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ITALY'S 'SAFE COUNTRIES OF ORIGIN' LEGISLATION UNDER CJEU SCRUTINY: CHALLENGING THE (UN)SAFETY

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With the decisions issued on 15 May 2024, the first-tier Court of Florence submitted two preliminary references to the Court of Justice of the European Union (CJEU) concerning Italian legislation on 'safe countries of origin'. The Italian judges asked the CJEU to clarify whether EU law should be interpreted in a way that precludes national legislation, such as the Italian one, which permits the declaration of a third country as a safe country of origin with the exclusion of certain categories of at-risk people. The issue raised by the Court of Florence is significant also considering the recently approved Regulation (EU) 2024/1348, which will be applicable from 12 June 2026 and allows both the EU and Member States to designate third countries as safe countries of origin. This Regulation offers a slightly different discipline on this matter, but it is likely that the solution adopted by the CJEU in the cases referred by the Court of Florence will also influence its interpretation.

The concept of 'safe countries of origin' has its roots in European practice, having been adopted by European countries even before it was formalised in EU law with Directive 2005/85/EC. This concept was not introduced to better protect the individual rights of asylum seekers, but as

a tool to manage and contain migration flows. For this reason, it has been harshly criticised by several commentators from the outset (Martenson and Mccarthy, 1998; Costello, 2005; Hunt, 2014).

The basic idea is that when «it can be shown» that a third country is «generally and consistently» safe, the asylum application of a national (or habitual resident) of that country should be considered unfounded unless «he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances» (Article 37 of Directive 2013/32/EU). This presumption severely impacts the right to asylum, as it not only reverses the burden of proof, placing it exclusively on the asylum seeker, but also permits Member States to apply an examination procedure that is accelerated and/or otherwise simplified (Article 31, paragraph 8 of the Directive).

The inherent problem of this approach is that the evaluation of the safety of a third country is a general assessment, likely influenced by political rather than humanitarian reasons. Conversely, the right to asylum, which is negatively affected by this assessment, is an individual right requiring thorough, case-by-case examination. This represents a radical reversal of the cultural and legal paradigm of asylum policies, which are being treated as migration policies aimed at deterring asylum seekers and fostering a culture of disbelief among those responsible for deciding on their applications (Venturi, 2019).

Thus, it is not coincidental that the European Court of Human Rights (ECHR) has reiterated the principle that declaring a state a safe country of origin «does not relieve the extraditing State from conducting an individual risk assessment» (ECHR, DL v. Austria, 7 December 2017).

In 2018, Italy joined the majority of EU Member States that have chosen to adopt a list of safe countries of origin (in 2022, 19 Member States). The latest list, promulgated on 7 May 2024, includes 22 safe countries of origin: Albania, Algeria, Bangladesh, Bosnia-Herzegovina, Cameroon, Cape Verde, Colombia, Ivory Coast, Egypt, Gambia, Georgia, Ghana, Kosovo, Northern Macedonia, Morocco, Montenegro, Nigeria, Peru, Senegal, Serbia, Sri Lanka, and Tunisia. It has been argued that this list was likely drafted primarily, if not exclusively, based on data about the origin of

asylum seekers over the past years (ASGI).
The Italian legislation and subsequent practice on safe countries of origin have been harshly criticised by commentators, primarily raising concerns about the procedural and substantive diminution of the protection of the right to asylum for vulnerable refugees, as well as the inconsistencies and controversies in the choice of third countries designated as safe (Pitea, 2019; Armone, 2021; Flamini, 2023; Pirrello, 2024).

Following these criticisms, the Florence Court has challenged the legitimacy of the Italian regulation on the concept of safe countries of origin in two ways.
Firstly, it has denied that certain countries included in the government's list, such as Senegal and Tunisia, can be considered safe for all their nationals (Tribunale di Firenze, 2020 and Tribunale di Firenze, 2023).
Secondly, in the two decisions under consideration, it has argued that the Italian legislation is incompatible with EU law, particularly when it allows for the possibility of declaring a third country as a safe country of origin with exceptions for specific categories of people (Article 2-bis, paragraph 2 of legislative decree 25/2008).

The decisions concern two distinct but very similar cases. Consequently, they follow the same line of reasoning.
The first case concerns the Ivory Coast, which was designated by the Italian government decree of 17 March 2023 as a safe country of origin, with the exception of eight groups of people: prisoners, physically or mentally disabled people, albinos, HIV-positive people, the LGBT+ community, victims of gender discrimination (including victims and potential victims of FGM), victims of trafficking, and journalists.
The second case concerns Nigeria, which was declared by the same decree as a safe country of origin, with the exception of eleven groups of people. In addition to those mentioned for the Ivory Coast, the exceptions include internally displaced people, members of the IMN (Islamic Movement in Nigeria), and members of the IPOB (Indigenous People of Biafra). Additionally, the northeast part of Nigeria is considered dangerous due to the presence of Boko Haram.
It is important to note that these exceptions were not included in the

government decree itself, but in a note from the Foreign Minister referenced by the decree. The Court of Florence considered this note incorporated into the decree to avoid a contradiction between the two documents, which would render the designation of the two countries as safe invalid, given that large parts of their populations are recognised by the government itself as being in danger.
It is immediately apparent that these exceptions are very broad and difficult (if not impossible) to verify within the accelerated and simplified procedure reserved by Italian legislation for nationals from safe countries of origin.

In light of the above, the Court of Florence requests that the CJEU clarify whether EU law (specifically, Articles 36, 37 and 46 of Directive 2013/32/EU) should be interpreted in such a way as to preclude national legislation like the Italian one, which permits the declaration of a third country as a safe country of origin with the exclusion of certain categories of at-risk people. As an alternative, assuming that this method of designation is not completely prohibited by EU law, the Court requests clarification on whether EU law prohibits a national rule that designates a third country as a safe country of origin but includes personal exceptions for groups of people that, in terms of both number and type, are difficult to ascertain within the limited timeframe of the accelerated procedure.

After formulating the preliminary references to the CJEU, the Court of Florence clarifies its position. It acknowledges that several Member States (EUAA report) follow the practice of declaring safe countries of origin with personal exceptions. However, it contends that this practice contradicts Directive 2013/32/EU for three reasons.
First, it argues that the declaration of a third country as «generally and consistently» safe is not compatible, both logically and textually, with the exception for entire categories of the population. A similar concern has been raised by the Court of Brno regarding territorial exceptions in case C-406/22, which is still pending. In this regard, the Advocate General Emiliou has expressed the opinion that the «designation as a safe country of origin can be made only on a full territorial basis», with arguments that appear partly relevant to cases involving personal exceptions as well

(Michková, 2024). The Court of Florence's position on this matter is clear: it is illogical to designate a country as safe for certain groups while excluding minorities who face discrimination due to their personal characteristics and whom asylum laws are intended to safeguard. A country cannot be considered «generally and consistently» safe if safety applies only in part (see also UNCHR, 2010, p. 344 and 345).
Second, the Court of Florence observes that Directive 2013/32/EU does not permit territorial or personal exceptions. In contrast, Directive 2005/85/EC, in Article 30, explicitly allowed for such exceptions. The omission of this provision in the latest Directive, which aims to establish a common framework for Member States, suggests that the EU legislator intended to abolish this option, indicating it should no longer be considered permissible (Advocate General Emiliou, 2024; Pitea, 2019).
The third and final argument presented to the CJEU is arguably the most compelling. The Court of Florence recalls that the rationale behind the concept of safe countries of origin is to expedite and simplify the decision-making process for asylum applications in "non-problematic" cases. However, when there are several exceptions based on personal characteristics often difficult to verify in specific cases - such as victims of gender-based violence or members of the LGBT+ community facing discrimination (Gattuso, 2023) – this rationale is clearly undermined. Furthermore, given the accelerated procedure, public authorities have limited time to determine if an applicant belongs to these vulnerable groups. Therefore, her right to asylum is likely to be denied simply because she comes from a country that is deemed safe, even though it is not safe for her. This is why the recently approved Regulation (EU) 2024/1348 allows for the designation of a third country as a safe third country with personal exceptions, but only if these exceptions apply to «clearly identifiable categories of persons» (Article 61). If these categories are not clearly identifiable, as in the cases decided by the Court of Florence, the government's designation reveals its true intent: to deter asylum seekers from countries with significant immigration flows to Italy (even if they are unsafe for significant parts of the population) and to foster scepticism among those responsible for adjudicating their

applications.

The arguments presented by the Court of Florence in the two decisions under review are compelling. Upon examining the exceptions listed by the Italian government, it becomes immediately apparent that Ivory Coast and Nigeria cannot be considered «generally and consistently» safe, given that so many minorities face the risk of persecution. Moreover, since the exceptions are supposed to be identified through the accelerated and simplified procedure designed for applicants from safe countries of origin, there is a high likelihood that individuals belonging to these discriminated minorities will be denied the right to asylum. Considering the widespread discrimination and persecution in these countries, they should be regarded as ordinary countries of origin, and their nationals should undergo the standard asylum procedure in Italy, allowing authorities to thoroughly assess their asylum claims. In light of these circumstances, perhaps the Court of Florence could have also disapplied the decree designating Ivory Coast and Nigeria as safe countries of origin.
Nevertheless, the Court's effort to challenge part of the Italian legislation and to promote a more human-rights-oriented interpretation of EU law is commendable. By rejecting the possibility of providing personal (and territorial) exceptions to the general assessment of safety, the Court of Florence aims to prevent unstable and troubled countries from being partially declared safe and to ensure comprehensive scrutiny of the right to asylum for all applicants coming from them.

Of course, it is not possible to foresee whether the CJEU will embrace the interpretation put forward by the Court of Florence. On the one hand, the arguments proposed by the latter are convincing, with the Advocate General echoing some in a related case. On the other hand, Regulation (EU) 2024/1348 allows for exceptions based on personal grounds, and it seems unlikely that the CJEU will completely contradict the approach recently adopted by the EU legislator. Perhaps an intermediate solution capable of balancing procedural efficiency and rights protection could be to limit the provision of exceptions, as too many would undermine the rationale and effect of declaring a third country as a safe country of origin. In this perspective, the CJEU could adopt a solution similar to that of the

EU legislator and restrict exceptions only to «clearly identifiable categories».

Nevertheless, the fundamental issue persists, as it pertains to the very concept of safe countries of origin, which conflicts with the humanitarian imperative to assess asylum claims of refugees thoroughly and on a case-by-case basis, without any procedural or substantive limitations. The fact that Regulation
(EU) 2024/1348 has reaffirmed this concept leaves little hope for a radical change in the EU's approach to refugee matters. Therefore, the only hope lies in small and progressive corrections by national and EU courts. Perhaps the cases under consideration could mark the beginning of this reformative trend.

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