LUCILLA TEMPESTA[*]

FAILURE TO VALIDATE DETENTIONS IN ALBANIA: TOWARDS A CLARIFICATION BY THE CJEU

ABSTRACT. *The article examines the Italy-Albania Protocol in light of the concept of a "safe third country" and the legal issues arising in its implementation. It traces an analysis of Regulation 2024/1348 and the recent case law of the Court of Justice of the European Union (CJEU), highlighting the tensions between Italian and European law.*

The contribution delves into the practical impact of the designation of safe third countries on the Italian system, dwelling, too, on the newly enacted Decree-Law 158/2024 (and its subsequent updates) and the regulatory developments that will culminate in the New Pact on Migration and Asylum.

Finally, the limits and opportunities of the disapplication of administrative acts conflicting with European criteria are discussed, along with the role of the CJEU in resolving regulatory conflicts.

CONTENT. 1. Introduction. – 2. The Italy-Albania Protocol and the Safe Countries Decree: First Applications and Impacts. – 3. The Intricate Judicial Disputes in Italy. – 4. The Ordinary Judge and the Review of Legitimacy on Safe Countries: Limits and Potential of Disapplication. – 5. Conclusion.

[*] Master's Degree in Law, University of Roma Tre.

1. Introduction

Managing migration and asylum claims continues to be a terrain of legal and political tension in Italy, as evidenced by events related to the recent agreement with Albania.

The Italy-Albania agreement explores the application of border procedures in a non-EU country, where national and European law both apply. On November 6, 2023, Prime Minister Giorgia Meloni and Edi Rama signed the Protocol for Strengthening Cooperation on Migration. This agreement stems from the need to strengthen bilateral cooperation between the two countries in the field of migration and the prospect of the Republic of Albania's accession to the European Union.

The purpose of the agreement (art. 2), consisting of 14 articles and two annexes, is the relocation of asylum seekers rescued at sea by Italian ships to centers on Albanian territory (art. 4) that will be able to accommodate up to 3,000 people. The duration of the agreement will be five years with automatic renewal unless one country decides to withdraw (Art. 13). Minors, pregnant women, and other vulnerable individuals are excluded from these centers and returned to Italy. Jurisdiction remains Italian in Albanian territory (Art. 5-8). Entry and stay in Albanian territory is granted "*for the sole purpose of carrying out border or repatriation procedures provided for by Italian and European legislation and for the time strictly necessary for the same*" (Art. 4, co.3). Two state-owned areas (Art. 3) identified in Annex 1 are granted free of charge for the duration of the protocol. The first center is located near the port of Shengjin: the disembarkation and identification process will be carried out there, where there will also be a reception center for asylum seekers (hotspots). The second center for repatriation (CPR) of those who do not qualify for refugee status or asylum was built in Gjadër. The expenses for the procedures and construction of the facilities are entirely borne by the Italian side, which is also responsible for ensuring that there are health facilities to provide the necessary health services. The Albanian authorities cooperate with the Italian authorities to safeguard essential and unavoidable medical care for detained migrants. According to Article 6 of the protocol, the Italian side ensures the maintenance of order and security within the Designated Areas, while the Albanian side takes care of it in outer space and during transfers. A unit responsible for the smooth running, coordination, and

supervision of security issues is established for both Parties. The Italian authorities are in charge of preventing the unauthorized exit of migrants from Albanian territory during and after the completion of administrative procedures. On this point, it is stressed that from the wording of Art. 6 (5) of the protocol, an intent of blanket detention could be inferred in that the migrant's presence in designated areas of Albanian territory would authorize his or her automatic detention. The period of detention in the centers, according to the letter of Art. 9, operates following Italian law, that is, foreigners must be detained "*only for the time strictly necessary*," which may not exceed 18 months in the case of the execution of expulsion (Art. 14 TUI), while on the other hand, in the case of applying the asylum procedure at the border, equal to 28 days[1]. The categories to which the protocol applies are asylum seekers from safe countries of origin during the procedure of examining the international application to whom the accelerated procedure applies (i.e., non-vulnerable subjects), to those who have already applied and obtained a denial, and finally to persons awaiting repatriation in the absence of the requirements for residence in Italy[2]. In the case of persons rescued at sea, Article 14 TUI co. 1 stipulates that they are to be taken "to the nearest detention center for repatriation": the protocol, as initially arranged, would derogate from this rule.

Interestingly, the European asylum and migration pact is based on the fiction of non-entry, a characteristic element of the border procedure, while the Italy-Albania pact is based on the fiction of entry into Italian territory[3]. This fiction of entry does not solve the problem of the application of common European asylum norms in Albania, which are inextricably linked to the territory. The territorial limitation for European norms has been upheld by the ECHR and the Court of Justice of the European Union. The Italian government has clarified that only migrants rescued in international waters may be transported to Albania. The clarification follows the discussion in 2018 when the EU Commission ruled out extraterritorial asylum

[1] Eleonora Celoria and Andreina De Leo, 'Il Protocollo Italia-Albania e il diritto dell'Unione Europea: una relazione complicata' (2024) 1 Diritto, Immigrazione e Cittadinanza.

[2] Lorenzo Piccoli, 'No Model for Others to Follow' (Verfassungsblog, 14 November 2023).

[3] Gli Stati Generali sulla detenzione amministrativa, Intervento Silvia Albano (Video, [Milano], Prima giornata 17-18 May 2024)

procedures by arguing that the application of extraterritorial EU rules was neither possible nor desirable, pointing out that only migrants rescued in international waters would be allowed to disembark in safe third countries because then the ships would not be considered to be on EU territory. The same document states that sending an asylum seeker back to a third country without processing his or her asylum claim would constitute refoulement, which is not permitted under either EU or international law. Admitting the possibility of seeking asylum outside the territory of the Union would require an extraterritorial application of European law, which, as pointed out, is not desirable or possible at present. Article 9 of the Procedures Directive guarantees the asylum seeker the right to remain in the territory of the European Union for the duration of the asylum procedure. In addition, the Procedures Directive excludes the application of the asylum procedure as regulated by the same regulations outside the territory, border areas, and territorial waters. The proposal to transfer to Albania only migrants rescued in international waters does not resolve the legal issue, since according to the ratification law and protocol, EU law should apply. Moreover, the European Commission's discourse, which considered ships in extraterritorial waters not as EU territory, does not consider that, according to EU law, the determination of a state's territory is subject to national law. In Italy, Art. 4 of the Navigation Code states that Italian ships in international waters are considered Italian territory[4]. Therefore, Italian and EU regulations must be applied to such ships. Consequently, rescued migrants should be transported to Italy, not Albania, as their transfer elsewhere could amount to collective refoulement, which international and EU law prohibit. An operational problem, on the other hand, concerns the Italian police who would have to deal with identification, possibly repatriation, and asylum procedures by having to act in foreign territory. The coast guard and finance guard are the two authorities legitimized to rescue migrants at sea and transfer them to Albania, either from the coast of Sicily or, having to make an even longer journey, from Lampedusa. The inadequate capacity of the boats would result in continuous long journeys. This circumstance could result in further

[4] Mario Savino and Flavio Valerio Virzì, 'Il protocollo tra Italia e Albania in materia migratoria: prime riflessioni sui profili dell'extraterritorialità' (ADiM Blog, November 2023).

aggravation of overcrowding in reception centers, with particular reference to locations such as Lampedusa. In addition, operations in Albania require the presence of Italian officials who will have to make the trip from Italy several times to complete all procedures.

The agreement ensures that the most fragile people will be landed in Italy and not in Albania by enacting selective landings, in violation of Article 3 of the Italian Constitution as by admitting an assumption of discrimination based on a personal condition involving vulnerability or otherwise, this was also confirmed by the Council of Europe Commissioner for Human Rights, Dunja Mijatović. The issue of detention of persons transported to Albania who apply for asylum raises serious legal questions. Access to the procedure and screening is not possible on the ships, where it is instead mandatory to provide information to people about the possibility of applying for international protection[5]. The European Court of Human Rights in 2013[6] had expressed itself by explaining that "no assessment of the condition of persons rescued at sea can be conducted on board of Italian ships before their land transportation and should be carried out with appropriate personnel and with all guarantees." The registration and formalization of the application must take place in front of the border authorities (border police or police headquarters), and if it is deemed appropriate to apply in Albania, applications will be registered there. Union law does not allow for automatism in any case: an assessment of the least afflictive measures is always required, thus excluding detention. In contrast, only detention is conceived in Albania[7], representing a second profile of non-compliance. There can be no automatism regarding who can or should remain in Albanian territory or return to Italy, not even in the case of coming from a country of origin deemed safe. Immediacy at this stage is not feasible, since situations of violence, persecution, or people from vulnerable groups are not always immediately identifiable. Consider, for example, minors for whom age verification is

[5] Mario Savino, 'La legge di ratifica ed esecuzione del Protocollo Italia-Albania: tre problemi di sostenibilità giuridica e amministrativa' (ADiM Blog, January 2024).

[6] Hirsi Jamaa case for the collective rejections implemented in 2009 to Libya.

[7] Fatima Zahra El Harch, 'Il protocollo Italia-Albania è legge: tra (nuovi) vuoti normativi e (vecchie) violazioni di diritti' (Melting Pot, 21 February 2024).

necessary. Moreover, it is not possible to order detention and subsequently seek supporting evidence.

Notwithstanding the several doubts regarding the agreement, on February 15, 2024, the Italian Senate of the Republic approved the text ratifying and executing the Italy-Albania Protocol. Criticisms raised in both territories concerned issues of unconstitutionality. In Italy, the criticism stemmed from a failure to comply with Article 80 of the Constitution, which states that "*The Chambers shall authorize by law the ratification of international treaties that are political, or provide for arbitration or judicial regulations, or import variations of territory or burdens to the finances or modifications of laws*." The protocol, given its content, prescribes the application of the aforementioned Article 80. In Albania, the President of the Republic's prior and necessary authorization involved a Constitutional Court hearing. The law was published in the Official Gazette on February 22 and entered into force on February 23.

2. The Italy-Albania Protocol and the Safe Countries Decree: First Applications and Impacts

Delving to the core of the topic addressed in this article, this section introduces the events that have triggered the significant debate over the practical application of the protocol. Between October 13 and 14, an Italian military ship transferred 16 migrants-all non-vulnerable men from countries considered "safe," such as Egypt and Bangladesh, to the detention center in Shengjin. In light of the agreement, the first of its kind in Europe, the three centers have been built: the hotspot detention center (for asylum seekers waiting for their expedited asylum claim to be considered), the repatriation detention center (for so-called irregular migrants ready for repatriation), and a small 20-seat penitentiary.

As previously outlined, the pact has, from a practical standpoint, raised several critical legal and economic issues. On the one hand, the concept of "safe country," a central element of the accelerated asylum procedures under the Cutro Decree, has already been challenged by Italian courts, which have not upheld the detention of asylum seekers in the Pozzallo and Porto Empedocle centers because they have

challenged the very concept of a safe country of origin. In addition, the Court of Justice of the European Union (CJEU) intervened, which, as will be discussed in more detail below, in the ruling on October 4, reiterated that to consider a country "safe," no human rights violations must occur on any person or in any part of the territory. On the other hand, doubts are emerging about the agreement's compatibility with the principle of non-refoulement enshrined in Article 33 of the Geneva Convention and already violated by Italy in Hirsi Jamaa v. Italy in 2012.

The critical issues also extend to the economic plan: the estimated costs for the project, amounting to 670 million euros over five years, have been described as disproportionate to the small number of people being transferred, leading to the opening of a file by the Court of Auditors. In addition, the use of military ships, such as the Libra, to transport migrants – lacking adequate facilities and with sailing times of three to four days – has sparked further controversy over the excessively onerous conditions of the system.

The application of the accelerated asylum procedure had already found serious impediments in its attempts to apply in Italy[8]. Even before the Rome Court's intervention, the border procedure had remained essentially unimplemented even on Italian soil where detentions had not been validated by the Sicilian courts first because the financial guarantee's decree conflicted with European law, and again by disapplying the safe countries decree[9].

The Italy-Albania agreement raised numerous criticisms especially regarding its compatibility with the principle of non-refoulment under the 1951 Refugee Convention, which states that no person may be sent back to a country where he or she may be subjected to torture, inhumane, or degrading treatment – «Article 33. – Prohibition of expulsion or return ("refoulement") *1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where*

[8] First, by disapplying the first financial guarantee decree, then rewriting it by the government, and again by disapplying the Safe Third Countries decree. In both cases, the conflict with EU law rests on the problematic application of the border procedure or the accelerated procedure with the detention of asylum seekers.

[9] Mario Savino, 'La mancata convalida dei trattenimenti in Albania: alcuni dubbi sulla decisione del Tribunale di Roma' (October 2024), ADiM Blog.

his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country». Critics of the agreement point out that migrants transferred to Albania could be subjected to treatment in violation of this principle. They also raise the risk of collective refoulement, which could occur if, once in Albania, migrants were to be sent back to their countries of origin without proper individual assessment of their asylum claims. This scenario is reminiscent of the aforementioned Italian conviction in Hirsi Jamaa v. Italy, where the European Court of Human Rights ruled that the collective refoulement of migrants without proper assessment of their claims violates fundamental rights.

Criticism has been emphasized regarding Albanian authorities' involvement in managing the system. Although Albanian forces are responsible for the centers' external security, the work of Italian authorities remains central. The allocation of responsibility between the Italian and Albanian forces raises questions about how effective the system can be in ensuring respect for human rights, especially considering that Albanian police forces may be called upon to intervene if migrants decide to leave the centers.

The agreement, while conceived as a pragmatic solution to ease the burden of the Italian reception system, is therefore at the center of a heated legal and political debate, which has resulted in a heated confrontation between the judiciary and the government.

On Oct. 18, the first group of applicants, previously transferred to Albania in light of the aforementioned protocol, had been released, as the Court of Rome had deemed their detention non-validate. In particular, in an Oct. 18 press release, the Ordinary Court of Rome, Specialized Section on Immigration, reviewed requests to validate detentions ordered by the Rome Police Headquarters under the Italy-Albania Protocol. Based on the October 4, 2024 ruling of the Court of Justice of the European Union (CJEU), which followed a preliminary reference by the court of the Czech Republic, the detentions were not validated. The reason lies in the impossibility of

considering the states of origin of the detained migrants as "safe," making the border procedure inapplicable. Therefore, as stipulated in the Protocol, the persons involved have the right to be transferred to Italy and cannot be returned to Albania. Yet again, on Nov. 11, seven asylum seekers detained in Albania were returned to Italy, following the suspension of the validation of their detention by the Court of Rome, which referred the matter to the Court of Justice of the European Union. Pending the Court's opinion, the applicants were transferred to Italy and released, as required by the Protocol. This decision, again, was due to the assessment that the asylum seekers' countries of origin could not be considered "safe," preventing the application of an expedited border procedure. In response, the Italian government approved the so-called "Safe Countries" decree identifying, this time with a primary-ranking source, a new list of 19 countries defined as safe, which still include the countries of origin of asylum seekers transferred to Italy, namely Egypt and Bangladesh. The courts in Bologna, Palermo, and Rome pointed out a potential conflict between the definition of "safe countries" contained in European legislation and that provided by the Italian government decree, raising precisely the issue before the CJEU. In the case of a conflict between national and European law, national judges have three options: not applying Italian law, seeking an opinion from the CJEU through a preliminary reference, or referring the matter to the Constitutional Court for an assessment of constitutional legitimacy. Under European law, all asylum seekers arriving on Italian territory enjoy the constitutionally protected right to apply ordinarily. The exception is for applicants from countries defined as "safe," in respect of which an expedited procedure may be applied, as provided for by European law. The notion of a "safe country" at the European level implies that in such a country, without exception, safe conditions are guaranteed for all persons, without discrimination or persecution based on race, ethnicity, sexual orientation, or other vulnerable groups. This definition was confirmed by the CJEU ruling of October 4, 2024.

Indeed, the Court of Justice of the European Union has ruled on the preliminary reference made by the Brno Regional Court (Czech Republic) concerning three key issues: the notion of a safe country of origin, the legitimacy of the designation of such countries, especially when it exclusively concerns parts of their territory and the possibility for the court to assess ex officio the legitimacy of the designation.

Starting with the notion of safe country of origin, and thus with the second

question for a preliminary ruling, the Court clarifies (paras. 68 and 69) that Article 37 of Directive 2013/32 must be interpreted meaning that a country cannot be designated as a "safe country of origin" if even only part of its territory does not meet the criteria outlined in Directive 2013/32, thus, to be considered "safe," the entire territory of the country must meet the required conditions, without exception. These conditions include the general and continued absence of persecution (as defined in Article 9 of Directive 2011/95), torture or inhuman or degrading treatment, and threats of indiscriminate violence related to internal or international armed conflict. Article 37 of Directive 2013/32 must be interpreted narrowly, excluding the possibility of designating a third country as a safe country of origin if such designation is limited only to certain parts of its territory. A different interpretation, allowing partial designation, would have the effect of broadening the scope of the special examination regime in the directive in the absence of clear textual support in that provision. Moreover, the interpretation that excludes partial designation is supported by the regulatory development of Article 37. Before the introduction of Directive 2013/32, Directive 2005/85 regulated the designation of third countries as safe countries of origin in Article 30. This provision explicitly allowed member states to designate even only part of the territory of a third country as safe, provided that the conditions set out in Annex II of Directive 2005/85 were met for that specific part of the territory. These conditions, broadly similar to those set out in Annex I of Directive 2013/32, required a demonstration that there was "generally and consistently" no persecution, torture, or other forms of inhuman or degrading treatment. However, with the entry into force of Directive 2013/32, the former regulation was repealed under Article 53, replacing Article 30 of Directive 2005/85 with Article 37 of the new directive. So, the new wording, unlike the repealed rule, no longer provides any option for member states to designate only part of a third country's territory as safe (paras. 71-74). The CJEU decided not to join the proceedings on the "Czech" issue concerning territorial exceptions, which was resolved on October 4, and the "Italian" issue on personal exceptions. This represents an aspect worthy of attention, since, on the contrary, the Rome Tribunal applied the conclusions that emerged from the Oct. 4 judgment in the

context of personal exceptions as well, without adopting a cautious approach[10]. In conclusion, as already noted by others[11], the reasoning of the CJEU rests on a rigidly oppositional approach: a country is either safe in its entirety or it is not at all.

The Court of Rome, Immigration Section, following the validation hearing on 11/11/2024, decided by order to refer the case to the Court of Justice of the European Union, under Articles 267 TFEU, 105 et seq. of the Rules of Procedure, and Article 23a of the Statute of the Court. In the meantime, it suspended the validation judgment, maintaining the legal effects related to the effectiveness of the detention (48 hours), which automatically triggered the expiration of the period provided by law, i.e., in the end, the Bengali and Egyptian migrants will have to be returned to Italian territory and released by necessary termination of the restrictive measure. According to Article 6 bis of Legislative Decree No. 142/2015, the fact that the asylum seeker comes from a third state designated as a safe country of origin justifies detention during the border procedure, as provided for in Article 28 bis, paragraph 2, letter b-bis) of Legislative Decree No. 25/2008. Moreover, the designation of the country of origin as a "safe country of origin", in this case, Egypt and Bangladesh, attached to the Ministerial Decree of May 7, 2024, must still be considered valid, unless other sources of information indicate otherwise while excluding certain categories of persons from the presumption of safety. The Tribunal raised doubts about the compatibility of this designation with European Union law, also in light of the recent ruling of the Court of Justice of the European Union on October 4, 2024. Following the legislative amendment adapting national legislation to the Court's decision, the reference to the possibility of designating a third state as a safe country for certain parts of its territory was removed, but the option to exclude specific categories of persons from the presumption of safety remained.

As for the preliminary questions, the first one proposed by the Tribunal of Rome concerns the compatibility of the recent amendment introduced by Decree-Law No. 158 of October 23, 2024, with European Union law. In particular, the Tribunal asks

[10] Mario Savino, 'La mancata convalida dei trattenimenti in Albania: alcuni dubbi sulla decisione del Tribunale di Roma' (October 2024), ADiM Blog.

[11] *Ibid.*

the CJEU to rule on the legality of the designation of safe countries of origin, which is now directly entrusted to ordinary law. The amendment abolished the two-phase structure of the designation procedure, which previously required that there be a preliminary assessment based on criteria defined by law in compliance with Article Art. 2-bis of Legislative Decree No. 25/2008 Paragraph 1 and then a specific designation of countries as safe through a lower-ranking act, i.e., the interministerial decree to be updated periodically, most recently on May 7, 2024. The second preliminary question raised by the Tribunal of Rome concerns the conformity of the current method of determining the list of safe countries of origin, as established by Decree-Law No. 158/2024, with European Union law, specifically compliance with the principles of transparency and legality. In particular, the Tribunal questions the Court of Justice as to whether the national legislation is incompatible if it does not require that the national legislature, when designating a third country as a safe country of origin, clearly explicate the assessment criteria adopted, the method used, and the information sources from which the data regarding the designated country were derived. The third preliminary question raised concerns the obligation of Member States to give judges the power and duty to make an independent and timely assessment of whether a third state qualifies as a safe country of origin. Indeed, the Tribunal questions the CJEU to clarify whether EU law requires member states to allow judges to use all relevant information from qualified sources to verify the correctness of the designation of a third country as safe. The fourth preliminary question wonders about the conformity of EU law with Italian legislation that allows a third country to be designated as a "safe country of origin" while excluding only certain categories of persons. The question emerges following the amendments introduced by Decree-Law No. 158/2024, which eliminated the possibility of excluding parts of the territory from such designation but retained the possibility of excluding specific categories of persons, in contrast, according to the interpretation of the Tribunal of Rome with the principle affirmed by the Court of Justice in the above-mentioned judgment of October 4, 2024, in Case C-406/22. The judges of the Tribunal of Rome continue to hold that the correct reading of EU law requires that a third country cannot be considered safe if it is not so for groups of individuals, whether this depends on the portion of the territory in which they are or could be, as examined by the Czech court, or on the "category" of individuals to which they belong. The Tribunal

considers that definitive clarification is needed on this interpretation's compatibility with the Union's law. In light of these considerations, the Tribunal considered it appropriate to refer to the Court of Justice for a ruling on the compatibility with Union law on the option of designating a third state as a safe country of origin, with the exclusion of certain categories of persons from the presumption of a safe country. Pending such a ruling, the Tribunal suspended the judgment, as provided for in Article 267 of the TFEU. It is interesting to highlight the Rome Tribunal's divergent approach to decisions on the second group of detentions in Albania[12]. Specifically, on October 18, the Tribunal had disapplied the rules designating Bangladesh and Egypt as safe countries of origin for the first applicants transferred to Albania, denying the validation of the detentions. Instead, on November 11 it chose a less "intrusive" approach. On this second occasion, the judges decided no longer to deny the validation of the detentions but rather to suspend them and refer the matter to the Court of Justice by way of a preliminary reference, thus choosing a path that leaves the final assessment open pending the European pronouncement.

3. The Intricate Judicial Disputes in Italy

Before analyzing the provisions under review, it is pertinent to consider the basic notions regarding the precedence of European Union law over national law that conflicts with it. In light of the principle of loyal cooperation (or *sincere cooperation*), outlined in Article 5 of the EEC Treaty (now Article 4(3) TEU), «*the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*.». Member states must ensure the judicial protection of individuals' rights arising from EU law having a direct effect. According to the jurisprudence of the Court of Justice, it is up to national courts to ensure that European rules are applied effectively without States being able to hinder the full exercise of those rights. Recalling the

[12] Mario Savino, 'Se i giudici tornassero a occuparsi del caso concreto? L'impasse sui Paesi terzi sicuri e una possibile via di uscita' (November 2024), ADiM Blog.

supremacy of European law over national law makes it clear that European Union law directly affects the Italian legal system. When there is a conflict between an EU norm and a national norm, the Italian court is obliged to give preference to the application of the European norm, to the exclusion of the national norm, after ascertaining that the European norm is sufficiently clear, precise, and unconditional.

Directive 2005/85/EC on minimum standards for procedures applied in Member States for granting and withdrawing refugee status was transposed into Italian law by Legislative Decree No. 25 of January 28, 2008, which provides, in Article 28 bis (introduced by Legislative Decree No. 142/2015), the possibility, under certain conditions, to follow an accelerated procedure. Directive 2013/32/EU intervened regarding the discretion of the member state when drawing up the list of countries considered to be safe. It, too, was transposed into Italian law by Legislative Decree Aug. 8, 2015, no. 1 42. Particular reference is made here to Article 37*, "National designation of third countries as safe countries of origin."* As can be seen from the aforementioned European law, the member state can only exercise constrained and technical discretion at the stage of designating a country as a "safe country." It should be noted that Article 37 of Directive 32/2013 does not impose any specific constraints on the national legislative source to be used for drafting the list of safe countries. Instead, it identifies the parameters to be observed[13], the reference sources, and the obligation for continuous updates. Because of the latter point, a point of contrast (or rather tightening) is observed between the decree-law[14] (which amended Legislative Decree 25/2008) and European legislation. Specifically, the (now amended) Article 2-bis, paragraph 4-bis, of the decree-law only allows for updating the list of safe countries once a year through an act with the force of law (to be reported to the European Commission), based on a report

[13] 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 (recast) (2013) *OJ L 180, 29.6.2013, article 38.*

[14] Decree-Law No. 158 of October 23, 2024, on urgent provisions on procedures for the recognition of international protection, is repealed and now contained in Law No. 187 of December 9, 2024, which converted into law, with amendments, Decree-Law No. 145 of October 11, 2024, on urgent provisions on the entry into Italy of foreign workers, protection and assistance to victims of caporalato, management of migration flows and international protection, as well as related judicial proceedings.

approved by the Council of Ministers by January 15[15]. This last point raises a conflict with the requirement for continuous updating outlined in Article 37(2) of Directive 32/2013[16]. As a preliminary remark, it should be reiterated that due to the primacy of European law, the scrutiny of the list of safe countries remains incumbent regardless of the source that encloses the list[17].

In the cases that will be analyzed below, reference is made in particular to the "accelerated border procedure". As further recalled by the Court of Justice of the European Union, countries in which the rights and freedoms outlined in the European Convention on Human Rights are not respected and in which there is a danger of persecution, torture, or other forms of inhuman or degrading punishment or treatment, cannot be designated as "safe"[18].

In response to the impasse created in the centers in Albania, as already mentioned, the Italian government, on October 23, approved a new decree, in this case, a decree law, 158/2024, containing the new list of countries considered safe. It is necessary to dwell now on the scope of this primary-level act and what impact it has on asylum procedures.

First of all, Decree-Law 158/2024 has been repealed and transposed into the new "Decreto Flussi" Decree-Law 145/2024 which concerns regulations for labor entry flows into Italy. From 22 countries that were present in the last interministerial decree updated in May 2024, the new decree-law, following the ruling of the European Court

[15] Paragraph 4-bis. «The list of safe countries of origin referred to in Paragraph 1 shall be updated periodically by an act having the force of law and shall be notified to the European Commission. To update the list, the Council of Ministers, by January 15 of each year, shall deliberate a report, which, consistent with the preeminent needs of security and continuity of international relations and taking into account the information referred to in paragraph 4, it shall report on the situation of the countries included in the current list and those whose inclusion it intends to promote. The Government shall forward the report to the relevant parliamentary committees.»

[16] «Member States shall regularly review the situation in third countries designated as safe countries of origin in accordance with this Article.»

[17] Chiara Cudia, 'Osservazioni sul decreto legge in materia di individuazione dei paesi di origine sicuri nelle procedure per il riconoscimento della protezione internazionale: quando il fine non giustifica il mezzo (e il mezzo è inidoneo a perseguire il fine)' (November 6, 2024), *Federalismi.it: Rivista di diritto pubblico italiano, comparato, europeo*.

[18] Andrea Natale and Fabrizio Filice, 'Nota ai provvedimenti di rigetto delle richieste di convalida dei trattenimenti disposti dalla Questura di Roma ai sensi del Protocollo Italia-Albania, emessi dal Tribunale di Roma, sezione specializzata nella protezione internazionale, il 18 ottobre 2024' (October 22, 2024), *Questione giustizia*.

of Justice, has eliminated three countries for which there was a territorial security exception while confirming countries where it is documented that there are exceptions regarding security for certain categories of people, such as those belonging to the LGBTIQ+ community. Today, the list of safe countries includes 19 states: Albania, Algeria, Bangladesh, Bosnia and Herzegovina, Cape Verde, Ivory Coast, Egypt, Gambia, Georgia, Ghana, Kosovo, North Macedonia, Morocco, Montenegro, Peru, Senegal, Serbia, Sri Lanka, and Tunisia. Already, the interministerial decree of May 7, 2024, had been challenged before the Lazio Regional Administrative Court (TAR Lazio), the new decree-law has only exacerbated the critical issues already highlighted, prompting the Court of Bologna to question the Court of Justice again on the correctness of the procedure adopted to define the list of countries considered safe and the Court of Catania to disapply Decree Law 158/2024 by invalidating the detention of a person subjected to the accelerated examination of the asylum application because he came from a "safe" country[19].

Article 2a of Legislative Decree No. 25 of January 28, 2008, was reformed by the previously mentioned Decree-Law No. 145 of October 11, 2024, now converted by Law No. 187 of December 9, 2024. In the first paragraph, the list of so-called safe countries has been updated, and in paragraph 4a, it is stipulated that it will be an act having the force of law and no longer an interministerial decree to amend and update this list of safe countries. How the list will be updated is also innovative in that the Council of Ministers will submit a report by January 15 of each year that will elucidate the current situation of the countries on the list and be useful for possible innovation of the list.

A safe country of origin, as defined by Article 2bis of Legislative Decree 25/2008, is a non-EU state that, based on its legal system, the application of laws in a democratic context, and the general political situation, is shown to be able to stably and consistently guarantee the absence of acts of persecution, torture, inhuman or degrading treatment, as well as dangers arising from indiscriminate violence in situations of internal or international armed conflict. This assessment also considers respect for

[19] 'La nuova "lista dei paesi sicuri" e lo svuotamento del diritto di asilo' Press release, (November 5, 2024) ASGI.

fundamental rights enshrined in international treaties, in particular, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the United Nations Convention against Torture. Compliance with the principle of non-refoulement under the Geneva Convention and the effective presence of redress mechanisms against possible rights violations are also checked. In light of the recent EU Court of Justice ruling and stringent requirements for the definition of a "safe country", the possibility of excluding parts of the territory has been eliminated, but it is still possible for *certain groups or categories of people* to be excluded from the country's security designation, as the CJEU has not deemed personal exceptions incompatible with the notion of a 'safe country'[20]. The definition provided by the European Directive 2013/32, Annex 1, substantially coincides with that provided by the Italian legislation in Legislative Decree 25/2008. Both are based on similar criteria for the designation of a safe country of origin, such as the general and consistent absence of persecution, torture, inhuman or degrading treatment, and dangers from indiscriminate violence. It is noted that European legislation does not contemplate the possibility of any exclusion of parts of the territory or categories of people in the definition of a safe country, unlike the previous 85/2005 directive. Article 37 - *National Designation of Third Countries as Safe Countries of Origin* is the legal basis for member states to introduce an internal rule designating at the national level which countries are safe countries of origin.

The designation of a safe country of origin assumes relevant procedural significance, directly affecting the asylum seeker. From the automatic presumption of the safety of a designated country comes an increased evidentiary burden on the applicant, who must provide concrete and specific evidence to show that, concerning his or her circumstances, the government cannot be considered safe, to obtain recognition of international protection[21]. In addition, under Article 32, para. 1(b-bis) of Legislative Decree 25/2008, the application can be rejected as manifestly unfounded,

[20] Italian Supreme Court of Cassation, First Civil Section, 30 December 2024, Ordinanza No. 22146/2024.

[21] The Supreme Court again emphasized this point in an interlocutory order published on December 30. The applicant must provide the personal reasons that make his or her country unsafe in the specific case, and these grounds can be invoked both at the stage of appealing the decision to deny international protection and at the validation stage. In the latter, if these reasons are deemed well-founded, the applicant may not be detained.

and the time limit for filing an appeal is reduced by half.

Article 92-bis of Legislative Decree 25/2008 stipulates that in the case of rejection of an application submitted by an applicant from a safe country of origin, the decision must be motivated only by noting that the applicant has not demonstrated the existence of serious reasons for considering the country unsafe concerning his or her particular situation. A further consequence is that the filing of the appeal does not automatically suspend the enforceability of the rejection order. However, under Article 35-bis, paragraph four of Legislative Decree 25/2008, the applicant may apply for suspension of the decision adopted by the Territorial Commission. Such a suspension may be granted by the judge by reasoned decree pronounced within five days of the submission of the petition and without convening the other party in advance if serious and circumstantial reasons emerge[22]. In conclusion, the designation of a safe country of origin results in a compression of procedural guarantees for the applicant. Expedited procedures apply for the consideration of the application, and in case of rejection, removal from the national territory is also possible despite the pendency of the appeal. Qualifying the country of origin as a safe country of origin simplifies the task of the administrative authority in charge of examining applications by exempting it from the obligation to demonstrate, on a case-by-case basis, that the country provides the applicant with effective and adequate protection from persecution or other serious harm[23]. In the case of the Italy-Albania protocol for persons coming from a safe country of origin and rescued at sea, the accelerated border procedure will be applied, by equating the Albanian territory with the Italian border.

It is, therefore, necessary to question the institution and the reasons for its use, considering that as of 2026, with the entry into force of the New Pact on Migration and Asylum, border detention will become the "ordinary" procedure for applicants from safe countries of origin who are considered less eligible for international protection[24].

[22] Marcella Cometti, '*The preliminary reference to the Italian Court of Cassation and the one to the Court of Justice and disapplication of an administrative act infringing EU Law. The case of the Ministerial Decree on Safe Countries of origin*' (2024) 3 *Review of European litigation.*

[23] *G.A. v M.I.* (Supreme Court of Cassation, First Civil Section, Dec. 4, 2024) R.G. 14533/2024.

[24] «In the interest of swift and fair procedures for all applicants, whilst also ensuring that the stay of applicants who

Based on objective principle[25], the new approach represents a significant departure from the current safe country of origin designation mechanism, which is not homogeneous among different member states, showing significant differences in the evaluation criteria and application methods adopted at the national level[26]. As outlined in EU Regulation 2024/1348, the border procedure is designed to quickly assess, in principle, whether an asylum claim is unfounded or inadmissible at the external border. The aim is to enable the immediate return of those with no right to stay while ensuring that well-founded applications are directed to the regular procedure, allowing rapid access to international protection while fully respecting the principle of nonrefoulement. The accelerated procedure will become mandatory in several cases. The provisions of the new Regulation assume that the applicant's claim is considered less legitimate since it falls into specific categories, such as being from a 'safe country of origin'. The Asylum Procedures Regulation introduces a potential bias by assuming lower credibility for applicants from countries with a protection rate of 20% or less, despite considerable variation in recognition rates between Member States.

do not qualify for international protection in the Union is not unduly prolonged, including those who are nationals of third countries exempt from the requirement to be in a possession of a visa pursuant to Regulation (EU) 2018/1806, Member States should accelerate the examination of applications of applicants who are nationals or, in the case of stateless persons, formerly habitual residents of a third country for which the share of decisions granting international protection is 20 % or lower of the total number of decisions for that third country, taking into account, inter alia, the significant differences between first instance and final decisions. Where a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data and taking into account the guidance note pursuant to Article 11 of Regulation (EU) 2021/2303, or where the applicant belongs to a specific category of persons for whom the low recognition rate cannot be considered to be representative of their protection needs due to a specific persecution ground, examination of the application should not be accelerated. Cases where a third country may be considered to be a safe country of origin or a safe third country for the applicant within the meaning of this Regulation should remain applicable as a separate ground for respectively the accelerated examination procedure or the admissibility procedure.» (Regulation (EU) 2024/1348, recital 56.)

[25] Mario Savino, 'Se i giudici tornassero a occuparsi del caso concreto? L'impasse sui Paesi terzi sicuri e una possibile via di uscita' (November 2024), ADiM Blog.

[26] Gianpiero Cassola, 'Il controllo giurisdizionale sulla designazione dei paesi di origine sicuri: l'istruttiva esperienza della Francia' (November 2024), ADiM Blog.

4. The Ordinary Judge and the Review of Legitimacy on Safe Countries: Limits and Potential of Disapplication

The logic of the New Pact on Migration and Asylum is based on an assumption: there is a distinction between migrants deserving of full protection and others who, with less chance of having their applications for international protection recognized, will be treated with fewer guarantees, shorter timeframes for procedures and lodging appeals, and may be subject to detention to be returned more quickly without incurring in secondary movements. The Rome Court, in remanding the matter to the CJEU, shows clear opposition to this distinction: a country must be considered safe in all its parts, as already stated in the October 4 CJEU ruling, and for all categories of people. On this point, the Italian Supreme Court ruled in an interlocutory order of Dec. 30, 2024, reiterating that the Court of Justice's ruling of Oct. 4, 2024, intervened only on the territorial exceptions but did not dictate an incompatibility with the notion of safe country in the presence of personal exceptions since the two exceptions have a "different degree of objectivity of ascertainment" not resulting, therefore, in a "perfect symmetry."

Dwelling on the role of the ordinary court concerning the extent of its review of the designation of a country of origin as safe, on July 1, 2024, the Court of Rome proposed to the Court of Cassation, according to Article 363a Code of Civil Procedure, the following preliminary question: should the ordinary court abide by the official list of safe countries of origin established by interministerial decree[27], or does it have an obligation, because of its duty of investigative cooperation, to verify, through updated information (COI), whether the country on the list meets, the security criteria required by European and national regulations[28]?

The First Civil Section of the Supreme Court ruled in chambers on December

[27] Reference is made to the decree of the Minister of Foreign Affairs and International Cooperation, in consultation with the Ministers of the Interior and Justice, May 7, 2024 (*Update of the list of safe countries of origin provided for in Article 2-bis of Legislative Decree No. 25 of January 28, 2008*), published in the *Official Gazette of* the Republic, General Series, No. 105 of May 7, 2024.

[28] Marcella Cometti, '*The preliminary reference to the Italian Court of Cassation and the one to the Court of Justice and disapplication of an administrative act infringing EU Law. The case of the Ministerial Decree on Safe Countries of origin*' (2024) 3 *Review of European litigation.*

4, 2024[29]. As the Court notes, the question is posed in a general way, that is, it does not only concern the case in which it was the applicant with an appeal against the order rejecting the application for international protection on the grounds of manifest groundlessness according to Article *28-ter* of Legislative Decree No. 25 of 2008 issued by the Territorial Commission but also the case in which the challenge was lacking. In the matter at hand, the applicant, a Tunisian citizen, had, even if not raising "*well-founded reasons to believe that the country of origin is not safe due to the particular situation in which he finds himself,*" reported that Tunisia could not be considered a safe country for the generality of people due to recent developments. As the Court unequivocally holds, the ordinary judge cannot and should not replace what is enshrined in the law and by the Minister of Foreign Affairs and International Cooperation since his jurisdictional ascertainment cannot extend beyond the concrete case in which he must assess that the exercise of power was not arbitrary, exercising instead a review of legitimacy on the ministerial decree "*where it clearly contrasts with the European and national legislation in force on the subject, also taking into account information on the countries of origin updated at the time of the decision, according to the principles on the subject of investigative cooperation*." The Supreme Court suggests only one path, namely the non-application of the act[30] if the judge exercises his cognition on the administrative act, not being able instead to annul or revoke it. It is compelling to clarify that the obligation incumbent upon the ordinary judge to carry out an updated assessment extends not only to the merits of the application for international protection but also to the applicability of the procedural framework established for migrants originating from safe countries. Therefore, the principle of law enunciated by the Supreme Court reiterates that the ordinary judge, in the regulatory context before Decree-Law No. 158 of October 23, 2024, and Law No. 187 of December 9, 2024, cannot replace the executive power or annul the ministerial decree with general effects. However, it can

[29] Italian Court of Cassation, First Civil Section, Sentenza No. 14533/2024, 19 December 2024.

[30] "*The power of disapplication of administrative acts can be exercised in the presence of any defect of legitimacy and for the violation of any legal norm, including of the European Union".*
Case law (Cass., Sez. Un., 25 Maggio 2018, n. 13193) has clarified that the power of disapplication can also be exercised in disputes in which the public administration is a party and not merely in those between private parties." G.A. v M.I. (Supreme Court of Cassation, First Civil Section, Dec. 4, 2024) R.G. 14533/2024 (para. 20).

(and should) assess, as part of its examination, whether the designation of a country as "safe" is legitimate[31], incidentally disapplying the ministerial decree, as an administrative act, if such designation manifestly contravenes European or national criteria, according to the official sources referred to in Article 37 of Directive 2013/32/EU, and thus whether the ministerial decree on Safe Countries is unlawful for violation of law[32].

5. Conclusion

While waiting for the ruling of the Court of Justice of the European Union, which will have to clarify the questions raised by the Italian courts[33], it is worth drawing attention to Regulation 2024/1348, which will introduce, as of 2026, a strengthening of cooperation between the European Union and member states regarding the designation of safe third countries. Specifically, the regulation gives the Union the power to designate safe third countries and to establish the criteria for such designation, as well as for the suspension or revocation of this designation[34].

Of particular relevance is Article 61 of the Regulation, which defines the "*Safe country of origin concept*". Paragraph 2 states that the designation of a third country as safe, whether at the European or national level, may provide exceptions for certain parts of the territory or identified categories of persons. This provision contrasts Article 2-

[31] « The judge, according to the European sources, must, keep unaltered his right-duty to acquire by all means all the elements useful to investigate the existence of the prerequisites of international protection, according to the attached personal conditions of the applicant and according to the general situation of the country of origin considered relevant when he decides on the appeal.
This means that the aforementioned dutiful power (on which the system peacefully converges) cannot be limited, in the possibilities of its explication by the mere fact that a state has been included in a list of countries to be considered safe based on information (admittedly qualified but) screened only in the governmental (or lato sensu administrative).» Supreme Court of Cassation (Civil Division, Section I), November 11, 2020, no 25311.

[32] 'Paesi Sicuri: Le bugie sulla pronuncia della Corte di Cassazione' Press release (December 23, 2024), ASGI.

[33] Reference is made to the preliminary references proposed by the courts of Florence (June 2024), Bologna (October 2024), Rome and Palermo (November 2024).

[34] Art. 60 *et seq*.

bis of Legislative Decree 25/2008, which, following the ruling of the Court of Justice[35], eliminated the possibility of exceptions for specific territorial areas, retaining only those for categories of persons.

As a final reflection on the points discussed, as stated in the December 30 Supreme Court ruling in case of a conflict between national and European rules, the former can be disapplied by ordinary courts. The principle that emerges is that «the ordinary court has the power-duty to exercise a review of the legitimacy of the designation by the government authority of a certain country of origin among the safe ones, where such designation 'manifestly conflicts with the European legislation in force on the subject'.»

[35] *M.-A.A. v Direcţia de Evidenţă a Persoanelor Cluj and Others* (Case C-123/24) [2024, ECLI:EU:C:2024:845].