ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI
č. **4** | **2024** | roč. **XXXII** | 549–574
https://doi.org/10.5817/CPVP2024-4-2

Judicial Review of Safe Countries of Origin Designations in Czechia*

Karolina Michková**

Abstract

The article thoroughly assesses one of the approaches towards judicial review of the safe country of origin mechanism. It focuses on the judicial review of safe country of origin designations. As will be shown on a case study of Czechia, there may be deficiencies in specific safe country designations that the courts have to address when considering administrative actions. Based on case-law analysis the article provides several criteria that should be considered during the judicial review and addresses some interpretative issues that may come into play.

Keywords

Safe Country of Origin; Judicial Review; Asylum Law; Asylum Procedures Directive; Czechia.

Introduction

A man from India applied for international protection in Czechia. The reason he gave was that he had borrowed money from a private lender and had not paid it back in time, so the lender was now threatening to kill him. He did not contact the police in his country of origin because he believed it was corrupt. The Department of Asylum and Migration Policy under the Ministry of Interior (hereinafter "Ministry of Interior") assessed his application and rejected it as manifestly unfounded, as India is on the list of safe countries of origin (hereinafter "SCO"), and the applicant did not show that it is not safe in his specific case. The safety was substantiated by the asylum authority with the document *India Safe Country of Origin Assessment*, which purports to show that there is generally and consistently no persecution, torture or inhuman or degrading treatment, punishment or threat of arbitrary violence in India due to international or internal armed conflict. India has ratified and complies with international human rights and fundamental freedoms treaties, including standards on effective remedies. It allows for the operation of legal entities that monitor the human rights situation. There are appellate courts to which citizens can take their grievances.[1]

* This publication was written at Masaryk university as part of the project "Constitutional Law and Theory of State in a Changing World" (MUNI/A/1552/2023) with the support of the Specific University Research Grant, as provided by the Ministry of Education, Youth and Sports of the Czech Republic in the year 2024.

** Mgr. Karolina Michková, Ph.D. student, Faculty of Law, Masaryk University, Brno, Czech Republic; Law Clerk, Constitutional Court, Brno, Czech Republic / E-mail: 458874@mail.muni.cz / ORCID: 0009-0006-0841-2669 / Scopus ID: 58118201500

1 Judgment of the Regional Court in Brno of 20 October 2021, No. 41 Az 58/2020-52, par. 2–5.

However, when the Regional Court in Brno (hereinafter "RCB") assessed the applicant's appeal it looked at the document in question, and learned that: *"The* [Indian] *Constitution of the country guarantees fundamental rights and freedoms, including freedom of movement, freedom of religion and prohibition of torture and other cruel, inhuman or degrading treatment or punishment. However, there is still no definition of torture in the legislation. Human rights deficiencies persist, in particular human rights violations, including cases of torture by the police and security forces, particularly in the north-eastern states of India and in Kashmir, discrimination against women and girls, and a lack of investigation and prosecution of sexually motivated crimes. While India's minorities – particularly Muslims, scheduled castes and scheduled tribes – enjoy equal status before the law, in practice, violence and discrimination based on caste or religion persist".*[2]

On the one hand, there was the applicant's testimony describing his fears of persecution in his country of origin and the unavailability of internal protection, while on the other hand, there was a country report, which demonstrated India's safety deficiencies. On the availability of internal protection, the report only stated that the police, like other security forces, violated human rights and tortured people. Nevertheless, the Ministry of Interior rejected the application for international protection as manifestly unfounded, concluding that the applicant comes from an SCO, and did not rebut the presumption of safety. The RCB found fault with the Ministry of Interior's procedure and annulled its decision due to insufficient country-of-origin information.

The article focuses on the SCO concept in Czech law. However, as Czechia is an EU Member State, it also refers to EU law since the SCO concept has its origins in EU law, specifically Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (hereinafter "Procedures Directive"), and forms an important and sometimes controversial part of the Common European Asylum System. The idea behind the SCO concept is that states will have more time to process legitimate international protection applications rather than being overwhelmed by "bogus" ones.[3] The main difference between an applicant from an SCO and an applicant from a non-SCO country lies in the burden of proof. The applicant coming from an SCO must rebut the presumption of safety.[4] It is assumed that a country designated as an SCO does not normally generate refugees and that applications from that country are likely to be unfounded.[5] There is an assumption that *"certain asylum seekers do not require*

2 CZECH MINISTRY OF INTERIOR. *Evaluation of India as a safe country of origin*. 2019, pp. 2–3. Country report obtained through a request for information based on the Czech Freedom of Information Act.

3 MARTENSON, H., MCCARTHY, J. "In General, No Serious Risk of Persecution": Safe Country of Origin Practices in Nine European States. *Journal of Refugee Studies*. 1998, Vol. 11, no. 3, p. 306. DOI: http://doi.org/10.1093/jrs/11.3.304; HAILBRONNER, K. The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective. *International Journal of Refugee Law*. 1993, Vol. 5, no. 1, p. 33. DOI: http://doi.org/10.1093/ijrl/5.1.31

4 ENGELMANN, C. Convergence against the Odds: The Development of Safe Country of Origin Policies in EU Member States (1990–2013). *European Journal of Migration and Law*. 2014, Vol. 16, no. 2, p. 282. DOI: http://doi.org/10.1163/15718166-12342056

5 HUNT, M. The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future. *International Journal of Refugee Law*. 2014, Vol. 26, p. 502. DOI: http://doi.org/10.1093/ijrl/eeu052

protection at all because their country of origin is regarded by the destination country as inherently safe".[6] In other words, the applicants have to prove that in their particular situation their country of origin cannot be considered safe.[7] However, without the appropriate tools to ensure that the SCO concept is applied correctly, it risks becoming a formalised instrument designed to quickly reject applications for international protection without individual assessment of the applicant's situation.[8] Applications from countries designated as SCOs are generally treated as manifestly unfounded and are often subject to accelerated procedures[9] (e. g. no automatic suspensive effect of the appeals procedure[10]). With such an approach, there is a significant risk that the state will reject an application for international protection that had merit[11] and the applicant will then be returned to their country of origin, where they will be at risk of serious harm or even death and the rejecting state will violate the non-refoulement principle.

The United Nations High Commissioner for Refugees (hereinafter "UNHCR") had warned against the use of the SCO concept in a way that would *a priori* preclude a whole group of asylum seekers from refugee status. It may also be quite difficult to determine whether a certain country is safe, due to volatile human rights situations and the fact that inherently biasing political and foreign policy considerations may be in play when determining a safety of a certain country. Nonetheless, where the concept is used in a procedural sense to assign certain applications to expedited or accelerated procedures or has an evidentiary function it can help reduce backlogs and help identify cases for expedited treatment. However, the use of the SCO concept should not block access to the asylum procedure and should not result in serious inroads into procedural safeguards.[12]

Judicial review is considered as a safeguard in the use of the SCO concept.[13] Article 46(3) of the Procedures Directive requires Member States to provide for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination

6 JOHN-HOPKINS, M. The Emperor's New Safe Country Concepts: A UK Perspective on Sacrificing Fairness on the Altar of Efficiency. *International Journal of Refugee Law*. 2009, Vol. 21, no. 2, p. 219. DOI: http://doi.org/10.1093/ijrl/eep007

7 ENGELMANN, op. cit., p. 282.

8 MARTENSON, MCCARTHY, op. cit., p. 307; ZYFI, J., ATAK, I. Playing with lives under the guise of fair play: the safe country of origin policy in the EU and Canada. *International Journal of Migration and Border Studies*. 2018, Vol. 4, no. 4, p. 15. DOI: http://doi.org/10.1504/IJMBS.2018.096765

9 COSTELLO, C. The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection? *European Journal of Migration and Law*. Brill Nijhoff, 2005, Vol. 7, no. 1, p. 52. DOI: http://doi.org/10.1163/1571816054396842

10 GIEROWSKA, N. Why Does No Common European List on Safe Country of Origin Exist Despite Numerous Efforts Aimed at the Harmonisation of European Asylum Policy? *Journal of International Migration and Integration*. 2022, p. 12. DOI: http://doi.org/10.1007/s12134-021-00922-1

11 MACKLIN, A. A safe country to emulate? Canada and the European refugee. In: LAMBERT, H., MCADAM, J., FULLERTON, M. (eds.). *The Global Reach of European Refugee Law*. Cambridge: Cambridge University Press, 2013, p. 103. DOI: http://doi.org/10.1017/CBO9781107300743.004

12 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES. Background Note on the Safe Country Concept and Refugee Status. In: *Refworld* [online]. 26. 7. 1991 [cit. 16. 9. 2024]. Available at: https://www.refworld.org/reference/annualreport/unhcr/1991/en/92352

13 HUNT, op. cit., p. 534.

of the international protection needs at least in appeals procedures before a court or tribunal of first instance. This allows for the potential to effectively address the procedural repercussions resulting from SCO designations and ensures the right to an effective remedy[14] as required by Art. 47 of the Charter of Fundamental Rights of the European Union.[15] Articles often describe examples of how courts played an important role in invalidating certain SCO practices[16] or SCO designations.[17] It has also been said that the growing case law related to the SCO concept suggests that SCO designations do not speed up the refugee status determination procedure but postpone a more thorough review of the application for international protection to the appeals procedure.[18] One factor that might play a role in the way the courts review SCO designations is the way the SCO policies and lists are made. Usually, SCO lists are created by ministries in the form of a ministerial decree[19] (which is also the case in Czechia). This leaves the SCO designation at the discretion of the executive branch.[20] Without the oversight of the legislative branch, the only branch left to remedy possible missteps is the judicial branch reviewing the decisions of the asylum authority.

In the case described above the RCB remedied a wrong decision of the asylum authority. However, this may not always be the case. As much as the courts represent a safety net of sorts that catches cases that have fallen through the net of asylum authority assessment, this safety net also has its weaknesses and loopholes. At the same time, the severity of potential misconduct by both the asylum authority and the courts is high. The applicant may face a real risk in the country of origin, and their return may violate the principle of non-refoulement.

Until October 2021, the judicial review of the administrative proceedings regarding international protection for applicants from SCOs in Czechia focused on whether the applicants managed to rebut the presumption of safety.[21] In essence, this involved determining whether the applicants presented compelling evidence that could persuade the asylum authority to conclude that, in their unique circumstances, their country could be regarded as not safe. Such a successful challenge would result in the annulment of the administrative decision, reopening of the international protection proceedings in which the application could no longer be considered manifestly unfounded and leading to its evaluation through standard asylum proceedings. The RCB case depicts another approach towards

14 HUNT, op. cit., pp. 526–527.

15 Charter of Fundamental Rights of the European Union. In: *Official Journal of the European Union*. 26. 10. 2012. ISSN 1977-091X. DOI: http://doi.org/10.3000/1977091X.C_2012.326.eng

16 COSTELLO, C. Safe Country? Says Who? *International Journal of Refugee Law*. 2016, Vol. 28, no. 4, p. 613. DOI: http://doi.org/10.1093/ijrl/eew042

17 ENGELMANN, op. cit., p. 283; GIUFFRÉ, M., DENARO, C., RAACH, F. On 'Safety' and EU Externalization of Borders: Questioning the Role of Tunisia as a "Safe Country of Origin" and a "Safe Third Country". *European Journal of Migration and Law*. 2022, Vol. 24, no. 4, p. 595.

18 Ibid., pp. 298–299.

19 Ibid., p. 282.

20 ZYFI, ATAK, op. cit., p. 350.

21 SLÁDEKOVÁ, S. Bezpečné země původu a soudní přezkum. In: *Ročenka uprchlického a cizineckého práva 2020/2021*. Praha: Wolters Kluwer ČR, 2022, p. 270.

judicial review regarding applications for international protection submitted by applicants coming from countries designated as SCOs. The approach lies in the review of a particular SCO designation. While the RCB is not the first to come up with this approach, it was first in Czechia and caused a chain reaction of sorts in the Czech case-law concerning SCOs, which resulted in two Czech preliminary references to the Court of Justice of the European Union (hereinafter "ECJ") regarding the use of the SCO concept. While one of these has been decided based on a different legal problem than the one that has been described by the referring court and did not address the SCO concept at all[22] another one has been decided by the ECJ in the beginning of October 2024 and touches on SCO designations with territorial exceptions, relevance of the activation of Art. 15 of the European Convention on Human Rights to SCO designations and the *ex offo* responsibilities of courts when dealing with appeals concerning applicants coming from SCOs.[23]

In Czechia, the SCO concept is regulated by the Act No. 325/1999 Coll. on Asylum (hereinafter "Asylum Act"). Czechia ranks as one of the highest[24] in terms of the number of countries on its SCO list, with 25 countries. The Czech SCO list (in a form of a Ministerial Decree no. 328/2015 Sb.) contains countries that make up the most significant number of applicants for international protection in Czechia, which led to its frequent use in the past five years, most notably regarding applicants from Ukraine.[25] The frequent use of the SCO concept led to a significant amount of case-law of specialised administrative branches of regional courts as well as of the Supreme Administrative Court (hereinafter "SAC"). All the case-law of administrative courts is publicly available, which leads to a higher level of awareness of legal representatives of applicants for international protection who use relevant case-law concerning SCOs in order to win their cases. This in turn leads to a broader judicial dialogue, not just between the SAC and the regional courts but between the different regional courts[26] who have to deal with the relevant case law of their peers and react to it.

This is precisely what happened following the above-mentioned judgment of the RCB and it resulted in an interesting case study of judicial treatment of a particular aspect of the SCO concept, namely judicial review of an SCO designation based on country-of origin-information.

22 MICHKOVÁ, K., DŘÍNOVSKÁ, N. Between Return and Protection: The ECJ Mixes Up Czechia's Return Procedure. *Verfassungsblog.* 2023. DOI: http://doi.org/10.17176/20231221–111310-0

23 *CV vs. Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky,* case no. C-406/22.

24 'Safe country of origin' concept in EU+ countries. *EASO* [online]. 9. 6. 2021, Situational Update. Available at: https://euaa.europa.eu/sites/default/files/publications/EASO-situational_update-safe_country_of_origin-2021.pdf; EUROPEAN UNION AGENCY FOR ASYLUM. *Applying the Concept of Safe Countries in the Asylum Procedure* [online]. 2022. Available at: https://euaa.europa.eu/sites/default/files/publications/2022-12/2022_safe_country_concept_asylum_procedure_EN.pdf

25 Ukraine was removed from the SCO list in October 2023 after the use of the SCO concept towards Ukrainian refugees has been effectively suspended since the war erupted in February 2022.

26 There are eight regional courts. Each regional court has an administrative branch. The applicants may appeal the decision of the Ministry of Interior at each of them but that depends on territorial jurisdiction. The territorial jurisdiction is based on where the applicant for international protection was registered to reside on the date of the decision of the Ministry of Interior.

Although the defence of the SCO concept lies in the existence of sufficient safeguards[27] including judicial review[28] (oversight)[29] the literature is confined to specific examples regarding judicial review of the SCO concept.[30] Research solely focused on the functioning of the judicial review of the SCO concept is lacking even though courts are big drivers of change regarding SCO policies.[31] The article will focus on judicial review of SCO designations based on country reports. Through a case study of Czech judicial review of the SCO concept, particularly involving applications for international protection related to Tunisia I will demonstrate how this particular approach may improve the actual practice of an asylum authority regarding the creation of country reports but also how there are systemic flaws concerning the use of the SCO concept.

Section 1 of the article describes the legal basics of the SCO concept and its place within EU law. Section 2 will describe the use of the SCO concept in Czechia while considering the broader context of the development of the Czech asylum law in order to move to a narrower topic in Section 3 where I will thoroughly describe and explain two "pilot" judgments concerning the judicial review of SCO designations. These are two key judgments which need to be described more thoroughly since they have changed the *status quo* of the Czech judicial approach towards the SCO concept. Before these judgments, the courts usually focused on the rebuttal of the presumption of safety. The two judgments have brought forward the review of specific SCO designations. While the RCB was first, the 10th Chamber of the SAC adopted the RCB's approach on the SAC level and elaborated on some of the criteria to be considered when reviewing the designation of a certain country as safe that I will discern in this section of the article.

In Section 4 I will delve further and explore the differing approaches of Czech courts in a case study involving applications related to Tunisia. The case study is based on cases that have explicitly addressed the "pilot" judgments, used the conclusions stemming from these cases and dealt with the designation of Tunisia as an SCO. The reason for choosing Tunisia lies in the fact that multiple decisions are available and show differing approaches towards judicial review of the SCO designation as well as broader systemic problems with the use of the SCO concept. A 2022 article focusing solely on Tunisia from a socio-legal view puts forward several arguments in opposition to Tunisia's SCO designation. It also specifically argues that the role of European judges can be of great help in dismantling the labelling of Tunisia as an SCO.[32] Based on the available case-law in the EUAA database, in 2023 the Italian Courts disapplied the Italian SCO list in the form of a ministerial decree, because they found that Tunisia cannot be considered an SCO anymore based on updated

27 HAILBRONNER, op. cit., p. 65.

28 MARTENSON, MCCARTHY, op. cit., p. 316; EASO, op. cit., p. 9; EUROPEAN UNION AGENCY FOR ASYLUM, op. cit., p. 16.

29 ENGELMANN, op. cit., p. 283.

30 COSTELLO, 2025, op. cit.; ENGELMANN, op. cit.

31 EUROPEAN COUNCIL ON REFUGEES AND EXILES. *"Safe countries of origin": A safe concept?* [online]. 2015, p. 2. Available at: https://www.ecre.org/wp-content/uploads/2016/06/AIDA-Third-Legal-Briefing_Safe-Country-of-Origin.pdf

32 GIUFFRÉ, DENARO, RAACH, op. cit., p. 595.

country information.[33] Lastly, the 2023 *Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia* raised critique regarding migration issues.[34]

As to the data collection, all judgments of administrative branches of Czech regional courts, as well as the SAC, are publicly available in the SAC database.[35] I searched for judgments by using the numbers of the "pilot" judgments in the full-text search bar without any time limit. I then specifically focused on cases concerning Tunisia, which was made possible because the anonymisation of the judgments is focused mostly on names and addresses and not on the asylum stories and the countries of origin. The country reports cited in the article have been obtained through a request for information to the Ministry of Interior (Department for Asylum and Migration Policy) based on the Czech Freedom of Information Act.

1 The SCO Concept: the Legal Basics

At the EU level the SCO concept is currently set down by the Procedures Directive. According to points 40 and 42 of the Preamble, if a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless they present counter-indications. However, this designation does not establish an absolute guarantee of safety. If the applicant shows that there are valid reasons to consider the country not to be safe in their particular circumstances, the designation of the country as safe can no longer be considered relevant for them (this is further set down in Article 36 of the Procedures Directive). Article 31(8)(b) provides for the possibility of accelerated procedures regarding applications from SCOs.

Annex I of the Procedures Directive provides criteria for designating a country as an SCO. Such a designation should be based on the country's legal framework, the application of the law within a democratic system, and the general political circumstances. An SCO is one where there is generally and consistently no persecution, torture, inhuman or degrading treatment or punishment, or threats due to indiscriminate violence in situations of international or internal armed conflict. The assessment takes into account factors like the country's laws, respect for human rights as per international conventions, adherence to the non-refoulement principle and the availability of effective remedies against violations of rights and freedoms. According to Article 37 the assessment of whether a country qualifies as an SCO should be based on various information sources, including input from other Member States, European Union Agency for Asylum (hereinafter "EUAA"), UNHCR, the Council of Europe, and relevant international organizations. Member States must regularly

33 *Judgment of the Tribunal in Florence no. 9787/2023* [online]. 2023. Available at: https://caselaw.euaa.europa.eu/pages/viewcaselaw.aspx?CaseLawID=3740; *Judgement of the Tribunal of Catania no. 4689/2023* [online]. 2023. Available at: https://caselaw.euaa.europa.eu/pages/viewcaselaw.aspx?CaseLawID=3574

34 *The Memorandum of Understanding between the EU and Tunisia: Issues of procedure and substance on the informalisation of migration cooperation – EU Immigration and Asylum Law and Policy* [online]. [cit. 3. 3. 2024]. Available at: https://eumigrationlawblog.eu/the-memorandum-of-understanding-between-the-eu-and-tunisia-issues-of-procedure-and-substance-on-the-informalisation-of-migration-cooperation/

35 Available at: https://vyhledavac.nssoud.cz/Home/Index?formular=4

review the situation in SCOs and are required to notify the Commission of the countries they designate as SCOs. It is up to the Member States to designate countries as SCOs.

On the 10 April 2024, the European Parliament approved the Migration and Asylum Pact, which contains ten legislative texts, one of them being the regulation *establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU* (hereinafter "Regulation"). The Regulation should come into effect in 2026. Article 61 of the Regulation sets down the SCO concept. A third country may be designated as an SCO if, based on the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is no persecution and no real risk of serious harm. Article 61(2) allows for territorial and personal exceptions, meaning that the SCO designation may be made with exceptions for specific parts of the country's territory or clearly identifiable categories of persons (now typically used for LGBT+ persons, women, minorities, etc.). This differs from the Procedures Directive, which does not explicitly allow for SCO designation exceptions. There is currently a pending Italian preliminary reference at the ECJ regarding the possibility of use of personal exceptions.[36] The rest of Article 61 basically copies the Procedures Directive, specifically Article 37 (sources for SCO designation) and Annex I(criteria for designation) except for the non-refoulement criterion [Annex I(c) and Article 61(4)(c)] which is elaborated on more broadly: *"the absence of expulsion, removal or extradition of own citizens to third countries where, among other things, there is a serious risk that they would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where their lives or freedom would be threatened on account of their race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another third country".*

The most significant change stemming from the Regulation comes in the form of an EU-wide SCO list (Article 62). This has been attempted in the past, however the ECJ invalidated the mechanism for the adoption of an EU wide SCO list on institutional grounds.[37] The European Commission should be responsible for creating the SCO list with the EUAA's assistance. EUAA will provide the Commission with information and analysis on countries which could be considered for designation as SCOs. The Commission will also consider any requests from Member States to assess whether a country could be designated as an SCO at EU level. Article 63 then deals with the suspension of SCO designation in cases of significant changes in the situation in the SCO which also depends on the Commission and its assessment. At the same time, Article 64 retains the national SCO designation limited by EU-wide SCO suspensions.

Although the use of the SCO concept is voluntary, its use by most of the EU Member States can be explained by the "pull factor theory". The theory lies on the assumption that asylum seekers are rational law consumers who are searching for the most generous protection standards. Thus, no country wishes to be the "weakest link", which might

36 QUARI, S. *Italy's 'safe countries of origin' legislation under CJEU scrutiny: challenging the (un)safety* [online]. 2024 [cit. 5. 7. 2024]. Available at: https://www.dirittocomparati.it/italys-safe-countries-of-origin-legislation-under-cjeu-scrutiny-challenging-the-unsafety/

37 *European Parliament vs. Council of the European Union,* case no. C-133/06; COSTELLO, 2016, op. cit., p. 606.

result in an increasing number of asylum seekers.[38] Even though the SCO lists may vary depending on the Member State, research suggests that they are often copied between the Member States also due to the pull factor theory.[39] This theory has been refuted by a number of scholars due to the fact that restrictiveness of a country's asylum policy is only one among many other factors affecting the distribution of asylum seekers.[40]

2 Asylum Law and the Use of the SCO Concept in Czechia

§ 2(1)(k) of the Asylum Act specifies the criteria for designating a country as an SCO. It basically copies the Annex I of the Procedures Directive with the exception of one criterion. It does not explicitly require the country to uphold the non-refoulement principle and this criterion is applied through direct effect. At the same time, it provides one additional criterion that Annex I of the Procedures Directive does not contain which is that the country enables the activities of legal entities that monitor the human rights situation. § 16(2) of the Asylum Act establishes that an application for international protection will be rejected as manifestly unfounded if the applicant for international protection comes from an SCO, unless the applicant for international protection proves that this country cannot be considered as such in their case. § 86(4) of the Asylum Act empowers the Ministry of Interior to create an SCO list through a ministerial decree (currently Ministerial Decree no. 328/2015 Sb.) which has to be reviewed at least once a calendar year.

As a former communist country, Czechia's asylum law had to be built from scratch. Before 1989 Czechia was one of the countries that mainly produced refugees and thus there was no need for international protection regulation. That changed after the fall of communism as applications for international protection started to emerge.[41] Before its 2004 accession to the EU, Czechia was bordering the EU and served as a transit country for asylum applicants trying to get to Germany. From 1999 to 2003 almost 54 000 foreigners applied for international protection in Czechia[42], most notably 18 000 in 2001 and 11 400 in 2003.[43] For contrast, in 2023 the number of applicants for international protection was 1 425 and has not exceeded 2 000 applications a year since 2006.[44] Both the politicians and the asylum authority remember the 1999 to 2003 onslaught of applications for international

38 GIEROWSKA, op. cit., p. 6.

39 ENGELMANN, op. cit., p. 298.

40 GIEROWSKA, op. cit., p. 6.

41 HONCŮ, Š., KOHUTIČOVÁ, P., VYSTAVĚLOVÁ, M. *Azylová politika České republiky pohledem analýzy policy* [online]. 2007, p. 12. Available at: https://www.yumpu.com/xx/document/read/6919598/sarka-honcu-pavlina-kohuticova-miroslava-vystavelova

42 The rapid rise in numbers was due in part to the fact that a stricter legislation was introduced regarding the stay of foreigners in Czechia whose status had suddenly changed to an applicant for international protection.

43 Available at: https://www.mvcr.cz/clanek/mezinarodni-ochrana-253352.aspx?q=Y2hudW09MTU%3d

44 MINISTRY OF THE INTERIOR OF THE CZECH REPUBLIC, DEPARTMENT FOR ASYLUM AND MIGRATION POLICY. *Numbers of applications for international protection by years (1993–2023)*. 2024. Available at: https://www.mvcr.cz/clanek/souhrnna-zprava-o-mezinarodni-ochrane-za-rok-2023.aspx

protection.[45] Thus, the question of asylum and migration continues to be controversial and politically divisive in Czechia. However, it is not just the legislative and the executive branch with which asylum law has a difficult relationship as the Czech judicial branch has a complicated history with asylum law as well.

Before 2003, the administrative law agenda fell under the judicial review of high courts whose main agenda was criminal and civil law. Although the Czech Constitution presupposed a supreme administrative court, the Czech legislator did not establish one until it was forced to do so by a ground-breaking ruling of the Czech Constitutional Court[46], which annulled the old legal regulation concerning administrative judicial review. The SAC was established in 2003 and from the start it was overrun with cassation complaints against decisions of administrative branches of regional courts. In its first year, it already had 4 243 cases, and in 2004 and 2005, it had more than 5 000 cases a year.

In 2004 and 2005, more than half of the SAC's agenda was asylum law.[47] This was caused by two factors. First, the amendment of the Czech Act no. 326/1999 Coll. on the Residence of Foreign Nationals introduced stricter residence rules, thus a number of foreigners tried to deal with this by applying for international protection. Second, the administrative action as well as cassation complaint to the SAC used to have an automatic suspensive effect, which resulted in a desirable prolonging of the stay of the foreigner applying for international protection in Czechia if they brought their case against the asylum authority before administrative courts.[48] The agenda was overwhelming. In order to deal with the cases effectively, the SAC developed some approaches to consider asylum cases unfounded. One of them lay in the fact that in cases concerning non-state actors of persecution, the administrative courts usually rejected the actions and cassation complaints based on the fact that the applicant did not attempt to seek the protection of his rights before the state authorities and that he could not, therefore, rely on the failure of national protection.[49]

The vast number of asylum cases led to an amendment of the Czech Asylum Act in October 2005 and the Administrative Procedure Code.[50] The amendment established a new procedural concept of inadmissibility of cassation complaints. It allowed the SAC to reject cassation complaints in a simpler procedural way, provided they did not substantially exceed the applicants' own interests. This was done by referring to the already existing case-law, which foreshadowed the resolution of the arguments raised by the applicant and thus led to the conclusion that the cassation complaint did not substantially exceed the complainant's own interests. What is important to note is that, at the time, this was only possible in cases

45 KOPEČEK, L. Imigrace jako politické téma v ČR: analýza postojů významných politických stran. *Central European Political Studies Review* [online]. 2004, Vol. 6, no. 2–3 [cit. 17. 7. 2024]. Available at: https://journals.muni.cz/cepsr/article/view/4040

46 Judgment of the Czech Constitutional Court of 27. 6. 2001, case no. Pl. ÚS 16/99. Available at: https://www.usoud.cz/en/decisions/2001-06-27-pl-us-16-99-administrative-judiciary

47 *Nejvyšší správní soud: zpráva o činnosti v letech 2003–2009*. Praha: Wolters Kluwer ČR, 2010.

48 BOBÁK, M., HÁJEK, M. *Nepřijatelnost dle § 104a s. ř. s.: Smysluplný krok nebo kanón na vrabce?* Brno: Masaryk University, p. 54.

49 KOSAŘ, D., MOLEK, P. *Zákon o azylu: komentář*. Praha: Wolters Kluwer ČR, 2009, p. 113.

50 Nejvyšší správní soud: zpráva o činnosti v letech 2003–2009, op. cit., p. 100.

concerning asylum law.[51] The number of asylum cases had declined,[52] however, a study shows that the amendment itself was not the reason for the decline.[53] In 2004, there were 3 124 international protection cases before the SAC. In 2006, it was 1 503, and in 2009, it was only 553 cases a year.[54] The reason for the decline did not lie in establishing the inadmissibility of the cassation complaint but in the fact that Czechia joined the EU in 2004, stopped being an EU border state[55] and started to be bound by the Dublin II regulation, which limited the range of foreign nationals who could lodge an application for international protection in Czechia.[56]

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status introduced the SCO concept in EU legislation. The Czech Asylum Act had already contained the SCO concept since its adoption in 2000.[57] However, there was no published list of SCOs.[58] In 2015, a Ministerial Decree no. 328/2015 Sb. was adopted, giving the Czech SCO list an official form. At that time, only 12 countries were on the list.[59] In 2018, the number of SCOs doubled, with the notable additions of Ukraine and Georgia where most refugees were coming to Czechia from at the time,[60] which consequently led to a broader use of the SCO concept and more frequent judicial review of the SCO concept. The second and most recent amendment of the SCO list came in October 2023.[61] There are currently 25 countries designated as SCOs in Czechia. Ukraine was removed as an SCO a year and a half after the war erupted. Armenia and the United Kingdom (following its departure from the EU) were included. Notably, Moldova and Georgia, who were on the SCO list before with territorial exceptions (Georgia with the exception of Abkhazia and South Ossetia, and Moldova with the exception of Transnistria), are newly on the SCO list without the territorial exceptions, probably as a reaction to a request for a preliminary ruling by the RCB, which claimed that the practice of territorial exceptions was contrary to the Procedures Directive.[62] What is surprising is that even before the ECJ decided on the case C-406/22 and agreed with the RCB, Czechia already reacted to the possible ruling. More importantly, designating parts

51 POTĚŠIL, L. Vývoj právní úpravy kasační stížnosti v SŘS. In: *Kasační stížnost*. Praha: C. H. Beck, 2022, p. 37.

52 Nejvyšší správní soud: zpráva o činnosti v letech 2003–2009, op. cit., p. 100.

53 BOBÁK, HÁJEK, op. cit., pp. 54–58.

54 Nejvyšší správní soud: zpráva o činnosti v letech 2003–2009, op. cit., p. 102.

55 KOSAŘ, MOLEK, op. cit., p. XLIX.

56 BOBÁK, HÁJEK, op. cit., p. 54.

57 KOSAŘ, MOLEK, op. cit., p. 13.

58 Ibid., p. 14.

59 Albania, Bosnia and Herzegovina, Montenegro, Iceland, Kosovo, Liechtenstein, Macedonia, Mongolia, Norway, the United States of America, Serbia and Switzerland.

60 Available at: https://www.mvcr.cz/clanek/statisticke-zpravy-o-mezinarodni-ochrane-za-jednotlive-mesice--v-roce-2017.aspx

61 Decree No. 289/2023 Coll., Ministerial Decree amending Decree No. 328/2015 Coll.

62 *Case C-406/22: Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice* [online]. 2022, p. 8. Available at: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=263901&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=489559

of a country as safe, even though before they have implicitly not been considered safe, without the situation in the country of origin changing, went even more against the logic of the request for a preliminary ruling.[63]

If the Ministry of Interior rejects the application for international protection there is no appeal within the administrative proceedings, but the applicant may submit an administrative action at the administrative branch of one of the Czech regional courts based on the territorial jurisdiction. The action does not have an automatic suspensive effect, and it is up to the decision of the regional court whether it grants it to the applicant and lets him stay for the proceedings. However, once it is granted, the suspensive effect stays in place even in the proceedings concerning a cassation complaint lodged at the SAC.

One of the first cases that worked with the new version of the SCO concept was the judgment of the SAC from 30 September 2008 no. 5 Azs 66/2008, which said that the SCO concept provides for a presumption that applications for international protection of persons coming from SCOs are unfounded. That means that an applicant for international protection from an SCO must show that in their case the state cannot be considered an SCO, which in effect means that they must show that they are at greater risk of persecution or serious harm than other persons in a similar position. Similar conditions are not required for applicants from non-SCOs, and thus, the designation of a particular country as an SCO increases the burden of proof on the side of the applicants for international protection.[64]

Until October 2021, the judicial review of the administrative proceedings regarding international protection for applicants from SCOs focused on whether the applicants managed to rebut the presumption of safety.[65] In essence, this involved determining whether the applicants presented compelling evidence that could persuade the asylum authority to conclude that, in their unique circumstances, their country could be regarded as not safe. Such a successful challenge would result in the annulment of the administrative decision, reopening of the international protection proceedings in which the application could no longer be considered manifestly unfounded and leading to its evaluation through standard asylum proceedings. This changed on 20 October 2021 when the RCB came out with a judgment concerning an Indian national that I have described in the Introduction and will elaborate on in the next section of this article.

3 The Czech "Pilot" Judgments on Judicial Review of Specific SCO Designations

The previous section described how the SCO concept works in Czechia in general. In this section I will focus on how the Czech courts have approached this concept. There are two key judgments which need to be described more thoroughly since they have changed the

63 MICHKOVÁ, K. Two Steps Forward? *Verfassungsblog*. Verfassungsblog, 2024. DOI: http://doi.org/10.59704/0c414300373c8859

64 Judgment of the Supreme Administrative Court of 30. 9. 2008, case no. 5 Azs 66/2008-70, IV c.

65 SLÁDEKOVÁ, S. Bezpečné země původu a soudní přezkum. In: *Ročenka uprchlického a cizineckého práva 2020/2021*. Praha: Wolters Kluwer ČR, 2022, p. 270.

status quo of the Czech judicial approach towards the SCO concept. Before these judgments, the courts usually focused on the rebuttal of the presumption of safety. The two judgments have brought forward the review of specific SCO designations which is why they are called the "pilot" judgments.

3.1 Judgment of the Regional Court in Brno of 20. 10. 2021, case no. 41 Az 58/2020-52[66]

In October 2022, a landmark judgment emerged from the administrative branch of the RCB,[67] causing a shift in the judicial review landscape in Czechia. The facts of the case and the content of the country report have been described at the beginning of this article. On the one hand there was an applicant for international protection claiming the absence of internal protection in India, while on the other hand there was the asylum authority with a low-quality country report that could probably prove that India was not a safe country of origin but not the other way around.

The RCB found that for the decision of the asylum authority to reject an application as manifestly unfounded to stand, the evidence used must clearly demonstrate that the country in question actually fulfils the conditions necessary for inclusion in the list of SCOs in accordance with the Procedures Directive and the Asylum Act. Art. 46 of the Procedures Directive mandates that Member States must provide an effective remedy, including a thorough assessment of both facts and law. When reviewing a decision regarding an SCO, the court must not only be able to assess whether the applicant has succeeded in rebutting the presumption of safety but must also address the question of whether the inclusion of the country on the SCO list was carried out in accordance with the Procedures Directive and the Asylum Act in the first place. Without this, there would be no meaningful oversight, and inclusion on the SCO list would effectively allow for the automatic rejection of protection to applicants from SCOs.[68]

The RCB further stated that the SCO designation creates a presumption that effective remedies are available in the country. When considering an application of an SCO applicant, the asylum authority is not obliged to examine the availability of internal protection on an application-by-application basis. Thus, beyond the basis on which the country's safety is inferred, it is not even obliged to gather further relevant evidence on the availability of internal protection in a particular case. However, the RCB emphasised that the presumption of the availability of internal protection in an SCO applies only if the listing of that country itself was carried out in accordance with the Procedures Directive or the Asylum Act. The court must then examine the fulfilment of this presumption.[69]

As to the content of the country reports proving the safety of an SCO, the RCB asserted that a report that rates a country of origin as safe should be of appropriate quality. It should

66 The author of the article worked as an intern of the presiding judge from September 2021 until March 2022.

67 Judgment of the Regional Court in Brno of 20. 10. 2021, case no. 41 Az 58/2020-52.

68 Ibid., par. 21–22.

69 Ibid., par. 23.

clearly show that there is no persecution or ill-treatment in the country in question on a general and consistent basis. It should also detail the extent to which the country provides protection against such treatment in the context of the criteria listed in Annex I of the Procedures Directive: the country's legislation and how it is applied, respect for the rights and freedoms set out in international human rights treaties, respect for the principle of non-refoulement under the Geneva Convention[70], and the system of effective remedies.[71] If the report contains information that raises questions about the security of a country, it should provide a satisfactory justification as to why the country can still be assessed as safe despite this information.[72]

The RCB explained that a country report justifying the safety of the country of origin effectively replaces the asylum authority's obligation to gather topical information on each application about the country of origin relevant to the asylum story of the individual applicant. It is essential that the country report is up-to-date and demonstrates that the asylum authority has met its obligation to review the SCO list at least once per calendar year.[73] Interestingly, the review once a year obligation does not stem from the Procedures Directive but from § 86(4) of the Czech Asylum Act. The RCB also criticised the length of the country report, stating that the evaluation of safety criticised was only 2.5 pages long.[74]

As to the content of the report, the RCB focused on whether it showed that the individual criteria under Annex I of the Procedures Directive and the Asylum Act were fulfilled, particularly regarding the availability of internal protection. The RCB concluded that, based on the country report, India does not meet the criteria of an SCO. There is a risk of persecution and torture by security forces and the police, which contradicts § 2(1)(k)(1) of the Asylum Act and Annex I of the Procedures Directive. Human rights violations in India are contrary to § 2(1)(k)(3) of the Asylum Act and Annex I(b) of the Procedures Directive. Indian law does not contain the term "refugee" nor non-refoulement provisions, which goes against Annex I(c) of the Procedures Directive. The effectiveness of India's remedies system was unclear from the country report contrary to § 2(1)(k)(3) of the Asylum Act and Annex I(d) of the Procedures Directive.[75] Designating India as an SCO violated both the Procedures Directive and the Asylum Act. According to the RCB, this meant that India did not qualify as an SCO under Article 36(1) of the Procedures Directive and Section 2(1)(k) of the Asylum Act. Consequently, the asylum authority could not reject the applicant's asylum application as manifestly unfounded under section 16(2) of the Asylum Act.[76]

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70 Convention relating to the Status of Refugees adopted on 28. 7. 1951 by United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950. Available at: https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees

71 Judgment of the Regional Court in Brno of 20. 10. 2021, case no. 41 Az 58/2020-52, par. 24–26.

72 Ibid., par. 20.

73 Ibid., par. 20.

74 Ibid., par. 37.

75 Ibid., par. 35.

76 Ibid., par. 36.

The RCB concluded that a country can only be considered an SCO in relation to a particular applicant if the designation as safe was made per the conditions set out in the Procedures Directive and the Asylum Act. Only if those conditions are met can the rebuttable presumption of safety of the country of origin be applied.[77]

Surprisingly, the asylum authority did not contest the judgment before the SAC, even though the Ministry of Interior also has the right to lodge a cassation complaint as an administrative authority. A possible explanation is that a regional court rendered the judgment and thus lacked the authority as opposed to an SAC (apex court) decision. Maybe there was a concern that if the asylum authority lodged a cassation complaint, the SAC would agree with the RCB, which would make this an argumentatively binding opinion for all administrative branches of the Czech regional courts and the SAC as well.

However, the judgment of the RCB was still subject to discussion at the SAC, which chose to include it in its *Collection of Decisions*,[78] a publication issued every month by the SAC to ensure uniformity of decision-making of the courts in the administrative justice system. The SAC selects decisions, opinions or fundamental resolutions of the SAC, decisions of regional courts in the administrative justice system and resolutions of the Chamber for competence disputes.[79] This, of course, made the judgment of the RCB stand out and gain a certain level of authority. It also helped to make other regional courts aware of the decision. Although all the decisions of the administrative branches of regional courts are available, the SAC's *Collection of Decisions* helps to highlight some of them.

3.2 Judgment of the Supreme Administrative Court of 12. 10. 2022, case no. 10 Azs 161/2022-56

A notable judgment that followed the RCB judgment was issued by the 10th Chamber of the SAC a year later, on the 12 October 2022 and concerned an applicant from Algeria. The SAC was reviewing another judgment of the RCB of the 4 May 2022, no. 22 Az 53/2021-25. The SAC took into account the RCB "pilot" judgment and elaborated on some of the criteria set down by the RCB.

Regarding the requirement that the country reports be up to date, the SAC agreed with the RCB that Art. 37(2) of the Procedures Directive requires a periodic review of SCO designations, although the Procedures Directive does not set a specific time limit. However, § 86(4) of the Asylum Act requires that a periodic review take place at least once a year. SAC further added that at the same time, the obligations of the asylum authority do not end with the fact that once a year, under § 86(4) of the Asylum Act, it updates the report on the security of a particular country. The periodic review under Article 37(2) of the Procedures

77 Ibid., par. 37.

78 Mezinárodní ochrana: bezpečná země původu Řízení před soudem: přezkum splnění podmínek bezpečné země původu. *Sbírka rozhodnutí Nejvyššího správního soudu* [online]. [cit. 27. 8. 2023]. Available at: https://sbirka.nssoud.cz/cz/mezinarodni-ochrana-bezpecna-zeme-puvodu-rizeni-pred-soudem-prezkum-splneni-podminek-bezpecne-zeme-puvodu.p4282.html

79 O Sbírce. *Sbírka rozhodnutí Nejvyššího správního soudu*. [online]. [cit. 27. 8. 2023]. Available at: https://sbirka.nssoud.cz/cz/o-sbirce.c-2.html

Directive also entails the obligation to continuously monitor the situation in the countries identified as safe and to consider a reassessment of safety in the event of sudden or significant changes (which also stems from recital 48 of the preamble to the Procedures Directive).[80]

The SAC further stated that the content of the country reports should be mainly based on information from other Member States, the EUAA, the UNHCR and the Council of Europe, which is a clear requirement stemming from Article 37(3) of the Procedures Directive. In this case, the SAC found that the asylum authority did not consider these documents in relation to Algeria. In the country reports used, it has referred to them only occasionally and only to substantiate fragmentary and purely formal statements (e. g. international treaties Algeria has ratified). The asylum authority should have referred to these required sources to assess whether Algeria fulfils the criteria set down by Annex I of the Procedures Directive. The SAC elaborated that Art. 37(3) of the Procedures Directive cannot be understood dogmatically. The asylum authority does not have to examine the views of all Member States or use other sources to designate a country as safe. However, according to the SAC, the asylum authority must regularly draw on these sources. If, on the other hand, the sources cited in Article 37(3) of the Procedures Directive indicate that a particular country is not safe, the asylum authority must thoroughly explain its possible contrary conclusion.[81]

3.3 New Approach Towards Judicial Review of SCO Applications for International Protection in Czechia

Based on these "pilot" judgments, before considering whether or not the applicant met the burden of proof concerning the rebuttal of the presumption of safety, the court should consider whether the Member State has designated the country as safe in accordance with the Procedures Directive and the Asylum Act.

Several criteria for judicial review can be deduced. First, the assessing court has to consider whether the relevant documentation demonstrates that the asylum authority has complied with its obligation to review the SCO list at least once per calendar year. In practice, this criterion is considered in relation to the country reports used by the asylum authority. In the case concerning India, the report was dated July 2019, and the case was decided in September 2020. According to the RCB, this indicated that the asylum authority did not fulfil its obligation. In the case concerning Algeria, one of the reports was from January 2017 and another from April 2019. The decision was set down in November 2021, which indicated that one of the reports was nearly five years old at the time of the decision and the second one approximately 2.5 years old. The SAC found that the reports were not updated and indicated that the asylum authority did not fulfil its obligation to review the situation in the SCO at least once per calendar year.

[80] Judgement of the Supreme Administrative Court of 12. 10. 2022, case no. 10 Azs 161/2022-56, par. 22–23.

[81] Ibid., par. 26.

Second, the assessing court has to consider whether there were any special circumstances that indicated a need for a review. This criterion was highlighted by the SAC, which stated that the asylum authority must continuously monitor the situation in the countries identified as safe and consider a reassessment of safety in the event of sudden or significant changes. Czechia later addressed this obligation at a hearing before the ECJ concerning a request for a preliminary ruling brought by the RCB in a case concerning a Moldova national who applied for international protection in Czechia.[82] Moldova invoked Article 15 of the European Convention on Human Rights, which meant that it derogated from its obligations under the Convention. According to the RCB, this was an occurrence that should have triggered a review of the situation by the asylum authority and should be reflected in an updated country report. Both the Advocate General and the ECJ have agreed.[83] During the hearing at the ECJ, the legal representative of Czechia stated that the Czech asylum authority has its own internal database on countries of origin. As soon as the situation changes, it reassesses the situation in the SCO daily. The asylum authority is obliged to consult this database, and if it concludes that the country is no longer safe, the SCO concept will not apply. However, no further information on the database was provided. Thus, it is unclear whether there is any possibility for the courts to examine how it functions.

Third, the assessing court has to consider whether the country report is based on relevant information within the meaning of Article 37(3) of the Procedures Directive. Article 37(3) of the Procedures Directive requires that the assessment of whether a specific country should be considered safe should be based, in particular, on information from other Member States, EUAA, UNHCR, the Council of Europe and other relevant international organisations. If the country report does not use these sources, this poses a problem. However, SAC stated that this does not necessarily mean that without these sources, the asylum authority can never designate a country as an SCO and that Article 37(3) should not be understood dogmatically. In the case considered by the SAC, the Algerian country report had other problems as well (not up to date, and the content itself contradicted the criteria in Annex I of the Procedures Directive). Therefore, it is not clear whether a country report should be considered sufficient by the courts when its only flaw lies in the fact that it does not use the sources required by Article 37(3) of the Procedures Directive.

Fourth, the assessing court has to consider whether the information in the country reports actually proves the safety of the SCO and meets the conditions of Annex I of the Procedures Directive and Section 2(1)(k) of the Asylum Act. In both "pilot" judgements, this was a problem for the country reports concerned. First, both were quite short as the relevant information was contained on approximately two pages. What needs to be kept in mind is that these reports effectively replace the obligation of the asylum authority to gather specific information in each case. Thus, it is expected that the relevant information should

82 Case C-406/22.

83 Judgment of the European Court of Justice of 4. 10. 2024, *CV vs. Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky*, case no. C-406/22, par. 45–62. Opinion Of Advocate General Emiliou on the Case *CV vs. Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky,* case no. C-406/22, 30. 5. 2024, par. 55–75.

be more than two pages long. In both cases, the country reports also contained information that contradicted the safety of these countries (India and Algeria) and thus did not fulfil the safety conditions.

Concerning the country report on India, its content was later addressed in a different case before the 2nd Chamber of the SAC which was reviewing a judgment of the Regional Court in Hradec Králové of 2. 7. 2021, no. 28 Az 4/2020-78. Contrary to the RCB, the 2nd Chamber of the SAC found the country report to be satisfactory. It stated that the country report, used to establish India as an SCO, acknowledges human rights deficiencies. However, these deficiencies are not shown to be widespread and systematic. While individual violations may occur, they do not categorically disqualify India as a safe country. To assess a country's safety designation, one must consider its overall capacity to protect human rights. Even countries with sporadic human rights issues can still be deemed safe if these issues are not pervasive, recurring, or a standard part of how the country operates. India cannot be viewed through the human rights standards of the rich, ethnically relatively homogeneous, religiously rather lukewarm and socially satisfactorily cohesive Czechia or other countries of the West.[84] What is essential is the undoubted honesty of India's efforts to respect human rights and the satisfactory results it has achieved in this field, given its circumstances.[85]

The case of the SAC's 2nd Chamber has been criticised for failing to grasp the significance of the SCO concept.[86] It was pointed out that the purpose of designating a country as safe is not to applaud the efforts of less developed countries in protecting human rights but to ensure a high standard of respect for fundamental human rights. While it's expected that countries on the SCO list might have lower human rights records than EU countries, they must still meet certain criteria under the Procedures Directive to qualify as safe. In the case of India, it was questionable whether all the criteria required by the Procedures Directive were met. The country report did not clearly establish whether the reported persecution was widespread or isolated. In contrast, the RCB interpreted the concept of "generally and systematically" and held that it was sufficient for that concept to be met if systematic persecution or ill-treatment was directed against a particular group of the population. The SAC did not expressly dispute this conclusion. It only faulted the applicant for failing to certify that these deficiencies are of a general and systematic nature. However, that is not the task of an applicant for international protection. They bear the burden of proof only in relation to their own asylum grounds. It is for the asylum authority to gather information which clearly demonstrates that, even if there have been instances of persecution or serious harm in the country concerned, they are not of a general and systematic nature. According to the criticism, the 2nd Chamber's judgment perpetuates the asylum authority's practice of designating countries as safe based on wholly inadequate information.[87]

84 Judgment of the Supreme Administrative Court of 17. 2. 2022, case no. 2 Azs 214/2021-72, par. 36.

85 Ibid.

86 SLÁDEKOVÁ, S. Bezpečné země původu – potřebujeme je vůbec? In: *Ročenka uprchlického a cizineckého práva 2022* [online]. Brno: Wolters Kluwer ČR, 2023. Available at: http://ochrance.cz/dokument/rocenka_uprchlickeho_a_cizineckeho_prava_2022/rocenka_uprchlickeho_a_cizineckeho_prava_2022.pdf

87 Ibid., pp. 243–244.

Only after considering the above-explained criteria and concluding that the SCO designation was (is) lawful can the court assess whether the applicant provided relevant information to rebut the presumption of safety.

The "pilot" judgments presented a new way of looking at the possibilities of judicial review concerning applications regarding SCOs in Czechia and follow the approach towards judicial review in other EU member states. However, as can be deduced from the judgment of the 2nd Chamber of the SAC, not all Czech courts took this opportunity. I will elaborate on this further in the next section, where I will point out the differences in the approach of the Czech courts in a case study concerning judicial review of applications for international protection from Tunisia.

4 The Application of the Czech "Pilot" Judgments: a Case Study on Tunisia

First, I broke down the two key cases that brought forward a new type of judicial review concerning the SCO concept in Czechia. Now I will focus on a case study concerning judicial review of applications for international protection from Tunisia.

4.1 Judgment of the Regional Court in Pilsen of 16. 12. 2021, case no. 60 Az 56/2021-43

The first case concerning an applicant from Tunisia after the "pilot" judgment came from the 60th Chamber of the Regional Court in Pilsen (hereinafter "RCP").[88] The 60th Chamber of the RCP reacted to an argument raised by the applicant who, referencing the RCB "pilot" judgment, pointed out several flaws in the Tunisian country report. First of all, the country report was dated July 2020, and the asylum authority set down its decision in November 2021, which in itself raised doubts about whether the asylum authority fulfilled its obligation to review the list of SCOs at least once per calendar year. The report also admitted that there are cases of persecution without elaborating on the extent of this problem. It was also unclear from the report whether Tunisian state authorities could provide effective protection against persecution by non-state actors.[89]

The 60th Chamber of the RCP effectively copied the RCB "pilot" judgment and went on to review the country report. The country report *Assessment of Tunisia as a safe country of origin – July 2020* had only five pages – the introductory page, the second citing the relevant law and the last citing resources, which left only two pages which were supposed to prove that Tunisia fulfils all the criteria to be considered as an SCO. The RCP agreed with the applicant that the report was not updated. Another country report used by the asylum authority was topical. However, the information contained in it did not prove, according to the 60th Chamber of the RCP, that Tunisia should be considered an SCO.[90] The report

88 Judgment of the Regional Court in Pilsen of 16. 12. 2021, case no. 60 Az 56/2021-43.

89 Ibid., par. 2.

90 Judgment of the Regional Court in Pilsen of 16. 12. 2021, case no. 60 Az 56/2021-43, par. 16.

did not contain any consideration of whether there were any effective remedies against violations of rights and freedoms, only general statements which did not provide any specific information about the functioning of effective remedies, which violates § 2(1)(k)(1) of the Asylum Act as well Annex I(d) of the Procedures Directive.[91] The 60th Chamber of the RCP struck down the decision of the asylum authority. It stated that based on the information provided, Tunisia could not be considered an SCO and that the application for international protection could not be found manifestly unfounded based on § 16(2) of the Asylum Act. The 60th Chamber of the RCP emphasised that this does not mean that the applicant would be successful with his application but that in the new proceedings, the asylum authority would have to gather current and relevant information about Tunisia, which would prove that it can be considered as an SCO.[92] The 7th Chamber of the SAC confirmed the judgment without any additional comments.[93]

What then came as a surprise was the judgment of the 35th Chamber of RCP, who also considered a Tunisian applicant's case.

4.2 Judgment of the Regional Court in Pilsen of 28. 2. 2022, case no. 35 Az 1/2022-27

In this case, the country report concerned was *Assessment of Tunisia as a safe country of origin – November 2021.* The 35th Chamber of RCP did not elaborate much on it. It found that the applicant did not claim nor prove in the proceedings before the asylum authority that Tunisia could not be considered an SCO.[94] Even though the RCP itself wrote in the narrative part of the judgment that the applicant claimed in its action that the asylum authority did not compile enough topical and relevant documentation[95] it then stated that the applicant did not claim that Tunisia could not be considered an SCO in the proceedings before the court. According to the 35th Chamber of the RCP, there was no need for the asylum authority to compile any other documents, and the country report was sufficient.[96]

The report *Assessment of Tunisia as a safe country of origin – November 2021* has six pages in total. The consideration of safety itself takes up 2.5 pages. The relevant information on the protection of human rights goes as follows:

> *"Protection against persecution or ill-treatment is guaranteed in Tunisia by the Constitution and other legal norms, which also provide for a system of remedies against violations of these rights and freedoms. However, the judiciary is not fully independent, and its reform has been slower than political*

91 Ibid., par. 18–23.

92 Ibid., par. 27 and 29.

93 Judgment of the Supreme Administrative Court of 16. 6. 2023, case no. 7 Azs 1/2022-35.

94 Judgment of the Regional Court in Pilsen of 28, 2. 2022, case no. 35 Az 1/2022-27, par. 11.

95 Ibid., par. 3.

96 Ibid., par. 11.

reforms. There is no systematic and consistent persecution under Article 9 of Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011, torture or inhuman or degrading treatment in Tunisia."[97]

However, the human rights situation is not entirely unproblematic (here, the report cites a source from June 2020):

"The country has been criticised in some human rights areas for inadequate protection, particularly in the context of the ongoing fight against terrorism and in the area of women's rights. The rights of sexual minorities are not sufficiently protected in Tunisian legislation against violence based on sexual orientation and gender identity. The Penal Code criminalises same-sex sex. However, in this respect, sexual minorities have not been systematically persecuted by the state based on their sexual orientation and collective identity."[98]

The report goes on to list the number of applicants for international protection since 2014. It states that *"[n]o applicant from Tunisia has received international protection in the Czech Republic, either in the form of asylum or subsidiary protection"*.[99] It then elaborates on what international treaties on human rights were ratified by Tunisia.[100] The last part concerning human rights concerns activities of legal persons monitoring the human rights situation (which is a criterion for SCO designation set down by § 2(1)(k)(4) of the Asylum Act) and states that

"[a] wide range of domestic and international human rights groups have researched and published their findings on human rights cases without government restrictions. The Department of Justice handles investigations of human rights violations at the government level. Within the Office of the President, the High Committee on Human Rights and Fundamental Freedoms monitors human rights and advises the President. The Minister responsible for relations with constitutional bodies, civil society, and human rights is coordinating government activities related to human rights".[101]

Based on the information provided in the report and on the cases discussed above, it cannot be clearly concluded that Tunisia can be considered an SCO. In the above-discussed case of the 60th Chamber of the RCP, the main problem lay in the fact that the report did not contain any consideration of whether there were any effective remedies against violations of rights and freedoms, only general statements which did not provide any specific information about the functioning of effective remedies, which violates § 2(1)(k)(1) of the Asylum Act as well as Annex I(d) of the Procedures Directive, which poses a problem in this case as well. No specific information is provided regarding the remedies. The 35th Chamber of the RCP did not take the case of the 60th Chamber of the RCP into account. Also, the information regarding the human rights violations came from a source which had not been updated (the country report is from November 2021 and cites a source from June 2020).

It is also interesting to note that the country report uses asylum recognition rates as an argument for safety of Tunisia. This approach is problematic. With time the safety assessment

97 CZECH MINISTRY OF INTERIOR. *Evaluation of Tunisia as a safe country of origin*. 2021, p. 2. Country report obtained through a request for information based on the Czech Freedom of Information Act.

98 Ibid., p. 2–3.

99 Ibid., p. 3.

100 Ibid.

101 Ibid., p. 4.

becomes self-fulfilling. If a country keeps being designated as an SCO for low asylum recognition rates, the asylum recognition rates will stay low due to the SCO mechanism. In 1993, the Belgian Constitutional Court invalidated a specific mechanism within the SCO system. It found that a safety of a country could not be based on the fact that at least five percent of asylum seekers came from that country and the rate of asylum recognition was under five percent. The Belgian Constitutional Court ruled that this violated constitutional principles of equality. In 2015, the Belgian Council of State removed Albania from Belgium's list of safe countries due to the recognition rates of asylum seekers from Albania.[102]

The 35th Chamber of the RCP seems to have based its rejection on the fact that the applicant did not claim information relevant to the safety of Tunisia and that he did not raise the safety issue before the asylum authority. Both of these arguments touch on the issue of full and *ex-nunc* examination of both facts and points of law required by the Procedures Directive. In the recent judgment the ECJ concluded that national courts should consider whether the designation of the country as safe is contrary to EU law, even if the applicant did not raise this.[103] In other words, when national courts are considering cases where the SCO concept is engaged, they should raise, of their own motion, the incompatibility of the SCO designation with the requirements of the Procedures Directive. Based on this approach the 35th Chamber of the RCP would've had to annul the decision of the asylum authority, stating that based on the country report, Tunisia cannot be considered an SCO, and the application for international protection could not be found manifestly unfounded based on § 16(2) of the Asylum Act. Question is whether this should not have been the case regardless, since the applicant argued that the asylum authority did not compile enough topical and relevant documentation. However, the success of any administrative action lies in the specificity of the claims. Compared to the Judgment of the 60th Chamber where the applicant thoroughly dissected the report, here the applicant criticised it quite generally (at least as it seems from narration).

4.3 Judgment of the Regional Court in Hradec Králové of 14. 11. 2022, case no. 29 Az 3/2022-66

In this case, the applicant argued that the documents used were insufficient to designate Tunisia as safe. The applicant drew attention to the RCB "pilot" judgment and stated that the court is obliged to assess whether the country's designation as safe was made per the conditions laid down in the Procedures Directive and the Asylum Act. The applicant stated that the supporting documents do not provide a sufficient basis for including Tunisia on the list of safe countries of origin.[104]

The 29th Chamber of the Regional Court in Hradec Králové (hereinafter "RCHK") stated that in so far as the applicant has argued that the documentation does not provide a sufficient

102 COSTELLO, 2016, op. cit., p. 613.

103 Judgment of the European Court of Justice, *CV vs. Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky*, case no. C-406/22, par. 84–98.

104 Judgment of the Regional Court in Hradec Králové of 14. 11. 2022, case no. 29 Az 3/2022-66, par. 5.

basis for including Tunisia on the list of safe countries of origin, his statement lacks specific allegations to rebut the presumption of safety. The applicant limited himself to general objections, but based on those objections, the court could not assess whether the inclusion of Tunisia on the list of safe countries was, in fact, in breach of the Procedures Directive and the Asylum Act requirements. In that situation, the RCHK was obliged to rely on the evidence gathered by the asylum authority, from which no other conclusion could be drawn than that Tunisia could be regarded as a safe country of origin.[105]

In this case the *Assessment of Tunisia as a safe country of origin – November* 2021 was used, as well as more specific country reports such as the *Current Political and Security Situation in the Country – February 2022* and *Situation of Unsuccessful Applicants for International Protection on Return to their Homeland of 10 February 2021*. The *Assessment of Tunisia as a safe country of origin – November 2021* was already addressed in this article and found insufficient. The RCHK did not seem to understand the "pilot" judgments as it based its decision on the fact that the applicant did not provide any particular statements to rebut the presumption of safety. This is the wrong approach which mixes up the review of the rebuttal of presumption of safety and the review of a particular SCO designation. The applicants bear the burden of proof only in relation to their own asylum grounds, not the designation of their country as an SCO. The applicant specifically argued against the fact that Tunisia was designated as an SCO based on the documents used in his case. Following the approach of the RCB it was up to the RCHK to analyse the safety assessment documents through the lens of the SCO designation criteria in Annex I of the Procedures Directive and the Asylum Act and conclude whether or not Tunisia fulfils them based on these documents.

4.4 Judgment of the Regional Court in Pilsen of 29. 11. 2022, case no. 35 Az 4/2022-30

In this case, the applicant argued that the information collected by the asylum authority during the asylum proceedings is often very general and does not reflect the actual situation in the country concerned. He also pointed out that it is somewhat superficial since it assesses the situation in Tunisia from the safety of Europe.[106]

According to the 35th Chamber of the RCP, the applicant did not argue that the conditions for including Tunisia in the list of countries considered safe countries of origin were not met at all. Nor did he explicitly demonstrate in the proceedings before the asylum authority that Tunisia could not be considered an SCO in relation to him. The applicant did not even demonstrate that the system of protection of rights in Tunisia is dysfunctional. He merely stated that he could not turn to the competent authorities in Tunisia because they were often bribed by his family, from whom he was in danger. The applicant thus did not put forward any relevant reasons in the proceedings as to why the system of protection of rights in Tunisia does not work.[107] Nor did the applicant do any of the above in the proceedings

105 Ibid., par. 29.

106 Judgment of the Regional Court in Pilsen of 29. 11. 2022, case no. 35 Az 4/2022-30, par. 3.

107 Judgment of the Regional Court in Pilsen of 29. 11. 2022, case no. 35 Az 4/2022-30, par. 12 and 14.

before the court. The information of the asylum authority was sufficient. As regards the applicant's allegation that the documents used were superficial, the RCP stated that it was for the applicant to show that Tunisia could not be regarded as a safe country in his case. The applicant failed to fulfil that obligation in the proceedings before the asylum authority. The subsequent allegation of the superficiality of those documents raised in the proceedings before the court does not alter the matter since the applicant bore the burden of proof in the asylum proceedings.[108]

Since the same Chamber considered this case as in the case No. 35 Az 1/2022-27 and used the same arguments I point the reader back to the comments on that case. The *Assessment of Tunisia as a safe country of origin – November* 2021 was addressed by the court and its general stance on burden of proof and *ex nunc* review can be criticised in this case as well. Same as in the RCHK case, the 35th Chamber also mixed up the review of the rebuttal of presumption of safety and the review of a particular SCO designation.

4.5 Differing Approaches Towards Judicial Review of a Specific SCO Designation

Although the "pilot" judgments presented a new way of looking at the possibilities of judicial review concerning applications regarding SCOs, not all courts took this opportunity to critically assess country reports concerning SCOs. However, some of the regional courts still had to deal with the "pilot" judgments since the applicants raised them. The problem lies in the fact that not all courts distinguish between the two stages of the judicial review: 1) whether the Member State has designated the country as safe following the Procedures Directive and the Asylum Act and only then 2) whether or not the applicant met the burden of proof concerning the rebuttal of the presumption of safety. The applicants bear the burden of proof only in relation to their own asylum grounds, not regarding the designation of a country as safe in general.

There were cases where the applicant argued that the country report was insufficient to prove that a country should actually be considered an SCO. However, the courts said there is a presumption of safety, and the applicant did not provide any relevant information to rebut this. It is unclear how the applicants should formulate their claims to trigger the review of their country's designation as an SCO. The safest route seems to be to dispute the specific content of the country report. General critique of the report being too vague and generic seems to usually fall on deaf ears as the courts might prefer to deal with these cases quickly referencing Art. 16(2) of the Asylum Act unless they are required to deal with specific arguments. This will have to change with the recent judgment of the ECJ and its stance on the *ex officio* SCO designation review. The judgment pushes the courts to address SCO designations even if the critiques of the safety assessments are not very specific.[109]

[108] Ibid., par. 15.

[109] Judgment of the European Court of Justice of 4. 10. 2024, *CV vs. Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky*, case no. C-406/22

Conclusion

The article thoroughly introduced one of the approaches to SCO judicial review, namely the review of SCO designations, specifically regarding country reports. It is important to emphasise that there are two stages of the judicial review regarding SCO designation: 1) whether the Member State has designated the country as safe according to law and 2) whether the applicant met the burden of proof concerning the rebuttal of the presumption of safety. Only when the country report actually proves that the country is safe can the presumption of safety be applied. Not all courts distinguish between these two stages, which leads to rejections of administrative actions because the applicant did not provide sufficient information. The "recipe" seems to be for the applicant to actively engage with the specific content of the country reports. Otherwise, much is left to the willingness of the courts who may or may not subscribe the country reports to a thorough review. Based on the ECJ judgment in the case C-406/22 the courts have this obligation *ex officio* which might significantly impact the protection of refugees coming from SCOs.

When addressing the contents of the country report, the focus should be on the topicality of the report (whether it is up to date), the sources used for the report or the content of the report itself (according to the report, the country does not fulfil some of the criteria in Annex 1 of the Procedures Directive or § 2(1)(k) of the Asylum Act). When assessing whether the report is up to date, the courts should consider not only the date of issue of the country report but also the dates of the cited sources. If the aim is to have up-to-date reports and a report is dated 2022 while all its sources are dated 2020, it should not pass the criterion of topicality.

The case study showed how the approaches of the national courts towards SCO cases may differ. This creates unfair differences between applicants for international protection who cannot influence the court or even a chamber hearing their case. Thus, it is important that the national courts follow each other's case-law and properly understand the nuances of the SCO designation review. If they do, their approach to safety of countries should be unified. In other words, if one court finds that, based on the information provided in the safety assessment, a country cannot be considered safe, other national courts should not then find, based on the same available information, that the country is safe. Naturally, this burden does not lie only on the courts but on the legal representatives of applicants for international protection as well. The case study clearly demonstrates the importance of following case-law and using it before the courts. That way, even if the court is not aware of a particular case which disputed the safety of a country on the SCO list, applicant for international protection (its legal representative) can make the court address the relevant case law.

At the same time the focus on the courts and their involvement in the asylum proceedings that engage the SCO concept does not address the core of the issue. As has been mentioned earlier in the article, it has been suggested that SCO designations do not speed up the refugee status determination procedure but postpone a more thorough review of the application for international protection to the appeals procedure (i. e. judicial review). In the ideal

setting, countries should be designated as SCOs only if their situation actually warrants this designation. The designation should be properly justified in a thorough country report which should not raise human rights concerns and if it does, it should meticulously explain why, despite these concerns, the country can be considered an SCO. This burden lies with the asylum authority and other actors in the executive branch responsible for the application of the SCO concept. At the same time there is a need for quality legal representation from the beginning of the asylum proceedings. That way one of the issues raised by the courts, that the applicant did not dispute the SCO designation during the asylum proceedings, could be mitigated. The centre of the dispute would lie before the asylum authority and a thorough review would not be postponed to the judicial proceedings during which legal help might be more available.

Without the appropriate safeguards at the executive branch, the protection is left to the judicial branch which is not infallible. It is also important to note that not all cases make it to court. Properly based SCO designations, high quality country reports, regular review of the safety situation by the executive branch and quality legal aid may prevent the violation of the non-refoulement principle and provide adequate protection to applicants for international protection without engaging the judicial branch at all.