in Article 5(1) of the Asylum Act and should meet the following requirements:

- Ratification of and compliance with the ECHR, the Refugee Convention, the Convention against Torture and the UN Covenant on Civil and Political Rights.
- Political stability which guarantees compliance with the mentioned legal standards.
- Compliance with the principle of a state governed by the rule of law.

According to the Asylum Appeals Commission, what is relevant is the possibility to find actual protection in the third country. This is not the case if there is no access to the asylum procedure or if the third country only applies the Refugee Convention to European Refugees.[82] According to the materials of the Federal Council in preparation of the mentioned provision, it is also necessary that the third country accepts the readmission of the person in question.[83]

This list includes all EU and EFTA member states.[84]

Turkey

For a country to be considered a "safe third country", the following conditions must apply (Article 74 of the Law for International Protection):[85]

81 ECRE Sweden 39

82 Asylum Appeals Commission, Decision EMARK 2000/10, 2001/14

83 Federal Council, Bundesblatt (Federal Gazette) 2002, 6884.

84 ECRE Country Report Switzerland 2016, 49

85 The wording resembles the EU definition in Article 38 Recast Asylum Procedures Directive.

(a) The lives and freedoms of persons are not in danger on the basis of race, religion, nationality, membership to a particular social group or political opinion;
(b) The principle of *non-refoulement* of persons to countries, in which they will be subject to torture, inhuman or degrading treatment or punishment, is implemented;
(c) The applicant has an opportunity to apply for refugee status in the country, and in case they is granted refugee status by the country authorities, they has the possibility of obtaining protection in compliance with the 1951 Refugee Convention;
(ç) The applicant does not incur any risk of being subjected to serious harm."
For a country to be considered a "safe third country" for an applicant, an individual evaluation must be carried out, and due consideration must be given to "whether the existing links between the applicant and the third country are of a nature that would make the applicant's return to that country reasonable."37

Article 4.4 of the Circular of International Protection provides additional interpretative guidance as to the interpretation of the "reasonable link" criterion, by requiring at least one of the following conditions to apply:
(a) The applicant has family members already established in the third country concerned;
(b) The applicant has previously lived in the third country concerned for purposes such as work, education, long-term settlement;
(c) The applicant has firm cultural links to the country concerned as demonstrated for example by his or her ability to speak the language of the country at a good level;
(ç) The applicant has previously been in the county concerned for long term stay purposes as opposed to merely for the purpose of transit.

Currently, there is no list of safe third countries, and individual assessments are carried out in each case.[86]

United Kingdom

The UK maintains both a safe countries of origin list, and the concept of a safe third country. The safe countries of origin designated by the UK are the Republic of Albania, Jamaica, Macedonia, the Republic of Moldova, Bolivia, Brazil, Ecuador, South Africa, Ukraine, India, Mongolia, Bosnia-Herzegovina, Mauritius, Montenegro, Peru, Serbia, and for men only, Ghana, Nigeria, Gambia, Kenya, Liberia, Malawi, Mali and Sierra Leone. Where the Secretary of State that a person originates from one of those countries, an applicant must show an individual risk in order to succeed in their claim.

The list of safe third countries includes all EU Member states (except Croatia), Norway, Iceland and Switzerland.[87] There is a power to add further countries by order of the Secretary of State.

EU and Dublin III states are treated as safe countries of origin, unless the claim is for asylum based on a risk in that country, because each of those countries has undertaken

86 ECRE Country Report Turkey 2016, 65-66

87 Asylum and Immigration (Treatment of Claimants) Act 2004 (AITOCA)

an obligation to provide procedures and conditions of reception which meet the international and European norms for protection under the Refugee Convention and the CEAS.

Safe third country removals take place on an individual basis to other countries. Home Office November policy also provides for safe third country cases to be dealt with on a case by case basis beyond the Dublin countries, and the United States, Canada and Switzerland are examples of such designations.

A safe third country assessment is specific to the individual and such a country is defined in the Immigration Rules (Para 345C) as one where:

> (1) the applicant's life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;
>
> (2) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention;
>
> (3) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country;
>
> (4) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country;
>
> (5) there is a sufficient degree of connection between the person seeking asylum and that country on the basis of which it would be reasonable for them to go there; and
>
> (6) the applicant will be admitted to that country.

As regards the required level of protection available in a third country, it must be Refugee convention compliant. In *Ibrahimi and Abasi* in 2016, Mr Justice Green, sitting in the High Court assessed the application of the Refugee Convention in Turkey, concluding that Turkey should be considered to be an unsafe country *inter alia* since it retains discretion to provide asylum seekers with 'limited residence but with a status short of refugee status'.[88]

The UK's Immigration Rules set out a number of non-exhaustive criteria for establishing a connection between the individual applicant and a safe third country.[89] These include:

- Time spent in the country;
- Cultural or ethnic connections;
- Ability to speak one of the country's main languages;

88 ECRE UK 52

89 Para 345D, Immigration Rules, available at: http://bit.ly/2krAPs1

- Relations with persons in that country, who may be nationals of that country, habitually resident non-nationals, or family members seeking protection there; and
- Family lineage, regardless of whether family is present in that country.

Home Office policy requires the Home Office to be satisfied that there is clear evidence of the applicant's admissibility to the third country.

Length of leave granted for asylum and subsidiary protection

Africa Chapter

The South African Department of Home Affairs issues refugee status permits under section 24 of the Refugees Act 1998 (as amended) for periods of 4 years, renewable at the end of the period, but often only after another refugee status determination process to determine the need for a further period of protection. The Act provides for refugees to be able to apply for a permanent right of residence after 5 years, but very few applicants are granted refugee status, which requires a certificate from the Standing Committee for Refugee Affairs (SCRA) that the person will need refugee protection 'indefinitely'. In many cases, the refusal of SCRA certification is accompanied by notice of intention to withdraw refugee status.

A White Paper on International Migration90 is set to bring sweeping changes to South Africa's refugee system, including border processing centres with detention facilities, and the removal of any opportunity to apply for a permanent right of residence, closing the route to naturalisation.

Americas Chapter

There have been no changes to the length of leave granted to recognised refugees in America. Both United States law and policy grant indefinite leave to remain to recognised refugees. One year after being granted asylum, a refugee may apply for a US Green Card, allowing them to work. A refugee holding a Green Card may apply for United States citizenship 4 years after receiving a Green Card (so at the earliest, 5 years after refugee status is granted, but probably longer).

In addition, the United States may designate a country with Temporary Protected Status (TPS)91, in which case migrants from those countries may live, and if permitted, may work in the United States for the time being. TPS is precarious: it was introduced in the Immigration Act 1990 and is used to protect migrants from countries experiencing ongoing armed conflict, environmental disaster or another extraordinary and temporary condition. TPS protection is for a specific period, which may be extended or terminated as the end of the period approaches.

90 *White Paper on International Migration for South Africa*, July 2017 (http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf)

91 Catholic Legal Immigration Network Inc: 'Temporary Protection Status Terminations: what you should know" (https://cliniclegal.org/resources/temporary-protected-status-terminations-what-you-should-know)

The Department of Homeland Security gives at least 60 days' notice of intention to terminate a country's TPS designation. The countries currently designated92 for TPS by the United States are El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. On November 20 2017, the Acting Secretary of Homeland Security, Elaine Duke, gave 18 months' notice of intention to terminate TPS for Haiti (22 July 2019), and on 6 November 2017, 12 months' notice of termination for Nicaragua (5 January 2019), first designated in 1999. TPS for Honduras was extended to July 5 2018, but was likely to be terminated on reasonable notice after that. A DHS press release on 6 November 201793 stated that:

> "Recognizing the difficulty facing citizens of Nicaragua – and potentially citizens of other countries – who have received TPS designation for close to two decades, Acting Secretary Duke calls on Congress to enact a permanent solution for this inherently temporary program.
>
> Nicaraguans and Hondurans with TPS will be required to reapply for Employment Authorization Documents in order to legally work in the United States until the end of the respective termination or extension periods."

Asia-Pacific Chapter

In Australia, the protection granted varies depending on how the migrant reaches Australia. Refugees who arrive lawfully in Australia can apply for and be granted a permanent protection visa, which then gives them all of the rights of a permanent resident.

Australia's scheme changed on 16 December 2014. Thereafter, migrants who arrive as unlawful maritime arrivals (UMAs), or who are not immigration cleared at a port, cannot apply for a permanent protection visa. UMAs or non-cleared port migrants have two options: a Skilled Humanitarian Entry Visa (SHEV) or a temporary protection visa (TPV). Applicants must elect whether to apply for a SHEV or a TPV.

- A SHEV visa is a temporary protection visa lasting 3 years. It carries the possibility that an employer may then sponsor the holder for a permanent visa.
- A TPV also lasts for 3 years and can be renewed. However, the legislative intent is that holders of TPVs are barred from ever gaining a permanent visa, just a rolling series of TPVs.

Following the designation of Nauru and Papua New Guinea by Australia as regional processing countries, backed by a Memorandum of Understanding, Nauru grants 20-year visas to those whom it recognises as refugees. Papua New Guinea grants annually renewable refugee visas, with the right to apply for citizenship after 8 years.

On 26 September 2014, Australia signed a Memorandum of Understanding with Cambodia, with settlement services (which appear to be a form of subsidiary protection) for recognised refugees in Cambodia, followed by assistance in voluntary repatriation of the refugees to their country of origin or another country where they have the right to enter or reside, to take place within 12 months of settlement in Cambodia. Ordinary refugees in Cambodia need to hold a resident's card for 7 years before becoming eligible for citizenship, but Refugee Action Coalition has recorded

92 USCIS Temporary Protected Status (https://www.uscis.gov/humanitarian/temporary-protected-status), 25 November 2017

93 https://www.dhs.gov/news/2017/11/06/acting-secretary-elaine-duke-announcement-temporary-protected-status-nicaragua-and

that no recognised refugees within Cambodia have been given either resident's cards or citizenship of Cambodia.

Europe

Article 24 of the Recast Refugee Qualification Directive 2013 requires that EU states give beneficiaries of refugee status a residence permit valid for at least 3 years, renewable, and that those granted subsidiary protection should be given a renewable residence permit valid for at least 1 year, and on renewal, 2 years.

Austria, Belgium, Denmark, Hungary and Sweden reduced their previous leave in line with Article 24, whereas previously, they had granted unlimited or long-term residence permits.

Austria reduced its unlimited residence permit to 3 years, and from 2017, will review the country situation based on the COI Unit's guidance on the main countries of origin, and if refugee status is still appropriate (because the situation has not improved, or not much), then an unlimited residence permit is granted, without the need for any further application by the migrant. If it appears that the refugee could return safely because of a change of country conditions, cessation procedures are begun when the 3-year permit expires. Subsidiary protection is in line with Regulation 24.

Belgium now gives recognised refugees a 5-year temporary residence permit. At the end of that period, unless the permit has been withdrawn, refugees will receive a residence permit of unlimited duration.

Bulgaria continues to grant indefinite duration status for both refugee and subsidiary protection. Identity documents issued pursuant to the grant of status are for 5 years for refugees, and 3 years for subsidiary protection.

Croatia gives a 5-year residence permit to recognised refugees and 3 years for subsidiary protection. The protection granted is lost, in either case, if the protected person moves out of the Republic of Croatia, or lives continuously abroad, for more than 6 months.

Cyprus grants a residence permit for 3 years to recognised refugees, renewable for 3 year periods only. There is no possibility of settlement or of longer periods of leave. For subsidiary protection, the initial period is 1 year, then renewable for 2-year periods for as long as the protected status lasts.

In **Denmark**, where in 2015 about 90,000 migrants had arrived, or passed through the country, the government and coalition parties proposed a range of measures to stem that flow. Residence permits were reduced from 5 years to 2 years for refugees, and for subsidiary protection, from 5 years to 1 year, with possible extensions of 2 years each. Family reunion was narrowed, and refugees with assets in excess of DKR 10,000 had their excess assets seized, unless of sentimental value (such as engagement or wedding rings). ,

Estonia has not yet provided information on this topic

Finland grants either fixed-term or permanent residence permits. Pursuant to section 53 of the Aliens Act, the normal period for an initial residence permit is 1 year renewable (but not longer than the migrant's travel document). However, recognised refugees receive a fixed-term continuous residence permit for 4 years, and beneficiaries of subsidiary protection for 1 year, in each case renewable if the

underlying circumstances are unchanged. Foreign nationals who have been lawfully in Finland for 4 years are eligible for a permanent residence permit, if the grounds for issuing the continuous residence permit remain valid, and there are no obstacles under the Aliens Act to the issue of a permanent permit.

France grants subsidiary protection in line with Article 24, but for recognised refugees, the permit granted to them and their family members is 10 years.

Germany grants residence permits in line with Article 24, pursuant to section 26(1) of the Residence Act. Renewal is generally on the same basis, provided that the conditions of grant continue to exist.

Greece grants 3 years to refugees and 2 years for subsidiary protection.

In **Hungary**, following a government decree in April 2016, the leave granted for refugee status was reduced in January 2016 from 10 years to 6 years renewable. For subsidiary protection, where previously 5 years had been given, that was also reduced to 3 years. Beneficiaries of both types of international protection receive a Hungarian ID, but their protection status will be reviewed every 3 years.

Ireland gives refugees a 1-year residence card initially, renewable for 3 years. Refugees may apply to be naturalised 3 years from their asylum application date. Subsidiary protection is normally 3 years, renewable for the same period. Beneficiaries of subsidiary protection may apply for naturalsation after 5 years from the date they were granted subsidiary protection.

Italy grants refugee and subsidiary protection permits for 5 years renewable. Italy also has a category of humanitarian protection permits, which last for

From June 2016, **Sweden** reduced its previously generous grants of refugee status leave to a 3-year temporary protection visa, and subsidiary protection to just 13 months. Family reunion was restricted to parents and minor children, who could show that they had lived together before reaching Sweden. 2 years renewable

We have not yet received any information on the length of leave granted by **Latvia, Lithuania** or **Luxembourg.**

Malta grants leave in line with Article 24, with both refugee and subsidiary protection permits renewable on request.

The Netherlands grants 5 years temporary asylum status to both recognised refugees and beneficiaries of subsidiary protection, with a residence permit of 5 years.

Norway grants recognised refugees a 3-year renewable provisional residence permit, and may apply for a permanent residence permit after 5 years94, subject to integration and financial criteria. The position on subsidiary protection is unclear and we seek clarification.

Poland continues to grant an unlimited period of refugee status, backed up with a 3-year renewable residence permit. Subsidiary and/or humanitarian protection is also granted for an unlimited period, and entitles the person to a 2-year renewable residence card.

94 https://www.regjeringen.no/en/aktuelt/regjeringen---nodvendige-innstramninger/id2481689/

Serbia grants 5-year refugee status, and 1 year for subsidiary protection. Recognised refugees do not need a separate residence document as their right to remain derives from their refugee status.

Spain grants 5 year residence permits to recognised refugees and beneficiaries of subsidiary protection, both renewable. Spain has a further category of humanitarian protection, for which a 1-year renewable permit is granted.

Sweden from July 2016 reduced the length of its previously indefinite residence for those in need of international protection or humanitarian assistance. For a period of 3 years, until 19 July 2016, recognised refugees receive a 3-year temporary residence permit, with the right to family reunification only if an application is made within 3 months of the refugee receiving their permit. Subsidiary protection is reduced to 13 months, renewable for 2 years if the protection grounds persist, with no right of family reunion. Humanitarian protection also lasts for 13 months, renewable for a further 13 months.

Switzerland grants recognised refugees a 1-year residence permit, the extension of which is the responsibility of the canton where the refugee is then domiciled. Those receiving subsidiary protection are granted temporary admission for 1 year, which is considered as a substitute for a deportation order which cannot yet be carried out due to legal or humanitarian obstacles.

Turkey has a dual asylum structure. In 2013, it adopted a comprehensive EU-inspired Law on Foreigners and International Protection, with the status of refugee, conditional refugee, and subsidiary protection. Only refugees from European states are eligible for full refugee status; conditional refugees from non-European states obtain protection without family reunification and without the possibility of settlement. Subsidiary protection beneficiaries also receive lesser rights but do have family reunion options.

In addition, under the Temporary Protection Regulation of 22 October 2014, refugees from Syria receive temporary protection95, legal stay, protection from refoulement and access to a set of basic rights and services, including free healthcare. They are then debarred from applying for any other form of international protection within Turkey.

It is unclear how long the status granted may be, or whether this limited regime has survived the recent political turmoil in Turkey.

United Kingdom grants 5 years' leave to remain to both refugees and beneficiaries of subsidiary protection (confusingly called humanitarian protection in UK law). At the end of this period, the person may make an application for further leave to remain, either by way of indefinite leave, or additional periods of limited leave. For those who do not qualify either for refugee or humanitarian protection, but cannot be removed because to do so would breach Article 3 of the European Convention on Human Rights, restricted leave may be granted, with no possibility of accruing a right to settle in the UK thereafter.

Future Working Party activity

95 http://www.asylumineurope.org/reports/country/turkey/introduction-asylum-context-turkey

We have arranged the information which we have been able to source, with reference to the IARLJ Chapter structure. Correction and further elucidation will be very warmly received.

In any case, more information is needed from each Chapter and region, particularly by reference to relevant case law and statutory changes. New members of the Working Party are sought who would be willing to act as Chapter rapporteurs. If anyone is interested, please let Judith Gleeson or Jacek Chlebny know during the Conference.

Our intention, with that further assistance, is that this report may in due course be suitable for publication on the IARLJ website, hopefully during 2018.

Evidence and commentary received by the Working Party [November 2017]

Africa

Jacob van Garderen, Summary of recent developments relating to the application of fast-track, safe third country and accelerated procedures in the south, west and east Africa, received by email 22 November 2017

America

Lori Sciabbala and Jennifer Higgins (USCIS RAIO) – Commentary on overview of expedited removal process, credible fear process, and safe third country parameters.

The Hon. Dorothy Harbeck, National Association of Immigratoin Judges, Eastern Region Vice-President and **Alice Farmer, Leslie Jenkins and Colleen Cowgill** of the United Nations High Commissioner for Refugees (UNHCR), US Protection Unit in Washington, DC, email commentary received 22 November 2017.

Professor Lenni B Benson, Professor of Law; Director Safe Passage Project Clinic, New York Law School, for a broad range of materials and press reports provided by email in November 2017

Asia-Pacific

Allan Mackey and Maya Bozovik, Asian Perspectives and realities in asylum protection and associated human rights – can the IARLJ assist? [presented at the 11th World Conference of the IARLJ, Athens 2017]

Australia

Sean Baker and Rolf Driver – commentary received by email 8 November 2017

Europe

Khalida Azhigulova – Asylum procedures in Europe (summary of materials)

IGC - Asylum Procedures, Report on Policies and Practices in IGC Participating States, 2015

France – Laurent Dufour, CEREDOC: Paper in French on the main jurisprudence of the Conseil d'État and Cour Nationale des Droits d'Asile (CNDA) in 2016 and 2017, commentary from CEREDOC's information bulletins.