

Chapter 15

The (Rebuttable) Presumption of the European Union Member States as ‘Safe Countries’ under the Dublin Regulation

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ABSTRACT

The purpose of this chapter is to analyze a particular aspect of the so-called Dublin Regulation, whose aim is to determine the European Union (EU) Member State responsible for examining an asylum application, that is, the presumption that the EU Member States are “safe countries.” Although the notion of “safe country” is on the base of the Dublin Regulation functioning mechanism, as it implies that any EU Member States can transfer an asylum seeker to any other EU country which is responsible, the authors contend that the safety of an EU Member State can be given as presumed for the purpose of asylum seekers. The analysis of the present work starts, firstly, with the examination of the notion of “safe country” under the Dublin Regulation. In the second part, relying on the European Court of Human Rights’ (ECHR) case-law, it will be discussed to what extent the Court of Strasbourg clarifies the notion of “safe countries” and the test it applies to it. Finally, the Commission’s proposal for a recasting of the Dublin Regulation will be analysed with the aim of foresee possible future developments of the EU law mechanisms to rebut such a presumption as applied to the EU Member States. It will emerge that in order to assess the safety of an EU Member State, attention has to be given to the prohibition of both direct and indirect refoulement as well as to the effective remedy at the EU Member State’s domestic level.

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INTRODUCTION

In order to deal with the needs of asylum seekers in its legal space, the European Union has enacted several acts, such as Directive on reception conditions for asylum-seekers (2003/9/EC), Directive laying down minimum standards for the qualification and status as refugees (2004/83/EC), Asylum Procedures Directive (2005/85/EC) and the so-called Dublin Regulation (343/2003/EC). These latter are part of the so-called Common European Asylum System, whose current aim is to establish common minimum standards among its Member States for the protection of asylum seekers. The purpose of this chapter is to analyze a particular aspect of the so-called Dublin Regulation, whose aim is to determine the European Union (EU) Member State responsible for examining an asylum application, that is, the presumption that the EU Member States are ‘safe countries.’ Although the notion of ‘safe country’ is on the base of the Dublin Regulation functioning mechanism as it implies that any EU Member States can transfer an asylum seeker to any other EU country which is responsible, we contend that the safety of an EU Member State can be given as presumed for the purpose of asylum seekers. The analysis of the present work starts, firstly, with the examination of the presumption of ‘safe country’ under the Dublin Regulation. In the second part, relying on the European Court of Human Rights’ (ECHR) case-law, it will be discussed to what extent the Court of Strasbourg clarifies the notion of EU Member States as ‘safe countries’ and the test it applies to it. Finally, the Commission’s proposal for a recasting of the Dublin Regulation will be analysed with the aim to foresee possible future developments of the EU law mechanisms to rebut the presumption of the notion of ‘safe country’ as applied to the EU Member States.

THE NOTION OF ‘SAFE COUNTRY’ UNDER THE DUBLIN REGULATION

The Dublin Regulation, whose legal base was art. 63 TCE (currently, art. 78 TFUE, Treaty of Lisbon), was adopted in 2003 with the aim to establish the responsibility of an EU Member State to examine an asylum claim on the base of specific criteria, and was meant to replace the previous legal norms, based on the Dublin Convention. Both the Dublin Convention and Regulation rely on the presumption that the EU Member States are ‘safe countries,’ that is, State parties mutually recognize each other as safe third countries. Therefore, the Dublin system always allows the “transfer” of applicants to another Member State that is “responsible,” on the base of the Regulation’s criteria, for examining their claims. Under Art. 20 (1) (e) of the Dublin Regulation, the decision to transfer an asylum seeker “*may* be subject to an appeal or a review. *Appeal or review concerning this decision shall not suspend the implementation of the transfer* except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this” (emphasis added). Before specifically addressing, in the last part of this section, the notion of ‘safe country’ under the Dublin Regulation, the next paragraphs will aim to provide a general overview of the main legal features of the Dublin Regulation as well as a definition of the notion of ‘safe country’ in its several variants under International Law.

The Main Legal Features Of The Dublin Regulation

In the doctrine, there is a general consensus that, although the Preamble of the Dublin Regulation lists several objectives, such as the harmonization of asylum policies, the protection of refugees in accordance with international legal instruments, the promotion of free movement, and the efficiency of asylum processes in the EU, the key

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