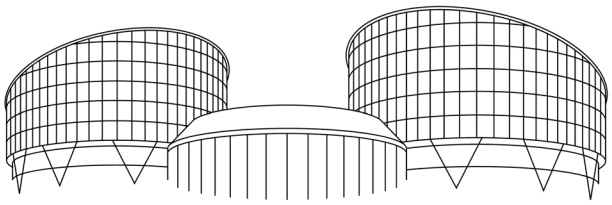

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

DIVISION DE LA RECHERCHE
RESEARCH DIVISION

Articles 2, 3, 8 and 13
The concept of a "safe third country" in the case-law of the Court

COUNCIL OF EUROPE
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STUDY OF THE ECHR CASE-LAW
ARTICLES 2, 3, 8 AND 13

SUMMARY

The Court has never questioned the legitimacy of the national lists of "*safe third countries*" as such, nor has it declared that a given third country was (or was not) safe. The current approach of our Court is mainly procedural; it is focused on examining the procedural guarantees that must necessarily underpin the evaluation carried out by domestic authorities. The deporting State cannot simply rely on its own definition of the third country as safe, and it has a general procedural obligation to carry out a fair and thorough examination of the conditions in that third country. The burden of proof in such cases is distributed in the following way: (1) the starting point is that it remains with the applicant; (2) if there is a well-known general risk in the third country, the authorities have a duty to carry out an assessment on their own motion; (3) concerning the individual risk, it remains with the applicant, but if the deporting State is made aware of relevant facts relating specifically to him/her, its authorities have to carry out an assessment on their own motion, especially if the applicant risks ill-treatment because of his/her membership of a persecuted group. Finally, the authorities have the obligation to provide the applicant with the necessary information in order to be able to challenge the definition of a third country as "*safe*".

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INTRODUCTION

1. This report summarises the State obligations deriving from the Court's case law in relation to returning asylum seekers to a country considered as a "*safe third country*" by the sending State.

2. The starting principle, always reiterated by the Court, is that the Convention does not contain an explicit right to political asylum. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to deport the person in question to that country (see, for example, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008). In cases concerning the expulsion of asylum-seekers, the Court has observed that **it does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention Relating to the Status of Refugees**. The Court's main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled (*M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 286, ECHR 2011). The Court's assessment of the existence of a real risk must necessarily be a rigorous one (see, for example, *F.G. v. Sweden* [GC], no. 43611/11, § 113, ECHR 2016). In other words, the Court is sometimes obliged to scrutinise the use of the "*safe third-country*" concept against the benchmark of Article 3 and the prohibition of non-*refoulement* enshrined therein.

3. Moreover, in the specific context of the application of the Dublin Regulation (see first and foremost *M.S.S. v. Belgium and Greece* [GC], cited above), the Court has found that 'indirect removal' (removal to an intermediary country which is also a Contracting State) leaves the responsibility of the transferring State intact, and that State is required, in accordance with the Court's well-established case-law, not to transfer a person where substantial grounds had been shown for believing that the person in question, if transferred, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. Furthermore, the Court has reiterated that where States cooperate in an area where there might be implications for the protection of fundamental rights, it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility *vis-à-vis* the Convention in the area concerned (*Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999-I). When they apply the Dublin Regulation, therefore, States must make sure that the intermediary country's asylum procedure affords sufficient

guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention (see *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III, and *K.R.S. v. the United Kingdom* (dec.), no. 32733/08, 2 December 2008, both summarised in *M.S.S. v. Belgium and Greece* [GC], cited above, §§ 342 et seq.).

I. PROCEDURAL OBLIGATIONS REGARDING THE CONCEPT OF A "*SAFE THIRD COUNTRY*"

4. There have been only a few cases where our Court has expressly and specifically examined the concept of a "*safe third country*", or, more precisely, where this concept has come into play as one of the substantive elements of the Court's reasoning. The first general conclusion is that, when dealing with this concept, **the Court's usual reasoning is essentially *procedural***, i.e., focused on examining the procedural guarantees that must necessarily underpin the evaluation carried out by domestic authorities to be in compliance with the Convention. The deporting State cannot simply rely on its own definition of the third country as safe, and it has a general procedural obligation to carry out a fair and thorough examination of the conditions in that third country. Two particular aspects of this procedural duty should be analysed: (A) the burden of proof, and (B) the right to information.

A. Burden of proof

(1) General principles relating to the burden of proof

5. With regard to the burden of proof in *non-refoulement* cases, the Court's current approach was summarised in the judgment of ***F.G. v. Sweden*** [GC], no. 43611/11, CEDH 2016), applicable, *inter alia*, to the examination, by the domestic authorities, of the question whether a particular country can be defined as a "safe third country" (here and hereafter – emphasis added):

> "125. It is in principle for the person seeking international protection in a Contracting State to submit, as soon as possible, his claim for asylum with the reasons in support of it, and to adduce evidence capable of proving that there are substantial grounds for believing that deportation to his or her home country would entail a real and concrete risk of exposure to a life-threatening situation covered by Article 2 or to treatment in breach of Article 3.
>
> 126. However, in relation to asylum claims based on a well-known **general** risk, when information about such a risk is freely ascertainable from a wide number of

sources, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities **carry out an assessment of that risk on their own motion**…

127. By contrast, in relation to asylum claims based on an **individual** risk, it must be for the person seeking asylum to rely on and to substantiate such a risk. Accordingly, if an applicant chooses not to rely on or disclose a specific individual ground for asylum by deliberately refraining from mentioning it, be it religious or political beliefs, sexual orientation or other grounds, **the State concerned cannot be expected to discover this ground by itself**. However, considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum seekers often find themselves in, **if a Contracting State is made aware of facts, relating to a specific individual**, that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion. This applies in particular to situations where the national authorities have been made aware of the fact that the asylum seeker may, plausibly, be a member of a group systematically exposed to a practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned…"

6. The Court has never questioned the fact that Contracting Parties define some countries as "*safe*" and establish lists of "*safe third countries*". However, it has emphasised that the **presumption of the safety of a country cannot be absolute** (*juris et de jure*). **The applicant must be able to challenge - and rebut - the presumption that a country is safe**. The applicant must have an effective possibility and an actual chance to put forward his or her arguments, in order to avoid bearing the entire burden of proof. The Court first clearly established this requirement in ***M.S.S. v. Belgium and Greece*** ([GC], no. 30696/09, ECHR 2011):

"351. Furthermore, the Court notes that the procedure followed by the Aliens Office in application of the Dublin Regulation **left no possibility for the applicant to state the reasons militating against his transfer** to Greece. The form the Aliens Office filled in contains no section for such comments …

352. In these conditions, the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception."

(2) Application in particular cases

7. ***T.I. v. the United Kingdom*** (dec., no. 43844/98, ECHR 2000-III) was the first case where the concept of a "*safe third country*" came more or less directly into play in the context of the "*Dublin regime*" (the Dublin

Convention, later the Dublin Regulation). The applicant was a Sri Lankan national suspected by the armed forces of this country to belong to the "*Liberation Tigers of Tamil Eelam*" (LTTE), a terrorist organisation. According to him, he was detained, tortured and ill-treated by army soldiers, by a pro-Government and anti-LTTE Tamil group, and then by the police. After his release, the applicant left Sri Lanka for Germany and claimed asylum there. The competent German authority found that, even assuming that the applicant had been tortured as alleged, these were excesses of isolated executive organs and could not be imputed to the Sri Lankan State; the asylum claim was therefore rejected. The competent administrative court likewise rejected the applicant's appeal, finding his factual allegations entirely incredible and declaring that, in the light of all the relevant circumstances and of the measures taken in the meantime by the Sri Lankan authorities, he would be sufficiently safe from political persecution if he returned to his native country. The applicant then left Germany and travelled to Italy and then, clandestinely, to the United Kingdom, where he claimed asylum.

8. The United Kingdom Government requested that Germany accept responsibility for the applicant's asylum request pursuant to the Dublin Convention, which it did. Subsequently, the Secretary of State directed the applicant's removal to Germany while refusing to examine the substance of his asylum claim. The applicant applied to the Court of Appeal, which held that the Secretary of State was entitled to conclude that the German authorities did indeed adopt a reasonable approach regarding its Convention obligations. The Secretary of State also refused to exercise his discretion to grant leave to remain in the applicant's favour on compassionate grounds, declaring that he considered Germany as a safe third country.

9. The applicant obtained a fresh medical report from a medical foundation, which found that the scars borne by the applicant were consistent not only with his own account of ill-treatment suffered in Sri Lanka, but also with the descriptions of Sri Lankan detention centres given by other asylum seekers in similar circumstances. The applicant then made a second unsuccessful application for judicial review, submitting the above medical evidence and challenging the certification of Germany as a safe third country because, *inter alia*, Germany failed to recognise persons as refugees where the persecution emanated from non-State agents. He also submitted several statements and affidavits from members of his family supporting his account of events.

10. Before the Court, the applicant complained that once deported to Germany, he would be immediately sent back to Sri Lanka, where he would face a real risk of ill-treatment. He emphasised that the German authorities only treated as relevant the acts of the State and that they did not consider excesses by individual State officials as State acts. They would not reconsider his asylum application, especially since he had no relevant new

evidence for their purposes and the medical reports only had regard to risks from sources not perceived by the German authorities as attributable to the State. He also invoked Article 13, alleging that, in the context of a return to an allegedly safe third country, the British courts did not carry out a sufficient factual scrutiny.

11. The Court declared the applicant's complaints manifestly ill-founded. It started its reasoning by declaring the United Kingdom responsible for the impugned situation:

> "… In the present case, the applicant is threatened with removal to Germany, where a deportation order was previously issued to remove him to Sri Lanka. It is accepted by all parties that the applicant is not, as such, threatened with any treatment contrary to Article 3 in Germany. His removal to Germany is however one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face the real risk of such treatment.
>
> The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. …
>
> The Court has therefore examined below whether the United Kingdom have complied with their obligations to protect the applicant from the risk of torture and ill-treatment contrary to Article 3 of the Convention. …"

12. The Court found that neither the United Kingdom nor Germany (third-party intervener in the case) had made any comments on the merits of the asylum claim, and that the materials presented by the applicant gave rise to serious concerns. It continued as follows:

> "… The Court reiterates that it is not its function to examine asylum claims or to monitor the performance of Contracting States with regard to their observance of their obligations under the Geneva Convention on Refugees. On this basis, the fact that the German authorities exclude from consideration of asylum claims non-State agent sources of risk of ill-treatment and ill-treatment from individual officers prohibited by the laws of the country is not directly relevant. The Court's primary concern is **whether there are effective procedural safeguards of any kind protecting the applicant from being removed from Germany to Sri Lanka**.
>
> Following the submissions of the parties, and having particular regard to the explanations provided by the German Government, the Court finds the present applicant could, on his return to Germany, make a fresh claim for asylum as well as claims for protection. … It is satisfied by the German Government's assurances that the applicant would not risk immediate or summary removal to Sri Lanka. …"

13. Then the Court examined the applicant's assertion that these proceedings in Germany would not offer him effective protection since they would, in all likelihood, result in a further rejection of his claims and an order of removal, last but not least because the previous decision of the Bavarian Administrative Court that the applicant lacked credibility would

be given significant weight. The Court acknowledged that these doubts were well-founded. Nonetheless, it noted that the apparent gap in protection resulting from the German approach to non-State agent risk was at least partly by the application of a specific provision of German law aimed at protecting persons facing risk to life and limb from non-State agents; despite being phrased in discretionary terms, the interpretation made by German courts made it clear that there was an obligation to apply its protection to persons in grave danger. In any case, while it might be that on any re-examination of the applicant's case the German authorities could still reject his claim, this was a matter of speculation and conjecture. The Court concluded:

> "In these circumstances, the Court finds that it is not established that there is a real risk that Germany would expel the applicant to Sri Lanka in breach of Article 3 of the Convention. Consequently, the United Kingdom have not failed in their obligations under this provision by taking the decision to remove the applicant to Germany. **Nor has it been shown that this decision was taken without appropriate regard to the existence of adequate safeguards in Germany to avoid the risk of any inhuman or degrading treatment** …"

14. Therefore the decision in *T.I.* already puts an emphasis on the procedural nature of the obligations of the respondent State. It is interesting to note that in a broadly similar case of ***K.R.S. v. the United Kingdom*** (dec., no. 32733/08, 2 December 2008), the Court came to the same conclusion without putting a special emphasis on this procedural obligation. It reiterated the same arguments as in *T.I.*, to conclude that the United Kingdom was responsible under the Convention. The applicant, an Iranian national, claimed asylum in the United Kingdom after coming there from Greece. The latter accepted responsibility under the Dublin Regulation, and directions were set for his removal to Greece. The Court acknowledged the legitimacy of the concerns raised by the applicant and a number of non-governmental organisations, but considered that they could not be relied upon to prevent the United Kingdom from removing the applicant to Greece. It noted in particular:

> "… On the evidence before it, Greece does not currently remove people to Iran … so it cannot be said that there is a risk that the applicant would be removed there upon arrival in Greece, a factor which Lord Justice Laws regarded as critical in reaching his decision. ...
>
> … [F]rom the standpoint of the Convention, there is nothing to suggest that those returned to Greece under the Dublin Regulation run the risk of onward removal to a third country where they will face ill-treatment contrary to Article 3 without being afforded a real opportunity, on the territory of Greece, of applying to the Court for a Rule 39 measure to prevent such. …
>
> The Court recalls in this connection that Greece, as a Contracting State, has undertaken to abide by its Convention obligations and to secure to everyone within their jurisdiction the rights and freedoms defined therein, including those guaranteed

> by Article 3. In concrete terms, Greece is required to make the right of any returnee to lodge an application with this Court under Article 34 of the Convention (and request interim measures under Rule 39 of the Rules of Court) both practical and effective. In the absence of any proof to the contrary, it must be presumed that Greece will comply with that obligation in respect of returnees including the applicant…."

15. In the case of ***Ghorbanov and Others v. Turkey*** (no. 28127/09, 3 December 2013), the applicants, a group of Uzbek nationals from Uzbekistan, left their home country fearing persecution because of their political and religious activities. Travelling through Tajikistan, Afghanistan and Pakistan, they eventually settled in Iran and were also granted refugee status by the United Nations High Commissioner for Refugees. However, they later fled to Turkey where they were also granted refugee certificates by the UNHCR, received food rations, and sent their children to school. One day, the Turkish authorities placed them in detention and forcibly deported them to Iran later that same evening without any formal deportation order. One week later they returned to Turkey illegally but were collected from their homes and deported again later that day. After they had asked the Iranian authorities for help, they were detained for two days and then deported back to Turkey. Relying in particular on Articles 2 and 3 of the Convention, the applicants complained that their repeated deportation to Iran exposed them to a real risk of death or ill-treatment in Iran as well as to a risk of being returned to Uzbekistan by the Iranian authorities.

16. In its partial admissibility decision of 24 August 2010, the Court dismissed this complaint as manifestly ill-founded in the following terms:

> "As for their complaint regarding the risk of deportation to Uzbekistan from Iran, the Court notes that the applicants were recognised as refugees by the UNHCR in Iran, where they lived for approximately six years before they left the country. The Court also notes that the applicants sought help from the Iranian authorities upon their second deportation and that they were returned to Turkey."

17. Later, in its judgment on the merits of 3 December 2013, the Court found a violation of Article 3 of the Convention on the account of the applicants' repeated summary deportation to Iran alone (and not because they would risk a further deportation to Uzbekistan or elsewhere). It noted, inter alia:

> "32. …All of the above leads the Court to conclude that the applicants – refugees recognised by the UNHCR – were illegally deported to Iran, a non-member State of the Council of Europe, **in the absence of a legal procedure providing safeguards against unlawful deportation**, and without a guarantee from the Iranian authorities that the applicants would be admitted to Iran. …"

18. In the connected case of ***Babajanov v. Turkey*** (no. 49867/08, 10 May 2016), the applicant, an Uzbek national removed to Iran together

with nineteen applicants from the aforementioned case of *Ghorbanov and Others*, complained about his alleged forced illegal deportation from Turkey to Iran. He entered Turkey illegally, having fled Uzbekistan in 1999 out of fear of persecution because he was a practising Muslim. Travelling via Tajikistan, Afghanistan and Pakistan, he eventually settled in Iran before fleeing for Turkey. On arrival in Turkey he applied for refugee status to the United Nations High Commissioner for Refugees (UNHCR) as well as to the Turkish authorities. He was given a temporary residence permit. When going to the police station for signature as required, he was placed in detention along with 29 other asylum seekers. They were driven to the border the same evening and forcibly deported to Iran. Captured by people smugglers and made to pay a ransom, they eventually managed a few days later to enter Turkey illegally again. He submitted that, since then, he has been living in hiding in Turkey, not having received any information from the Turkish authorities as to his asylum request. According to him, if deported to Iran or Uzbekistan, he would be at a clear risk of death or ill-treatment on account of his political opinions and religious beliefs. Conversely, according to the Government, the applicant was deported to Iran, a safe third country, in accordance with domestic law following an assessment of his asylum claim.

19. The Government also opined that, in its admissibility decision in *Ghorbanov and Others v. Turkey*, the Court had also considered Iran as a "safe third country". The Court disagreed with this interpretation:

> "43.… In this regard, the Court stresses that it does not share the Government's view that Iran was considered to be a "safe third country" in that decision. Such an assessment is nowhere to be found in the Court's decision in the case of *Ghorbanov and Others*. Besides, the applicant in the present application lived in Iran for approximately two and a half years as an asylum seeker, whereas the adults among the applicants in the case of *Ghorbanov and Others* lived in the same country for six years as refugees. Thus, in the Court's view, the present application has to be distinguished from the case of *Ghorbanov and Others*. …."

20. It continued by strongly stressing the procedural obligations of the respondent State:

> "43. … In any case, the Court finds that **the central question to be answered in the present case is not whether the applicant ran a real risk of ill-treatment in Iran or in Uzbekistan as such but whether the Turkish authorities carried out an adequate assessment of the applicant's claim** that he would be at risk of ill-treatment in case of deportation to Iran with refoulement to Uzbekistan before he was deported from Turkey to Iran on 12 September 2008 (see *M.D. and M.A.*, cited above, § 58). Therefore, **the Court's examination will be limited to ascertaining whether the State authorities had fulfilled their procedural obligations under Article 3 of the Convention** (see *F.G. v. Sweden* [GC], no. 43611/11, § 117, 23 March 2016).
>
> …

45. The Court notes that the applicant did provide some detailed information about his personal situation and the reasons for his fear of ill-treatment and that his arguments were supported by documents. … Having regard to the information and documents provided by the applicant, the Court finds that **the applicant adduced evidence capable of proving that there were substantial grounds for believing that, if he was deported to Iran with the risk of *refoulement* to Uzbekistan, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention**. **Therefore, the Turkish authorities were under an obligation to address the applicant's arguments and carefully assess the risk of ill-treatment if the applicant was to be deported to Iran with the risk of *refoulement* to Uzbekistan, in order to dispel any doubts about possible ill-treatment** (see, *inter alia*, *Müslim v. Turkey*, no. 53566/99, §§ 72 and 74, 26 April 2005; *Ryabikin v. Russia*, no. 8320/04, § 112, 19 June 2008; *Iskandarov v. Russia*, no. 17185/05, §§ 128-135, 23 September 2010; *Auad v. Bulgaria*, no. 46390/10, §§ 101-108, 11 October 2011; *Azimov v. Russia*, no. 67474/11, §§ 112-113, 18 April 2013; *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, §§ 114-118, 15 October 2015; *M.D. and M.A.*, cited above, § 55; and *F.G.*, cited above, § 120).

46. Against this background, the Court observes that the Government were explicitly requested to make submissions as to whether the applicant's asylum request had been examined and refused …. The Government also failed to respond to the Court's aforementioned questions and there are no documents in the case file to show that the applicant was notified of a formal deportation order. The Government solely submitted that the applicant's asylum claim had been assessed, without specifying the outcome of the assessment.

47. All of the above leads the Court to conclude that the applicant – an asylum seeker and a legal resident in Turkey – was deported to Iran, a non-member State of the Council of Europe, **in the absence of a legal procedure providing safeguards against unlawful deportation and without a proper assessment of his asylum claim**.

48. In this regard, the Court emphasises that, in view of the importance attached to Article 3 of the Convention, the absolute character of the right guaranteed by Article 3 and the irreversible nature of the potential harm if the risk of ill-treatment materialised, it is for the national authorities to be as rigorous as possible and to carry out a careful examination of allegations under Article 3, in the absence of which the domestic remedies cannot be considered to be effective (see *M.D. and M.A.,* cited above, § 66).

49. Hence, in the absence of an examination, by the national authorities, of the applicant's claim that he would face a real risk of treatment contrary to Article 3 if removed to Iran or to Uzbekistan and of a legal procedure providing safeguards against unlawful deportation, the Court considers that the applicant's deportation to Iran on 12 September 2008 amounted to a violation of Article 3 of the Convention…"

21. In the case of *Diallo v. the Czech Republic* (no. 20493/07, 23 June 2011), two Guinean nationals arrived in Prague from Senegal via Portugal. They applied immediately for asylum claiming they would be detained, and possibly even killed, if they returned to Guinea. Their applications were dismissed without even examining their merits, stating that they had arrived from Portugal, which was considered a safe third country. They applied for judicial review of the respective decision, which in the case of one of them

was expressly rejected by the competent court, and, in the case of another, the proceedings remained pending until they were terminated on his request; however, they did not have a suspensive effect as this applicant had come from a country considered a safe third country. As neither of the applicants complied with the order to leave the country, administrative expulsion proceedings were brought against them. In that context, the Ministry of the Interior gave its opinion that there were no obstacles to their removal, as they were facing expulsion to Portugal, which was a safe country. The police issued expulsion orders for the applicants to leave the country, and they were both removed to Guinea by plane via Brussels.

22. In the light of various reports that documented human rights violations in Guinea at the material time, the Court considered that both applicants had had an arguable claim, for the purpose of Article 13 of the Convention, that upon their return to Guinea they risked being ill-treated in violation of Article 3. The personal circumstances of the applicants made their fears well-founded, as they were sought by the police for their political activities. The Court continued as follows:

> "76. Regarding the asylum proceedings, the Court notes that their **asylum applications were rejected by the Ministry of the Interior without a consideration on the merits, on the ground that they had arrived from Portugal, which was considered a safe third country**. In this context the applicants argued that under the European Union Dublin Regulation it was the Czech Republic and not Portugal which should have examined their asylum request. It is, however, not the Court's task to interpret European Union law or domestic law; **it suffices to note that the applicants were not eventually expelled to Portugal but to their country of origin**.
>
> 77. The Court observes that **the applicants' claims that there was a real risk of ill-treatment in their country of origin were not subjected to close and rigorous scrutiny by the Ministry of the Interior as required by the Convention, or in fact to any scrutiny at all**. At the same time, their requests for judicial review did not have an automatic suspensive effect because their asylum requests had been considered manifestly unjustified. A constitutional appeal would not have had an automatic suspensive effect either.
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> …
>
> 79. Regarding the second applicant, the Court notes that unlike the first applicant the domestic court had reviewed his request for judicial review before he was expelled. However, not even the Regional Court subjected his arguable claim under Article 3 of the Convention to careful scrutiny but only confirmed the decision of the Ministry that his claim was manifestly unjustified because Portugal was a safe third country.
>
> 80. In these circumstances, the Court considers that the asylum proceedings did not provide the applicants with an effective domestic remedy within the meaning of Article 13 of the Convention.
>
> 81. Regarding the administrative expulsion proceedings, the Court similarly notes that none of the authorities examined the merits of the applicants' arguable claim under Article 3 of the Convention. In particular, the conclusions of the compulsory opinions of the Ministry of the Interior that there were no hindrances to the applicants'

expulsion were explicitly based on the assumption that the applicants were liable to be expelled to Portugal only.

…

85. Accordingly, none of the domestic authorities examined the merits of the applicants' arguable claim under Article 3 of the Convention and there were no remedies with automatic suspensive effect available to the applicants regarding the authorities' decision not to grant them asylum and to expel them. In view of the foregoing, the Court finds that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 of the Convention."

23. In *Isaka v. the Czech Republic* (dec., no. 36919/10, 6 September 2011), the applicant, a citizen of the Democratic Republic of the Congo (DRC) who had come to the Czech Republic through Russia, complained of his imminent expulsion to Russia. According to him, Russia could not be considered a "*safe third country*" because from there he risked a deportation to the DRC without even being able to claim asylum in Russia; he also feared inhuman conditions of detention in that country. Before the Court, the applicant raised a "*procedural*" complaint, criticising the absence of a thorough examination of his allegations according to which he risked being tortured or even killed once deported to the DRC. Moreover, he emphasised the fact that domestic law and practice in Russia did not permit such a thorough examination, either. Therefore, according to the applicant, in case of his expulsion the Czech authorities would carry out an "*indirect refoulement*".

24. The Court declared this complaint manifestly ill-founded in the following terms (original French version):

"(…) [L]e refoulement indirect vers un pays intermédiaire qui se trouve être également un État contractant n'a aucune incidence sur la responsabilité de l'État défendeur qui doit veiller à ne pas exposer le requérant à un traitement contraire à l'article 3 de la Convention par sa décision de l'expulser. La Cour a déclaré à cet égard que lorsque des États établissent des organisations internationales ou des accords internationaux pour coopérer dans certains domaines d'activité, la protection des droits fondamentaux peut s'en trouver affectée, et qu'il serait contraire au but et à l'objet de la Convention que les États contractants soient ainsi exonérés de toute responsabilité au regard de la Convention dans le domaine d'activité concerné (voir *T.I. c. Royaume-Uni* ((déc.), no 43844/98, CEDH 2000-III ; *K.R.S. c. Royaume-Uni* ((déc.), no 32733/08, CEDH 2008-...).

La Cour souligne d'emblée que **la différence fondamentale entre la présente requête et les affaires précitées dirigées contre le Royaume-Uni tient au fait que les requérants dans ces affaires, menacés d'expulsion du Royaume-Uni, étaient demandeurs d'asile dans ce même État ou dans un autre État de l'Union européenne**. Or, en l'espèce, (…) lorsque les autorités tchèques décidaient (…) de l'expulsion administrative du requérant et lorsqu'elles ont à deux reprises tenté de le renvoyer en Russie (…), elles n'avaient pas connaissance du fait que l'intéressé craignait le retour dans son pays d'origine. La Cour ne peut que constater que si le requérant courait un risque réel d'être soumis à la torture ou à des peines ou traitements inhumains ou dégradants en RDC, l'on aurait pu s'attendre à ce qu'il

> manifeste ses craintes dès qu'il se trouve dans un pays sûr. Or, comme le relève le Gouvernement, le requérant n'a demandé l'asile ni en Russie lorsqu'il y séjournait sur la base d'un visa touristique, ni dès son entrée sur le territoire tchèque. Même en admettant que le requérant a informé la police tchèque de son prétendu statut de réfugié lors du premier contrôle effectué à la frontière (…) l'on ne peut que s'étonner qu'il n'ait pas réitéré cette allégation lorsqu'il en a eu l'occasion, le même jour, pendant l'interrogatoire tenu en présence d'un interprète. Non seulement il n'a pas à cette occasion formulé de crainte quant à son retour en RDC mais il a aussi expressément déclaré que rien ne l'empêchait de retourner à Moscou, alors qu'il prétend à présent devant la Cour que la Russie ne le protégerait pas contre une éventuelle expulsion vers la RDC. (…)
>
> La Cour estime donc qu'avant même d'être placé en rétention en vue de son renvoi selon l'accord de réadmission, **le requérant a eu plusieurs possibilités de déclarer sa volonté de demander l'asile. À défaut de l'avoir fait, il ne peut pas aujourd'hui reprocher aux autorités tchèques de ne pas avoir examiné au moment opportun ses craintes de traitement inhumain ou de mort auxquels il pourrait être exposé en cas de son expulsion vers la RDC, ou l'existence en Russie de garanties procédurales effectives visant à faire examiner ces craintes**. (…) »

25. In two subsequent cases against Austria, *Mohammed* and *Mohammadi*, the Court likewise insisted on the procedural obligation of the respondent State. In ***Mohammed v. Austria*** (no. 2283/12, 6 June 2013), the Court did not put a special emphasis on the procedural obligation. The applicant, a Sudanese national, arrived in Austria via Greece and Hungary. Once in Austria, he lodged an asylum application, which the Austrian authorities rejected under the Dublin II Regulation, ordering his transfer to Hungary. The applicant then lodged a second asylum application, which did not have an automatic suspensive effect in relation to the valid transfer order, as well as a complaint against the detention order, requesting the Austrian courts to establish that this transfer to Hungary would constitute a risk for him, but in vain.

26. After having found a violation of Article 13 in conjunction with Article 3 of the Convention, the Court examined the applicant's complaint raised under Article 3 taken alone. It took note of the alarming nature of various reports on Hungary as a country of asylum published in particular by the UNHCR. These reports had observed that asylum-seekers who had been transferred to Hungary under the Dublin II Regulation had had to reapply for asylum there upon arrival and that such a renewed application had been treated as a second asylum application without suspensive effect. Together with the practice of automatically handing out a deportation order upon entry, this had resulted in a real risk of *refoulement* **without the transferee having effective access to an examination of the merits of his or her underlying asylum claim**. The Court therefore acknowledged the arguable nature of the applicant's declarations. However, it noted that the UNHCR had never requested EU Member States to refrain from transferring asylum-seekers to Hungary under the Dublin II Regulation, and that he had

welcomed a package of legislative amendments adopted by the Hungarian Parliament with a view to improving the factual and legal situation of transferees who immediately applied for asylum upon their arrival in Hungary would no longer be subject to detention. As regards the applicant's complaint concerning the alleged risk of *refoulement*, the Court noted that the applicant had not submitted any information about the reasons for leaving his country of origin, Sudan, and for seeking asylum. It further observed that, under the Dublin II Regulation, Austria as the transferring State was not required to conduct an analysis of the underlying flight reasons of an asylum-seeker, but only to establish whether another EU Member State had jurisdiction and to examine whether there were any general reasons or other obstacles that would require a stay of the transfer. While the Court had no difficulty in believing that the security and human rights situation in Sudan was generally alarming, it was not in a position to assume a real and individual risk for the applicant in the absence of any relevant information on his own situation and flight reasons.

27. In the second judgment, *Mohammadi v. Austria* (no. 71932/12, 3 July 2014), the Court put the procedural obligation at the centre of its reasoning. The applicant, an Afghan national, left his native village in Afghanistan and travelled via Iran, Turkey, Greece, "the former Yugoslav Republic of Macedonia", Serbia and Hungary, finally arriving in Austria, where he claim asylum. The Austrian authorities, including courts, rejected his asylum claimed and ordered his transfer to Hungary under the Dublin II procedure. Under Article 3 of the Convention, the applicant alleged that, if forcibly transferred to Hungary, he would not only be imprisoned under deplorable conditions, but also would be at risk of *refoulement* to a third country, possibly Serbia (the country he had travelled through before arriving in Hungary), without his asylum claim being examined on the merits in Hungary.

28. The Court found no violation of Article 3. It stated:

> "65. The Court observes that the subject matter of the present application is similar to that of the above-mentioned *Mohammed* case. … The main question to be considered by the Court is whether there have been significant changes since the adoption of that judgment in the situation for asylum-seekers, and Dublin returnees in particular.
>
> 66. The Court therefore takes note of the various reports on Hungary as a country of asylum either referred to by the parties in the application and during the domestic proceedings or obtained *proprio motu*. It also notes, however, that the Hungarian asylum legislation and practice has significantly changed since the applicant lodged the instant application and the parties made their submissions on the merits of the case. The Court therefore will only take into consideration the most recent reports and respective arguments by the parties.
>
> 67. The two main complaints by the applicant relate to (i) the risk of arbitrary detention of asylum-seekers and the detention conditions, and (ii) the risk of

refoulement to Serbia without having his asylum claim considered on the merits. The Court will examine each complaint separately in the following paragraphs.

…

72. Concerning the question whether the applicant would have access to asylum proceedings on the merits if returned to Hungary, the Court observes that both the UNHCR as well as the Hungarian Helsinki Committee in their latest reports stated that since the changes in legislation, those asylum-seekers transferred to Hungary under the Dublin system whose claims had not been examined and decided in Hungary had access to an examination of the merits of their claims upon their return …. According to the information provided by the Hungarian Government, the applicant has not yet had a decision on the merits of his case. Therefore, the Court notes that **he will have the chance to reapply for asylum if returned to Hungary and to have his application for international protection duly examined**.

73. When it comes to the alleged risk of *refoulement* to Serbia, recent reports by the UNHCR and the Hungarian Helsinki Committee consistently confirmed that **Hungary no longer relied on the safe third country concept and in particular examined asylum applications by Dublin returnees on the merits, as long as there had not yet been a decision on the case**. Following the changes in legislation which took effect in January 2013, deportation could no longer be imposed on asylum-seekers during the asylum procedure.

…

75. The Court therefore concludes that the applicant would currently not be at a real, individual risk of being subject to treatment in contrary to Article 3 of the Convention if expelled to Hungary."

B. Right to information

29. Closely related to the considerations on the burden of proof is the provision of right to the information. When applicants are not properly informed about the procedure they find themselves in, they will be unable to adequately circumstantiate their claims, because they will not be in a position to know which elements are needed to refute the presumption that a country is "*safe*". The right to information is an essential protective device against *refoulement*, namely a way to channel the applicants' claim into the asylum procedure, as well as any other individual circumstance that could exacerbate or heighten the risk under Article 3. In the current state of the Court's case-law, this aspect would not seem to be very developed. However, it could be said to be as important as the principles governing the burden of proof itself.

30. In ***M.S.S. v. Belgium and Greece***, cited above, the Court indicated that the lack of access to information "*is clearly a major obstacle*" in accessing the asylum procedure (which, logically, also applies to the possibility to adduce evidence against a country being "*safe*"):

"301. The Court notes, firstly, the shortcomings in access to the asylum procedure and in the examination of applications for asylum…: insufficient information for

> asylum-seekers about the procedures to be followed; … no reliable system of communication between the authorities and the asylum-seekers; a shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews; a lack of legal aid effectively depriving the asylum-seekers of legal counsel; …
>
> …
>
> 304. The Court notes in this connection that the applicant claims not to have received any information about the procedures to be followed. Without wishing to question the Government's good faith concerning the principle of an information brochure being made available at the airport, the Court attaches more weight to the applicant's version because it is corroborated by a very large number of accounts collected from other witnesses by the Council of Europe Commissioner for Human Rights, the UNHCR and various non-governmental organisations. In the Court's opinion, the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures."

31. In ***Kebe and Others v. Ukraine*** (no. 12552/12, 12 January 2017), the concept of "*safe third country*" was not analysed as such; however, in substance and indirectly, it had some relevance for the purpose of the Court's reasoning. In this case, the applicants were, respectively, Ethiopian and Eritrean nationals who tried to obtain asylum in Ukraine. The applicants complained that when the ship (flying the Maltese flag) they were travelling on had arrived in Ukraine, border guards had prevented them from entering the country, stopped them from lodging claims for asylum, and exposed them to the risk of ill-treatment in their countries of origin by ensuring that they remained on the ship: the latter was headed to Saudi Arabia, which had virtually no protection of asylum seekers and a constant practice of deporting them to their countries of origin. They also complained that they had had no opportunity to use a domestic legal procedure to address these actions.

32. The Court struck out the application in so far as it concerned two applicants (one of them had died in the meantime and the other had ended contact with his lawyer). In the case of the remaining applicant, the Court dismissed his claim relating to ill-treatment. The Court held that, after it had indicated an interim measure in March 2012, the applicant had been allowed to leave the ship and make an asylum application in Ukraine. He was therefore no longer at an immediate risk of ill-treatment in his country of origin. However, the Court held that there had been a violation of the applicant's right to an effective remedy under Article 13. In fact, although the applicant was eventually provided with access to an asylum procedure, this was not the case prior to the Court's interim measure. The Court held that the border guards gave him no proper opportunity to submit an asylum claim whilst he was on board the vessel. In particular, **they failed to provide him with any relevant information about Ukrainian asylum procedures**, failed to take into consideration his need for international

protection, and told him that they could not accept asylum applications. Furthermore, the guards' decision to prevent him from entering Ukraine had been enforceable immediately, without having his claim of potential ill-treatment (if removed to Saudi Arabia and then to Eritrea) examined by the authorities. This meant that he had not been provided with an effective remedy in relation to complaints about the threat to remove him from Ukraine, in violation of Article 13 in conjunction with Article 3 of the Convention.

II. WHETHER A PARTICULAR COUNTRY CAN BE CONSIDERED "*SAFE*"

33. It is important to note that the Court itself has **neither questioned the legitimacy of the national lists of "safe third countries" nor declared itself that a given third country was (or was not) safe**. In ***Babajanov v. Turkey***, cited above, the Court firmly rejected the respondent Government's attempt to interpret its previous inadmissibility decision in of *Ghorbanov and Others v. Turkey* (also cited above) as implying that the Court had recognised that Iran was a "safe third country":

> "43.… In this regard, **the Court stresses that it does not share the Government's view that Iran was considered to be a "safe third country" in that decision. Such an assessment is nowhere to be found in the Court's decision in the case of *Ghorbanov and Others*.** Besides, the applicant in the present application lived in Iran for approximately two and a half years as an asylum seeker, whereas the adults among the applicants in the case of *Ghorbanov and Others* lived in the same country for six years as refugees. Thus, in the Court's view, the present application has to be distinguished from the case of *Ghorbanov and Others*. …."

CONCLUSION

34. The Court has never questioned the legitimacy of the national lists of "*safe third countries*" as such, nor has it declared that a given third country was (or was not) safe. The current approach of the Court is mainly procedural; it is focused on examining the procedural guarantees that must necessarily underpin the evaluation carried out by domestic authorities. The deporting State cannot simply rely on its own definition of the third country as safe, and it has a general procedural obligation to carry out a fair and thorough examination of the conditions in that third country. The burden of proof in such cases is distributed in the following way:

(1) the starting point is that it is on the applicant;

(2) if there is a well-known general risk in the third country, the authorities have the duty to carry out an assessment on their own motion;

(3) concerning the individual risk, it remains on the applicant, but if the deporting State is made aware of relevant facts relating specifically to him/her, its authorities have to carry out an assessment on their own motion, especially if the applicant risks an ill-treatment because of his/her membership in a persecuted group.

Finally, the authorities have the obligation to provide the applicant with the necessary information in order to be able to challenge the definition of a third country as "*safe*".