Longing for Safety before the European Court of Justice

The Advocate General's Advisory Opinion in Alace and Canpelli

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On 10 April 2025, the Advocate General (AG) Richard de la Tour of the European Court of Justice (ECJ) delivered his Advisory Opinion in the joined cases C-758/24 *Alace* and C-759/24 *Canpelli*. The Opinion dealt with the powers of Italy – and, by extension, other EU Member States (MS) – to legislate on what constitutes a "safe third country" (STC) and a "safe country of origin" (SCO). The AG confirmed that Italy can list a third country as "safe" when it is "generally" deemed as such, provided that this designation is compliant with EU law. De la Tour also noted that in cases where an applicant's request for asylum or international protection is rejected, a national judge may request to review the sources that a MS relied upon to designate a STC, if they have not been published before.

While the AG's insistence that EU law and standards of international protection must be respected is to be welcomed, the Opinion lacks elaboration on the designation of a country as "generally" safe though some exceptions of groups of people at risk may be found. This piece discusses how the human rights of applicants seeking international protection are likely to be hindered by this approach.

The Italy-Albania Protocol

The *Alace* and *Canpelli* cases revolve around the Italy-Albania Protocol (signed on 6 November 2023), which has been widely discussed for its offshore asylum processing model. In a nutshell, the Protocol allows Italy to complete accelerated border procedures on Albanian territory but under Italian jurisdiction in two centres, Shengjin and Gjader. The legal issues stemming from the Protocol are numerous and include the externalisation of asylum procedures, extraterritorial jurisdiction, and the compatibility of national laws with EU law. The Protocol also raises concerns over human rights protection.

The concepts of STC and SCO are central to Italy's struggle to implement the Protocol. Crucially, the Albanian centres can only host people coming from a safe country. This provision is proving to be thorny for the Italian government. In one instance, the Tribunal of Rome held that 12 migrants who were not granted international protection after the accelerated asylum procedures could not be kept in Gjader since their home countries – Egypt and Bangladesh – were not deemed safe. The same conclusion was reached in another case involving 7 migrants also from Egypt and Bangladesh. The Italian Government promptly reacted to these judicial decisions and passed a Decree on 23 October 2024 which added both Egypt and Bangladesh to its list of safe countries (the list has been left unaltered for 2025).

On 4 November 2024, the Tribunal of Rome lodged a request for a preliminary ruling to the ECJ seeking clarification on the powers of MS to designate a third country and countries of origin as safe by a legislative act of primary law.

The Advisory Opinion

The request for a preliminary ruling lodged by the Tribunal of Rome referred four questions to the Court: (a) whether EU law precludes a MS from designating a third country as a SCO, (b) whether EU law requires sources considered when designating a country of origin as "safe" to be "accessible and verifiable", (c) whether national courts can rely on sources other than those referred to in the Directive 2013/23 when

reviewing the designation of "safety", and (d) whether MS can designate a third country as "safe" when there are groups that are persecuted within that country.

Key to answering the Tribunal's questions is the Directive 2013/32 with the main objective to develop standards for procedures in MS to grant and withdraw international protection to establish a common asylum procedure in the Union (Recital 12). Particularly relevant are Article 36 on the concept of safe country of origin, Article 37 on the national designation of third countries as safe countries of origin, Article 46 on the right to an effective remedy as well as Article 47 on the right to an effective remedy of the Charter of Fundamental Rights of the European Union (the Charter).

Referring to Articles 36 and 37, Directive 2013/32, the AG concluded that EU law does not preclude a State to define a third country as safe provided that such designation ensures the primacy of EU law and does not impact the purpose and objectives of the Directive itself (para. 39, cf. Case C-134/23 *Elliniko Symvoulio* and C-406/22 *Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky*).

Considering the second and third questions jointly, the AG proceeded to state that, in the event of an applicant filing a case upon rejection of a request for international protection, a national judge may review the sources that the State relied on to list a third country as safe if they have not been published previously (according to Article 46(3), Directive 2013/32) (paras. 62-64).

De la Tour also noted that a MS may designate a third country as safe, even when there are some categories of people that are deemed "at risk" in that same third country. These groups of people ought to be "limited, and clearly identifiable" (para. 70). However, the AG specified that the margin of discretion accorded to MS is not unlimited and must not be exercised without prejudice to the objectives and purpose of the Directive 2013/32, invoking the principle of proportionality (para. 87 and para. 93). The Opinion also relies on the designation of a country as "generally" safe (*généralement*, in the French version), as mentioned in Annex I to the Directive 2013/32 (paras. 78-79). De la Tour fleshed out the meaning of "generally" by referring to Recital 42, Directive 2013/32 which states that "an absolute guarantee of safety" cannot be established. Rather, "the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country" (para. 79). The AG elaborated on "generalisation and exceptions", specifying that there may be exceptions to the designation of a country as generally safe (para. 80). However, he noted that when there are too many exceptions to the generally safe third country, such conditions may lead to the conclusion that it is in fact not safe (para. 92).

Assessing Safety

The AG overall confirmed that standards of international protection ought to be respected in accordance with EU law and international law. The AG's answer to the first question does not come as a surprise since he relied on two recent cases decided by the Court. He also conformed to the European Commission's interpretation of Articles 36 and 37, Directive 2013/32, as presented at the hearing of the *Alace* and *Canpelli* cases on 25 February 2025. Here, then, de la Tour seems to be seeking to strike a balance between showing some deference to MS and upholding the primacy of EU law.

Concerning the responses to questions b) and c), the AG invoked the principle of proportionality and warned MS to respect the right to an effective remedy, enshrined in Article 47 of the Charter. De la Tour was dealing here with actions brought against the rejection of a request for international protection. In such instances, he noted, the applicant's right to an effective remedy ought to be respected and the sources that a MS relied on to designate a STC published (para. 64). As the AG explained, the publication of the sources relied upon to designate a country as safe reinforces the credibility and authority of a presumption of safety, which is in turn linked to the efficiency of review of asylum applications (para. 52). When sources have not been made publicly available, the national judicial authority may request to review them to assess the legality of the process of designation of safety (para. 65). This is a critical point in the Opinion that

confirms the importance of the judiciary to verify compliance with international law and EU law, by reviewing national policies and domestic law, to ensure that applicants will be able to defend their rights (para. 58).

Turning to the response to question d), as mentioned, the Opinion specifies that a country may be deemed as generally safe, even though "limited, and clearly identifiable" groups of people could be at risk there (para. 70). The AG also provided some examples of groups of people that may be subjected to persecution, including, but not limited to, people belonging to the LGBTQIA+ community, victims of gender-based violence, ethnic and religious minorities (para. 92).

The main issue here is that it is unclear how a country can be considered as generally safe when there are "limited" groups that are at risk (para. 70). De la Tour notes that when too many exceptions are found, the presumption of general safety will not hold, and that "these exceptions would rather reflect the existence of generalised and systemic failures or deficiencies in the obligations incumbent on the third country concerned towards its population" (para. 92). However, the Opinion remains vague in relation to how many groups at risk ought to be identified to counter the presumption of safety. Moreover, as noted by the AG, the group or, potentially, groups at risk ought to be "clearly identifiable" (para. 70). One may question how much clarity can be achieved regarding the identification of such group(s) due not least to the lack of a set-in-stone definition and interpretation of the term "persecution". These are two key points that the Opinion does not elaborate on enough and are likely to loosen the standards to determine the safety of third countries.

These are not new issues. In 1998, Henry Martenson and John McCarthy problematised the use of the concept of SCO, discussing the need to establish solid procedural safeguards, such as "independent scrutiny of the criteria that apply", when designating a country as safe. In 2016, Cathryn Costello noted that "SCO designations must be based on rigorous processes and sources, if they are to be credible and fair." Though she also warned that "the institutional structures thus far, at national and particularly at the EU level, seem likely to politicise determination." Today, the politicisation of the determination of STC and SCO continues to be a concern.

In sum, though the Opinion calls for respect of EU law and standards of international protection, it is unclear regarding the determination of general safety. Thus, MS can rely on a flexible and discretionary presumption of a generally safe country, to which exceptions may be found. Adopting a logic of exceptionalism to counter the presumption of (general) safety is likely to hinder the human rights of applicants seeking international protection as the cases of *Alace* and *Canpelli* themselves have shown.

Is Anywhere Safe?

As the centres in Albania have been emptying, on 28 March 2025 the Italian government approved yet another Decree to "save" the Italy-Albania Protocol and use the centres to repatriate migrants whose applications for international protection have already been rejected in Italy. On 11 April 2025, 40 migrants were transferred from Italy to Albania. However, the pursuit of safety is not over with the joined cases still pending before the ECJ. The "exceptionalism approach" may put at risk the human rights of applicants seeking international protection, if the standards to determine the general safety of a country remain vague. A clarification on behalf of the Court on this point would be desirable, provided that the ECJ will be mindful of the vulnerability of such processes to politicisation. Overall, undue reliance on the lists of safe countries and the discretionary assessments to designate STC and SCO are likely to further put at risk human rights and to lower international protection standards.

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