# OPINION NO. 2/2012 (XII.10) KMK. OF THE SUPREME COURT OF HUNGARY *(KÚRIA)* ON CERTAIN QUESTIONS RELATED TO THE APPLICATION OF THE SAFE THIRD COUNTRY CONCEPT

10 December 2012

The Supreme Court of Hungary *(Kúria)* issued an official opinion on 10 December 2012 in order to promote a harmonised practice at Hungarian courts regarding the application of the safe third country concept in asylum cases. The concrete reason for issuing such a guidance document was that in recent years, different Hungarian regional courts applied different approaches upon reviewing administrative decisions which deny admission to the in-merit asylum procedure based on the fact that the asylum-seeker arrived in Hungary from a safe third country. This also meant a diverging evaluation of the asylum situation in Serbia (the target country of most safe third country returns of asylum-seekers from Hungary).

The summary conclusions of the Supreme Court are as follows:

***"I.*** **[When reviewing administrative decisions regarding the application of the safe third country concept]** ***the court shall ex officio take into consideration the precise and credible country information at its disposal at the time of deciding, obtained in any of its procedures. In this context, the country information issued by the United Nations High Commissioner for Refugees (UNHCR) shall always be taken into consideration. In case of doubt, [...] the court may approach the country information service of the Office of Immigration and Nationality or it may obtain information from other reliable sources. [...]"*** In the explanatory part of the guidelines, the Supreme Court clarified a number of related principles:

- *"Due to the absolute character of the prohibition of torture, inhuman, degrading treatment, both the [administrative] authority and the court shall, upon assessing the safety of a third country and applying the principle of non-refoulement in this respect, take into consideration the facts and circumstances relevant at the time of its decision."* The Supreme Court therefore confirmed that even though the primary objective of the judicial review of administrative decisions is to verify the legality of these decisions at the time they were passed, in light of the absolute, non-derogable character of the non-refoulement obligation (in the sense of the extraterritorial application of the prohibition of torture, inhuman and degrading treatment and punishment) the administrative court cannot disregard potential changes in circumstances or relevant information received since the administrative authority's decision.
- *"If there is no available UNHCR country report on the given country, or the available UNHCR country report is outdated, both the administrative authority and the court shall specify this fact in its decision. The conclusion that a UNHCR country report is outdated shall be reasoned in details."*
- *"The court, in light of its obligation under international law to obtain country information from a variety of sources, shall evaluate, both individually and as a whole, all the information officially at its disposal, not only those submitted by the administrative authority (and occasionally by the applicant)."*

***"II. The fact that the asylum system of a third country is overburdened may render this country incapable to respect the rights of asylum-seekers. Such a third country shall not be regarded as safe for asylum-seekers."*** In the explanatory part, the Supreme Court emphasised that *"The fact that a certain country ratified the relevant international treaties is per se irrelevant when assessing the 'safety' of a country, since the application of these treaties in practice shall also be examined."* Later on, the Supreme Court further underlined the importance of having access to effective protection in the third country deemed as safe and specified that: *"Several circumstances shall be examined and evaluated according to their importance in this respect (for example whether the submission of an asylum claim is subject to any pre-condition, and if yes to what extent it may be impossible to fulfil this obligation in a reasonable time, whether the thorough assessment of an asylum claim is ensured, whether there are sufficient procedural safeguards and guarantees for judicial review, etc.)."*

***"III. The mere fact that the applicant did not try to submit an asylum claim in the third country does not per se justify the conclusion that the third country in question shall be regarded as safe in that particular case."*** In the explanatory part, the Supreme Court clarified a number of related principles:

- If a country is considered a safe third country, *"the burden of proof lies on the applicant to demonstrate that she/he did not have access to effective protection (individual circumstances play an important role in this case). The standard of proof applicable is substantiation (for example being under-age, presenting a plausible story, coherent declarations, etc.)."* Thus the Supreme Court confirmed that the lower/more flexible standard of proof generally applicable in asylum procedures according to Hungarian law (and reflected by the term "substantiate" instead of "prove") shall also be applied in this specific procedural element.
- *"The mandatory use of country information and the individualisation requirement are general procedural obligations set forth both by the Qualification Directive (Council Directive 2004/83/EC) and the Procedures Directive (Council Directive 2005/85/EC), which shall therefore be applied to all elements and phases of the asylum procedure. Admissibility, accelerated, airport, etc. procedures do not constitute an exception to this rule."*
- *"In case of a risk of chain refoulement the applicant cannot be reasonably expected to prove an individual risk, since this is typically a consequence independent from the will of the person concerned, on which often her/his personal characteristics have no influence either. If in the given country there is a general risk of chain refoulement, it is nearly impossible for the applicant to provide evidence, beyond the establishment of this fact (based on country information)."*

The original text (in Hungarian) is available at: http://www.kuria-birosag.hu/hu/kollvel/22012-xii10-kmk-velemeny-biztonsagos-harmadik-orszag-megitelesenek-egyes-kerdeseirol

All texts in italics are translated from the original guidelines (unofficial translation).

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