



Lawyers for Human Rights Legal Brief on the “First Safe Country” Principle

Introduction

The ‘first safe country’ principle affects the admission and recognition of asylum seekers. This brief considers the history of the principle and its impact on international and domestic law.

The ‘First Safe Country’ Principle

An asylum seeker flees a country where he or she faces persecution and ultimately arrives at a country where he/she hopes to receive protection. However, the route taken between the country of persecution and the country offering protection might lead through one or more countries. The ‘first safe country’ principle provides that once a person seeking asylum arrives in a safe country after fleeing persecution, that country is responsible for assessing the asylum claim. Consequently, an asylum seeker is expected to apply for asylum in the first safe country where they have an opportunity to apply for asylum. If they first apply for asylum in a subsequent country, that country can return them to the first country in order to adjudicate their asylum claim there.¹ The European Union encompasses this concept in the safe third party principle. Under this principle, an asylum seeker can be refused asylum and sent to a safe third country if the asylum seeker can be afforded protection in that safe third country. The safe third country rule differs from the ‘first safe country’ principle because an asylum seeker’s claim need not be lodged in the first safe country which they entered en route to their final destination. Various countries have adopted safe third country agreements with one another. These agreements provide that once a person fleeing persecution crosses into a country that is party

¹ J Hathaway, *The rights of refugees under international law* 2005

to these agreements, that party will be responsible for assessing refugee status.² The first country which is party to a safe third party agreement is not always the first safe country a refugee enters but it will bear the responsibility of assessing that refugee's status.

The Dublin regulation³ dictates a more complex method of assessment regarding which country carries the responsibility of assessing an asylum claim. This involves criteria in addition to first country of entry including: the principle of family unity, the issuance of residence permits or visas, and illegal entry or stay in a member state. Therefore, under the regulation, the country responsible for assessing a claim will not always be the first safe country.

The application of the rule may result in the denial of meritorious asylum claims because an individual passed through a number of countries en route to his or her final destination. Ultimately this practice risks subjecting refugees to whatever persecution they sought to avoid. Potentially, it could establish a legal framework whereby no country is willing to offer them protection as refugees.

History

Since the middle of the 1980s, the attitude towards asylum seekers by modern industrialized countries in the world has shifted. A pronounced increase in the number of refugees have poured out of war torn countries and failed States, particularly from Africa and Eastern Europe. With the current Arab revolution creating a mass exodus of people from Arab nations like Egypt and Libya, this deluge of refugees is likely to swell.

This demographic trend creates a "Refugee problem" for industrialized countries whose welfare systems struggle to accommodate the increasing number of refugees. These issues intersected when the EU opened its internal borders. In turn, this spawned a need for a holistic and harmonious approach to external border control across the EU. European Union nations

² *ibid*

³ Council Regulation (EC) No 343/2003 of 18 February 2003

entered into safe third party agreements in an attempt to manage the influx of refugees and harmonize immigration policies.

Application of the principle

Application of the “ Safe Third Country” Principle in the US-Canada context

The United States of America (US) and Canada have a safe third country agreement which requires asylum seekers to apply for asylum in the first of the two countries that they enter. Under the agreement, Canada can reject refugees if they first arrived in America en route to Canada. US and International Human Rights Organisations such as Amnesty International⁴ have criticized this agreement because the US is not considered a safe country for all refugees. Reports indicate that U.S. authorities have discriminated against refugees including incidence of human trafficking, deportation, internment and, in extreme cases, extraordinary rendition in the War against terror.⁶ The Inter-American Commission held that Canada violated the American Declaration on Human Rights by summarily returning refugee claimants to the US and failing to give individualized determination to the refugee claimants.⁷ The Commission held that governments ‘must conduct an individualized assessment of a refugee claimant’s case, taking into account all the known facts of the claim in light of the third country’s refugee laws’⁸ before removing an asylum seeker to a third country. Therefore, the implementation of the safe third country agreement could be unlawful.

⁴ A Marklin, The Values of the Canada US safe third party agreement, 2003

⁶ Andrew Moore Unsafe in America: Review of the US Canada safe third country agreement 2007 Santa Clare law review

⁷ *John Doe et al. v. Canada (Case 12.586)*

⁸ *John Doe et al. v. Canada (Case 12.586)*

Application of the “Safe Third Country” Principle in the European Union and Australia

The European Union (EU) and Australia also apply ‘the safe third country’ a principle as part of their asylum process.⁹ The Dublin II regulation¹⁰ is binding on all EU States. Denmark, who consented to its application, regulates the procedure for the examination of applications for asylum.¹¹ The regulation establishes a hierarchy of criteria for identifying the EU Member State responsible for processing an asylum claim.¹² This usually is the State through which the asylum seeker first entered the EU. It allows States to send an applicant for asylum to the state of first entry.¹³ It also allows for the return of an asylum seeker to a non-EU state if that state is considered safe. However, Article 3 of the regulation also allows a State to examine an application for asylum, ‘even if such examination is not its responsibility under the criteria laid down in the Regulation’.¹⁴

In contrast, the Australian safe third country system is much stricter than the European system. Australia has not entered a safe third country agreement with any other country. Therefore Australian Refugee policy derives solely from Australian legislation and case law¹⁵. Section 36(3) of the Border Protection Legislation Amendment Act 1999¹⁶ states that Australia has no obligation to protect an asylum-seeker who has ‘not taken *all possible steps* to avail himself of a right to enter and reside in...any country apart from Australia’¹⁷. This statute authorizes Australia to deport an asylum seeker back to any country that he traveled through. Then, the asylum seeker may be sent to any country where he might have a right to dual nationality regardless of whether that country is ‘safe’. A recent High Court decision in Australia has stated that Australia still owes asylum seekers protection in terms international law and sending them to an unsafe country would be a breach of its obligations.¹⁸

⁹ Sandra Lavenex Safe Third Countries 1999

¹⁰ The Dublin Regulation 2003/343/CE

¹¹ Report on the application of the Dublin II regulation in Europe

<http://www.ecre.org/files/ECRE%20Dublin%20Report%2007.03.06%20-%20final.pdf>

¹² *ibid*

¹³ *ibid*

¹⁴ Dublin II regulation

¹⁵ Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543

¹⁶ The Border Protection Legislation Amendment Act 1999

¹⁷ J Hunyor ‘Warra Warra: refugees and protection obligations in relaxed and comfortable Australia’ (2000) 5 Alt. L.J. 227, 229.

¹⁸ NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 213 ALR 668

Application of the "Safe Third Country Principle" and possible violations of International Law

The application of the principle may lead to asylum seekers being denied asylum because they passed through a number of countries en route to their final destination. In turn, an asylum seeker may never be afforded the opportunity to lodge an application for asylum in any country. This could ultimately expose them to persecution and refoulement. The consequent detention to enforce the transfer of the asylum seekers to a third country raises further human rights concerns. Detention pending deportation may subject asylum-seekers to cruel, inhumane or degrading treatment because of the miserable conditions in the detention facilities, the conduct of the enforcement officers and the period of detention. According to international law, it is forbidden for a country to return an asylum seeker to another country if that country's law is inconsistent with international asylum law.¹⁹

International law and the Principle of Non-Refoulement

The non-refoulement principle of international law protects refugees from being returned to places where their lives or freedom could be threatened. It has been considered a possible *jus cogens* of international law²⁰. Hence, the principle of non-refoulement can not be derogated and any law inconsistent with the principle is invalid.

Article 33 of the 1951 Geneva Convention relating to the status of refugees (Refugee Convention) prohibits sending a refugee to a place where their life or freedom might be threatened on account of myriad grounds.²¹

Art 33(1) states that no Contracting State shall expel or return ("refoule") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened

¹⁹ Convention Relating to the Status of Refugees, July 28, 19 U.S.T. 6259, U.N.T.S art 33

²⁰ 1985 Note on International Protection, Thirty-sixth Session of the Executive Committee of the High Commissioner's Programme, para. 17

²¹ Convention Relating to the Status of Refugees, July 28, 19 U.S.T. 6259, U.N.T.S

on account of his race, religion, nationality, membership of a particular social group or political opinion.²²

This prohibition requires a State proposing to remove a refugee or asylum seeker to undertake a proper and thorough assessment as to whether removal to the third country is actually safe. It also prohibits removal to a country where a danger of subsequent deportation to an unsafe country exists.²³ Therefore, the safety assessment of a third country as a prospective destination for removal of an asylum seeker must include safety from subsequent refoulement to a place of risk.

The Refugee Convention also prohibits the discrimination of refugees in Article 3. In terms of Article 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.²⁴ The article also provides that authorities must look at whether there is a consistent pattern of serious human rights violations in the country in question. In the 2008 ruling of *Saadi vs. Italy*²⁵, the European Court of Human Rights held that protection afforded by the article is absolute and imposes an obligation not to expel any person who would 'run the risk of being subjected to such treatment'.

In terms of Article 2(3) of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), Member States are prohibited from actions which will result in a refugee returning or remaining in a territory where their life or liberty would be at risk.

In terms of the Universal Declaration of Human Rights, "everyone has the right to seek and to enjoy in other countries asylum from persecution."²⁷ Also in terms of Conclusion 15 of the Executive Committee of the UNHCR states that the intentions of an asylum seeker concerning

²² Convention Relating to the Status of Refugees, July 28, 19 U.S.T. 6259, U.N.T.S

²³ *T.I. v The United Kingdom*, 2000

²⁴ Convention Relating to the Status of Refugees, July 28, 19 U.S.T. 6259, U.N.T.S

²⁵ *Saadi vs. Italy* 2008

²⁷ Universal Declaration of Human Rights, art 14(1)

the country he wishes to request asylum from should as far as possible be taken into account. Application of the 'first safe country' principle is inconsistent with these international obligations and declarations. A refugee should be entitled to claim refugee status from the country of her choice. No requirement in the Refugee Convention compels a refugee to seek asylum in the first country that they flee to.²⁸

The European Convention on Human Rights, Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

And Article 13

*"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*²⁹

Application of the "Safe Third Country Principle in the South African context

In terms of The Refugees Act of 1998³⁰, 'no person may be refused entry into the Republic, expelled, extradited or returned to any country or subject to any similar measure, if as a result' of such action the person ends up at a country where they will be subject to persecution on various grounds or their life and liberty are at risk.³¹ It also prohibits detention exceeding a reasonable and justifiable period. The principles of human dignity and equality for all are enshrined in South Africa's constitution³². Refugees are entitled to all the rights in the Bill of Rights in terms of s27 of the Refugees Act 130 of 1998 and the right to access social security is guaranteed in s27 (1) (c) of the Constitution.³³ There is also no requirement in South African legislation for an asylum seeker to refuge in the first safe country they travel through nor do South Africa currently have any safe third country agreements with any other countries.

²⁸ James Hathaway the law of refugee status, p.46 1992

²⁹ The European Convention on Human Rights 1950

³⁰ South African *Refugees Act*, No 130 of 1998

³¹ South African *Refugees Act*, No 130 of 1998 art 2

³² Constitution of South Africa, 1996

³³ Constitution of South Africa, 1996

CASES:

In *T.I. v The United Kingdom* the court held that application of the Dublin Regulations must ensure that the intermediary country's asylum procedure affords sufficient guarantees to avoid the removal of an asylum seeker, directly or indirectly, to his country of origin without any evaluation of the risks in the context of Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³⁴ Therefore, a State must ensure there is no risk of treatment contrary to the Convention prior to deportation. The *Saadi* court further explains, 'the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.'³⁵ Diplomatic assurances given by third countries to the deporting country authorities do not amount to a sufficient guarantee.³⁶

The European Court of Human Rights addressed the issue of safe third country in the 2011 case *M.S.S v Belgium and Greece* . The applicant had traveled through Greece, among other countries on his way to Belgium. When he applied for asylum in Belgium, Belgian officials deported him to Greece in terms of the Dublin II regulation. Once in Greece, he was immediately detained and suffered abuse at the hands of police officials. Although Grecian officials considered his application, he lived in deplorable conditions and the police physically abused and assaulted him while he was in detention. In addition, he faced a risk of deportation to Turkey. The court held that his treatment during detention violated Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Thus, Belgium's exposure of the applicant to the deficiencies of the Greek asylum procedure, detention and living conditions unlawfully violated article 3 of the European Convention on Human Rights by infringing on the right to not be subjected to cruel and degrading treatment. The Court also held that Belgium violated Article 13 because they failed to offer the applicant an effective remedy against his expulsion order.

³⁴ *T.I v The United Kingdom*

³⁵ *Saadi vs. Italy* 2008

³⁶ *MSS v Belgium and Greece*

The articles violated are also in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Hence a similar challenge can be brought against a country that is not a party to the European Convention on Human Rights but is a party of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Conclusions on the International Protection of Refugees

South Africa is a member of the UNHCR Executive Committee (the “Excom”) and decisions adopted by the Executive Committee are binding on all member states. We refer in particular to these Excom conclusions; With regard to South Africa’s intention to return asylum seekers who may have passed through other safe countries we also refer to these relevant Executive Committee conclusions on this issue:

1977 Excom 28th Session

No. 3 (XXVIII) GENERAL

The Executive Committee,

- (a) Was gravely preoccupied that in a number of cases the basic human rights of refugees has still not been respected, that refugees had been subjected to physical violence, to unjustified and unduly prolonged measures of detention and to measures of forcible return in disregard of the principle of *non-refoulement*.

No. 5 (XXVIII) ASYLUM

The Executive Committee,

- (a) Concerned, however, that according to the report of the High Commissioner cases continue to occur in which asylum seekers have encountered serious difficulties in finding a country willing to grant them even temporary refuge and that refusal of permanent or temporary asylum has led in a number of cases to serious consequences for the persons concerned;

(c) Requested the High Commissioner to draw the attention of Governments to the various international instruments existing in the field of asylum and reiterated the fundamental importance of these instruments from a humanitarian standpoint.

Conclusion

South Africa currently has plans to begin implementing the first safe country principle. Use of this principle to exclude and reject asylum seekers would, however, violate both National and International law. South Africa currently has no bilateral safe third country agreements with any countries. Furthermore such agreements would have no effect on the obligations that South Africa has in terms of the OAU convention, the Convention on Refugees or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment among other international instruments. South Africa is a signatory to these Conventions. In light of these international obligations, particularly non-refoulement, South Africa should be reluctant to pass responsibility for determining asylum claims and providing asylum. The implementation of the principle to exclude asylum seekers would also contravene art 28 of the Refugee Act rendering it unlawful. Application of the principle of first safe country in this manner in Canada, Australia and the EU has been successfully challenged in their respective courts.

Drafted by Kaajal Ramjathan-Keogh, Wayne Ncube and Patrick Lemon

Lawyers for Human Rights

21 June 2011

www.lhr.org.za