

A report on Norway's response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments

Norway's Asylum Freeze



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Table of contents

FOREWORD	5
LIST OF ABBREVIATIONS	6
SUMMARY	7
RECOMMENDATIONS	10
1 INTRODUCTION	12
1.1 Methodology.....	12
1.2 International legal framework.....	13
2 THE SUDDEN INCREASE OF ASYLUM ARRIVALS AT STORSKOG	16
2.1 Government's initial framing of the arrivals	17
2.2 Statistical overview.....	17
2.3 Government's initial reaction	18
3 EXPEDITED CHANGES IN LEGISLATION AND PRACTICE.....	20
3.1 Removal of a key legal safeguard from the 'safe third country' provision	21
3.2 Temporary suspension of Immigration Appeals Board's independence.....	25
3.3 Ministerial instructions to the immigration authorities	27
4 IMPLEMENTATION ISSUES AND CONSEQUENCES.....	30
4.1 Ceasing automatic appointment of lawyers.....	30
4.2 Implementation by the Directorate of Immigration (UDI).....	31
4.3 Concerns of the United Nations High Commissioner for Refugees (UNHCR)	34
4.4 The initial approach of the Immigration Appeals Board (UNE)	36
4.5 UNE's Grand Board cases	39
4.6 Abandoning Grand Board's precedent on irrelevance of readmission prospects.....	41
5 CONTINUING DENIAL OF ACCESS TO TERRITORY	46
6 BEYOND STORSKOG.....	50

Foreword

In 2015, Norway's Storskog border crossing with Russia suddenly became a new destination for asylum-seekers, originating mostly from countries with widespread serious problems of insecurity, such as Syria, Afghanistan and Iraq. Despite the approaching winter in this Arctic area and prohibition to cross the border by foot, almost 5 500 asylum-seekers crossed the border at Storskog on bicycles, cars and mini-buses during a few weeks. Norway initially decided to return these asylum-seekers to Russia. In accordance with expeditiously adopted legislative amendments and instructions from the Ministry of Justice and Public Security, Russia was described as a safe third country for most third country nationals. The immigration authorities then began issuing inadmissibility decisions to the applicants, refusing to assess their asylum applications on the merits. Although this approach has eventually been exposed as unworkable, it has negatively affected, and still continues to affect, the right to seek and enjoy asylum in Norway.

The present report examines Norway's response to the 2015 'Storskog situation.' It examines in detail key legislative amendments, ministerial instructions to the immigration authorities, as well as the practices of the National Police Immigration Service (PU), the Directorate of Immigration (UDI) and the Immigration Appeals Board (UNE). The report's main focus is on how the amendment of the 'safe third country' provision in Norway's Immigration Act affected the right to seek and enjoy asylum in Norway.

This report was prepared by NOAS' legal adviser Marek Linha. The report benefited from input provided by organisation's senior advisors André Møkkelgjerd (currently working for Sulland law firm), Andreas Furuseth and Jon Ole Martinsen. Useful comments were also given by the NOAS' General Secretary Ann-Magrit Austenå as well as legal advisor Cecilia Sognnæs, who has worked with individual Storskog cases during the most hectic periods described in the report.

Any errors or critical omissions are the sole responsibility of the author.

List of abbreviations

ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ICJ	International Court of Justice
ILC	International Law Commission
MoU	Memorandum of understanding
NOAS	Norwegian Organisation for Asylum Seekers
NRK	Norwegian Broadcasting Corporation
NTB	Norwegian News Agency
POD	National Police Directorate (<i>Politidirektoratet</i>)
PU	National Police Immigration Service (<i>Politiets utlendingsenhet</i>)
UDI	Norwegian Directorate of Immigration (<i>Utlendingsdirektoratet</i>)
UNE	Immigration Appeals Board (<i>Utlendingsnemnda</i>)
UNHCR	United Nations High Commissioner for Refugees

Summary

- **Described as migrants, not refugees:** 5 464 individual asylum-seekers arrived at the Storskog border crossing with Russia in 2015. The Norwegian government initially described asylum-seekers arriving at Storskog as ‘migrants, not refugees’, obscuring the fact that any migrant may potentially be in need of international protection. Without access to a fair and effective asylum procedure, the actual need for asylum cannot be properly determined. According to the Directorate of Immigration (UDI), which is the first instance in Norway’s asylum procedure, the largest group of asylum-seekers arriving at Storskog consisted of applicants from Syria, followed by applicants from Afghanistan, Iraq and stateless persons. The Norwegian immigration authorities eventually found that only 679 of the applicants who arrived at Storskog had some kind of residence permit in Russia or a multiple entry visa to Russia.¹
- **Legislation pushed through Parliament without public consultation:** In response to increased asylum arrivals at the Storskog border crossing, the Ministry of Justice and Public Security presented a new legislative proposal to Parliament on Friday afternoon, 13 November 2015. Parliament adopted it expeditiously and without public consultation on Monday morning, 16 November 2015. Among others, two key legislative amendments were introduced. First, a key legal safeguard was removed from the ‘safe third country’ provision in the Norwegian Immigration Act, i.e. section 32(1)(d), specifically the requirement that an asylum application “will be assessed” in a safe third country. Second, the independence of the Immigration of the Appeals Board (UNE) was affected as the power of the Ministry of Justice and Public Security was extended to give general instructions to the Board on interpretation of the law and exercise of discretion.²
- **Russia as a ‘safe third country’:** On 25 November 2015, the Ministry instructed the UDI and UNE to issue inadmissibility decisions in Storskog cases pursuant to the amended ‘safe third country’ provision. These asylum applications were thus not to be assessed on the merits. The instruction described Russia as “a safe country” for “most third country nationals” but required the assessment of “specific indications that the individual applicant nevertheless risks treatment in violation of Article 3 ECHR upon return to Russia” However, the instruction specified that the immigration authorities must operate with the following presumption: “If the applicant has a residence permit in, or a visa of a longer duration allowing more entries to Russia, it must be presumed that the applicant will be able to continue to stay in Russia on the same basis upon return. Return to Russia in such cases will therefore as a starting point not involve a violation of ECHR Article 3.”³
- **Crucial procedural guarantees removed:** According to the instruction, inadmissibility decisions were to be “implemented immediately” and no deadline for departure would be set, “so that the foreigner must leave Norway immediately.” The instruction demanded that on appeal “no suspen-

¹ See the statistical overview in section 2.2 of the report for more details.

² See sections 3.1 and 3.2 of the report for more details.

³ See sections 3.3 and 4.2 of the report for more details.

sive effect shall be granted, unless compelling reasons so require”, leaving the term ‘compelling reasons’ unspecified. No lawyers were to be automatically appointed in Storskog cases in which examination of asylum claims was denied on the merits, except for unaccompanied minors. The right to free legal assistance was still in place at that point, but asylum-seekers would need to find and contact a lawyer on their own. All efforts were to be made to issue inadmissibility decisions “while asylum-seekers are present at the Storskog border checkpoint.” Since lawyers were not automatically appointed, asylum-seekers would either remain uninformed about UDI’s refusals for a prolonged period or, in some cases, they would be informed about the decisions by the police at the same time as the police effectuated their return.⁴

- **A new, hybrid version of the concept of a ‘safe third country’, mixed with the concept of a safe country/area of origin:** While referring to the amended ‘safe third country’ provision, the ministerial instruction listed several examples of countries, including Turkey, as well as certain areas, including Kurdistan in Northern Iraq and Kabul in Afghanistan, noting that applications for asylum from persons originating from such countries or areas will be “most often manifestly unfounded”. According to the instruction, merits assessment was to be denied in such cases, irrespective of the risk of deportation from Russia to the country/area of origin.⁵
- **Two critical letters from UNHCR to the Norwegian government:** In a letter of 23 December 2015, UNHCR noted that the new legislative changes and instructions “appear to have created a hybrid between the concepts of ‘safe third country’ and the ‘safe country of origin’, without applying all of the established criteria and procedural safeguards for the implementation of these concepts.” In a separate letter sent two months later, UNHCR pointed out that there were not adequate safeguards in place in Norway to prevent chain *refoulement*, and that it cannot be concluded that holders of multi-entry visas to Russia are generally protected from removal from Russia. It further highlighted the deficiencies of the asylum system in Russia, pointing out that “asylum-seekers in the Russian Federation are at risk of arrest, detention and expulsion at all stages of the asylum process.”⁶
- **Refugees undeniably exposed to the risk of chain *refoulement*:** As pointed out by the Immigration Appeals Board (UNE), there have been instances where UNE reversed UDI’s inadmissibility decisions after the asylum applicants had already been deported. Examples include asylum-seekers from Syria and Yemen, who were first deported from Norway to Russia, where they were unable to legally stay or access the Russian asylum procedure. After the inadmissibility decisions were reversed, these asylum-seekers were brought back to Norway.⁷
- **Consequences for other states in the Dublin system:** According to official data from March 2017, some 1 000 asylum-seekers who had arrived at Storskog in 2015 have subsequently left Norway and applied for asylum in other European countries. By introducing a ‘safe third country’ rule that

4 See section 3.3 of the report for more details.

5 See section 4.2 of the report for more details.

6 See section 4.3 of the report for more details.

7 See section 3.3.1 of the report for more details.

fell short of the requirements of Article 3(3) of the Dublin III Regulation and Article 38(1)(e) of the EU Procedures Directive, Norway created a strong incentive for persons with real protection needs to flee from Norway, apply for asylum in other member states and stay hidden there until the time limits for Dublin-returns expire.⁸

- **The changes in law and practice have proven unworkable:** The Russian authorities have refused to readmit asylum-seekers who did not have a permanent residence permit in Russia.⁹ The Ministry thus issued new instructions to the immigration authorities in April and November 2016 that opened for merits assessment in cases with Russian single-entry visa and subsequently also in cases with expired multi-entry visa and expired residence permits. The amended ‘safe third country’ provision was eventually applied to refuse merits assessment of asylum applications in only circa 5% of all Storskog cases.
- **De facto abolishment of the institute of asylum on Norway’s border with Russia:** The arrivals of asylum applicants at Storskog stopped completely on 30 November 2015 as a result of what appeared to be pushbacks by the Norwegian border guards. From then on, further arrivals have been stopped by Russian border officials. Following the ministerial instruction of 24 November 2015 to the Norwegian Police Directorate, Norwegian border officials must consistently request the Russian side to not let any persons without Norwegian visa to approach the Norwegian national border. As a result of these border practices and the apparent cooperation from the Russian border officials, Norway has effectively abolished the institute of asylum on its border with Russia.¹⁰
- **Temporary legislation made permanent:** Although Parliament specified that the adoption of the legislative amendments would be temporary, the safeguard in the amended ‘safe third country’ provision, which required that applicant’s asylum claim “will be considered in that country”, has eventually not been restored. On the positive side, UNE regained its independence on 1 January 2018.¹¹
- **More asylum seekers exposed to the risk of chain *refoulement*:** The amended ‘safe third country’ provision has since been applied also in respect to third countries other than Russia, including Bosnia, Ukraine, Brazil, United Arab Emirates, Malta, Hungary, Romania, Italy and Greece. The right to free legal assistance has been effectively abolished in these cases and negative decisions may be implemented immediately. Pursuant to section 90(3) of the Immigration Act, time limit for requesting suspensive effect shall only be given “if it is not clear that the application should be refused examined on its merits”. In the preparatory works to this provision, the Ministry “emphasizes in this context that, when rejecting to a safe third country, it must be expected that in practice it will be clear in the cast majority of cases that rejection shall take place.” If suspensive effect is requested, it is not given automatically, but subject to individual assessment.¹²

8 See section 3.1.1 of the report for more details.

9 See section 4.6 of the report for more details.

10 See section 5 of the report for more details.

11 See section 3 of the report for more details.

12 See section 6 of the report for more details.

Recommendations

To ensure that Norway upholds its international obligations under international law, including the Refugee Convention and the European Convention of Human Rights (ECHR), Norway should:

Refrain from border practices that amount to denial of access to asylum procedure.

According to the instruction of 24 November 2015 from the Norwegian Ministry of Justice and Public Security to the National Police Directorate, the Russian border guards must be consistently requested to not let anyone approach the Norwegian national border through the Russian border checkpoint unless the person has Norwegian visa. In effect, this practice deprives the Refugee Convention of its practical meaning. The instruction must be revised to ensure that persons arriving from Russia and wishing to seek asylum in Norway are able to do so.

Reintroduce the legal safeguard in section 32(1)(d) of the Immigration Act, which required that “application for protection will be examined” in a safe third country.

All asylum cases, including those that are declared inadmissible pursuant to the amended ‘safe third country’ provision, i.e. section 32(1)(d) of the Immigration Act, are subject to section 73 of the Act that generally prohibits *refoulement*. While this is positive, it is important to remember that this obligation does not cover the entire scope of international legal obligations concerning protection of refugees. The Refugee Convention provides for an entire catalogue of substantive rights, from juridical status (Articles 12-16) to gainful employment (Articles 17-19), welfare (Articles 20-24) and administrative measures (Articles 25-34), including the right to identity papers (Article 27) and travel documents (Article 28). Sending refugees to a third country where their Convention rights will not be fulfilled in effect constitutes unlawful rights-stripping. Denying the totality of substantive rights to a refugee in this way in reality amounts to *exclusion* that goes beyond the exhaustive list of grounds for exclusion allowed under the Refugee Convention, including under Article 1E. The safeguard requiring that the “application for protection will be examined” in a safe third country must be restored to ensure that the substantive rights are fulfilled.

Assess all future applications from persons arriving to Norway from Russian territory on the merits.

The Storskog instruction of 25 November 2015 designated Russia as a safe country for most third country nationals and introduced a hybrid concept of a ‘safe third country’ mixed with the concept of a ‘safe country/area of origin’. This instruction must be revoked. According to UNHCR, asylum-seekers in Russia “are at risk of arrest, detention and expulsion at all stages of the asylum process.” Norway does not have an agreement with Russia that could ensure that asylum-seekers returned there will be guaranteed access to a fair asylum procedure and, if found to be in need of international protection, guaranteed their basic rights in line with the Refugee Convention and human rights law.

Revoke the amendment of section 17-18 of the Immigration Regulations to restore free legal assistance for all asylum-seekers.

Asylum-seekers whose applications are declared inadmissible pursuant to the amended ‘safe third country’ provision (i.e. section 32(1)(d) of the Immigration Act) or a separate ‘first country of asylum’ provision (i.e. section 32(1)(a) of the Act) are no longer eligible for free legal assistance without means assessment. This is a result of a recent amendment of section 17-18 of the Immigration Regulations, which means that such applicants are in practice unable to find a lawyer willing to take on their case, as the County Governor will normally deny applications for free legal assistance in asylum cases. Without legal assistance, these asylum-seekers risk *refoulement*.

Revoke the amendment of section 90(3) of the Immigration Act that allows immediate implementation of the inadmissibility decisions.

According to amended section 90(3) of the Immigration Act, the inadmissibility decisions “may be implemented immediately”. A time limit for requesting suspensive effect shall only be given “if it is not clear that the application should be refused examined on its merits”. In the preparatory works, the Ministry “emphasizes that, when rejecting to a safe third country, it must be expected that in practice it will be clear in the vast majority of cases that rejection shall take place.” The Ministry further specified that when a time limit for requesting suspensive effect is given, it may be set to be “very short, for example to a few hours”. The combination of this measure with the restriction of the right to free legal assistance has implications for the right to an effective remedy under Article 13 of ECHR, involving a serious risk of *refoulement*.

I Introduction

The present report details Norway's response to the sudden increase in asylum arrivals at the Storskog border crossing in the winter of 2015. Norway's response to the Storskog situation has previously been usefully summarised in Norwegian language.¹³ This report is the first systematised analysis on the subject available in English, besides early legal observations from UNHCR (briefly discussed in section 4.3 of the report). The report critically examines the most important legislative amendments, the following changes in Norway's asylum practice and the consequences that these changes entailed. The report is mostly descriptive in character, examining how the Norwegian authorities were responding to the evolving situation, but critical legal issues are raised.

The report is divided into six main sections. The introductory section briefly sets out the methodology and the relevant international legal framework. The second section provides a comparison of how the asylum arrivals were initially perceived versus the actual statistical data and notes the immediate reaction of the Norwegian authorities. The third section details key legislative amendments adopted by Parliament expeditiously and without public consultation in November 2015, as well as subsequent instructions from the Ministry of Justice and Public Security to the immigration authorities. The fourth section describes the initial implementation of the legislation and ministerial instructions by the Norwegian Directorate for Immigration, gives a brief overview of the concerns from the United Nations High Commissioner for Refugees following the adoption of the legislative measures and provides a detailed overview and analysis of the administrative practice developed by the Norwegian Immigration Appeals Board. The fifth section looks critically at the border practices adopted at the Storskog border crossing with Russia. Finally, the sixth section examines how the rules initially adopted as a response to the Storskog situation in 2015 have since been broadened and applied in the context of several others supposedly safe third countries besides Russia.

I.1 Methodology

The present report is a desk study, describing Norway's response to the 'Storskog situation' as it was unfolding in late 2015 and subsequently. While the report's main aim was not to provide an exhaustive, detailed legal analysis, some critical legal issues are raised.

References are primarily made to Norwegian domestic law, including the Immigration Act¹⁴ (*utlendingsloven*) and Immigration Regulations (*utlendingsforskriften*),¹⁵ as well as relevant ministerial instructions to the immigration authorities (referenced as *instruks*) and administrative circulars (*rundskriv*). Since the report discusses several legislative amendments, references to specific legislative decisions (*lovvedtak*) are also made.

Preparatory works often play an important role in Norway when determining the meaning of applicable legal rules. Preparatory works to the relevant domestic legislation are therefore also discussed

13 See for example: André Møkkelgjerd, *Asylkoden: 99 spørsmål og svar fra den norske asyldebatten*, Pax Forlag, 2017, pp. 53-60.

14 Norwegian Immigration Act, 'Lov om utlendingers adgang til riket og deres opphold her (utlendingsloven)', available at: <https://lovdata.no/dokument/NL/lov/2008-05-15-35>

15 Immigration Regulations, 'Forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften)', available at: <https://lovdata.no/dokument/SF/forskrift/2009-10-15-1286>

in some detail, including law proposals (referenced as *høringsnotat*), propositions to Parliament ('*proposisjon til Stortinget*', referenced as 'Ot.prp.' or 'prop.') and Official Norwegian Reports ('*Norges offentlige utredninger*', referenced as 'NOU'). Some official white papers prepared for Parliament ('*meldinger til Stortinget*', referenced as 'Meld. St.')

are also mentioned. The report refers to other relevant official documents that illustrate difficulties in the implementation of the amendments. The official documents cited in this report include internal evaluation reports from the Norwegian Directorate of Immigration (*Utlendingsdirektoratet*, UDI) and the National Police Immigration Service (*Politiets utlendingsenhet*, PU) that have been leaked and publicised by the media. References are also made to relevant correspondence between the Directorate and the Norwegian Ministry of Justice and Public Security (*Justis- og beredskapsdepartementet*), to which we have officially been granted access.

Relevant case-law from Norwegian domestic courts is unfortunately limited. To our knowledge, there is only one final court judgment from the Oslo County Court (*Oslo byfogdembete*), concerning return to Russia based on the amended 'safe third country' provision. A number of key asylum decisions from the Immigration Appeals Board (*Utlendingsnemnda*, UNE) are nevertheless discussed to illustrate relevant legal and practical issues.

Translations from Norwegian to English of the legislation and other official documents cited in this report are based on official translations to the extent this was possible. An official, translated version of the Immigration Act was updated on 21 December 2018, shortly before this report was finalised.¹⁶ To make the text in the report easier to read, references to legal provisions in the Immigration Act are simplified, so that, for example, 'section 32 paragraph 1 letter b' becomes 'section 32(1)(b)'.¹⁷ Unfortunately, an official, translated version of the Immigration Regulations is outdated and there are no official translations of preparatory works and other official documents that are cited in this report. Translations of these documents as well as citations from the media are therefore provided by the author of this report, who bears responsibility for potential errors or misrepresentations.

The report examines the legislative changes in the domestic asylum laws and practice within the framework of relevant rules of international law, shortly summarised below.

1.2 International legal framework

This section offers a brief summary of the most important principles and rules that have informed the focus of the report, as they have been highlighted through relevant case law of the European Court of Human Rights. Providing a detailed, exhaustive legal exposition of all relevant rules of international law would go beyond the scope of this report.

While the principle of state sovereignty implies the right of states to control the entry and residence of foreigners, this right is not unconstrained. Persons outside their country of origin who claim they would be exposed to a serious risk to their life or freedom if returned enjoy special protection under international law. As recently expressed by judge Pinto de Albuquerque in his concurring opinion in the case of *M.A. and others v. Lithuania*, which provides a useful summary of the European Court of Human Rights' case law, "To allow people to be rejected at land borders and returned without

¹⁶ An up to date official (but not legally binding) English translation of the Norwegian Immigration Act is available at: <https://lovdata.no/dokument/NLE/lov/2008-05-15-35>

¹⁷ Note that 'section' is in Norwegian language signified by '§'.

assessing their individual claims amounts to treating them like animals. Migrants are not cattle that can be driven away like this.”¹⁸

The principle known as *non-refoulement*, enshrined in both international treaty law and customary law, prohibits states from expelling, returning (*‘refouler’*) or extraditing a non-national to a country where the person would risk persecution or a severe human rights violation in the form of torture or other cruel, inhuman or degrading treatment or punishment. The principle is explicitly expressed in Article 33(1) of the Refugee Convention¹⁹ and Article 3 in the Convention against Torture (CAT).²⁰ In 1989, the European Court of Human Rights interpreted Article 3 of the European Convention on Human Rights (ECHR)²¹ as prohibiting *refoulement* in *Soering v. UK*.²² The Court has since reaffirmed several times that the principle is absolute, not allowing for any exceptions, including in *Saadi v. Italy*.²³

The principle of *non-refoulement* also includes the obligation to not expose people to the risk of chain *refoulement*. This means that a state A is legally prohibited from sending a person to another country B, where the person would face the risk of being sent further, in violation of the *non-refoulement* principle, to a country C. State A cannot be satisfied merely by the fact that country B ratified both the European Convention on Human Rights and the Refugee Convention. As clarified by the European Court of Human Rights in *M.S.S. v. Belgium and Greece*, it is not enough to presume that asylum-seekers would be treated in conformity with the Convention standards. On the contrary, the removing country is legally bound to verify how the authorities in the country of destination apply their legislation on asylum in practice.²⁴

More recently, in *Hirsi Jamaa and Others v. Italy*, the European Court of Human Rights ruled that *non-refoulement* obligations under the ECHR apply also extraterritorially (i.e. beyond state’s territory) in respect to persons who are under “continuous and exclusive de jure and de facto control” of the state authorities, including on the high seas.²⁵ In *N.D. and N.T. v. Spain*, the Court further highlighted that “where there is control over another this is de jure control exercised by the State in question over the individuals concerned [...], that is to say, effective control by the authorities of that State whether those authorities are inside the State’s territory or on its land borders.”²⁶

Another important rule of international law relevant in this context is the prohibition against collective expulsion of foreigners, expressed in Article 4 of Protocol No. 4 to the ECHR.²⁷ As pointed out in

18 M.A. and others v. Lithuania (app. no. 59793/17), ECtHR, 11.12.2018, Concurring Opinion of Judge Pinto De Albuquerque, para. 29, available at: <http://hudoc.echr.coe.int/eng?i=001-188267>

19 UN General Assembly, Convention Relating to the Status of Refugees, 28.07.1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

20 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10.12.1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html>

21 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights), 04.11.1950, ETS 5, available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf

22 *Soering v. UK* (app no. 14038/88), ECtHR, 07.07.1989, para. 91, available at: <http://hudoc.echr.coe.int/eng?i=001-57619>

23 *Saadi v. Italy* (app. no. 37201/06), ECtHR, Grand Chamber Judgment, 28.02.2008, para. 138, available at: <http://hudoc.echr.coe.int/eng?i=001-85276>

24 *M.S.S. v. Belgium and Greece* (app. no. 30696/09), ECtHR, Grand Chamber Judgment, 21.01.2011, para. 359, available at: <http://hudoc.echr.coe.int/eng?i=001-103050>

25 *Hirsi Jamaa and Others v. Italy* (app. no. 27765/09), ECtHR, Grand Chamber Judgment, 23.02.2016, para. 81, available at: <http://hudoc.echr.coe.int/eng?i=001-109231>

26 *N.D. and N.T. v. Spain*, (app. nos. 8675/15 and 8697/15), ECtHR, 03.10.2017, para. 54, available at: <http://hudoc.echr.coe.int/eng?i=001-177683> The case was referred to the Grand Chamber on 29.01.2018.

27 Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16.09.1963, ETS 46, available at: <https://www.refworld.org/docid/3ae6b3780.html>

N.D. and N.T. v. Spain, expelling foreigners without genuinely and individually examining their personal circumstances constitutes a breach of the provision.²⁸ In *Sharifi and Others v. Italy and Greece*,²⁹ repeated again in *N.D. and N.T. v. Spain*, the Court pointed out that, “Given that even interceptions on the high seas come within the ambit of Article 4 of Protocol No. 4 (see *Hirsi Jamaa and Others*, cited above), the same must also apply to the allegedly lawful refusal of entry to the national territory [...]”³⁰

The right to effective remedy, protected under Article 13 of the ECHR, is also crucial for asylum-seekers. In a recent case *M.A. and others v. Lithuania*, concerning a family from Chechnya that has been turned by Lithuanian border guards back to Belarus, the Court found that “an appeal before an administrative court against a refusal of entry was not an effective domestic remedy within the meaning of the Convention because it did not have automatic suspensive effect”³¹, pointing out that “even if the applicants had lodged such an appeal, in line with Lithuanian law they would have been immediately returned to Belarus rather than allowed to wait for the outcome of that appeal at the border or in a reception centre for aliens.”³²

It is also important to remember that the entire scope of refugee protection obligations cannot be reduced to the obligation of *non-refoulement*. The Refugee Convention consists of much more than just the definition of a refugee in Article 1A and the *non-refoulement* obligation in Article 33. As UNHCR notes in their recent guidelines on the ‘first country of asylum’ and ‘safe third country’ concepts, “While protection from *refoulement* is at the centre of refugee protection principles, the standards of treatment to which refugees and asylum-seekers have a right under 1951 Convention, its 1967 Protocol and international human rights law go beyond protection from *refoulement*.”³³ Accordingly, “As a precondition to return or transfer of an asylum-seeker or refugee to another country, it is crucial to establish that s/he has access in that country to standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards.”³⁴ In other words, a state wishing to refer an asylum-seeker to a ‘safe third country’ must not forget, among other things, that the Refugee Convention provides for an entire catalogue of rights, ranging from juridical status (Articles 12-16) to gainful employment (Articles 17-19), welfare (Articles 20-24) and administrative measures (Articles 25-34), including the right to identity papers (Article 27) and travel documents (Article 28). As noted by Hathaway, a state sending a refugee to a third country where her Convention rights will not be fulfilled will be responsible for “unlawful rights-stripping.”³⁵

28 *N.D. and N.T. v. Spain*, (app. nos. 8675/15 and 8697/15), ECtHR, 03.10.2017, para. 107, available at: <http://hudoc.echr.coe.int/eng?i=001-177683>

29 *Sharifi and Others v. Italy and Greece* (app. no. 16643/09), ECtHR, 21.10.2014, para. 212, available at: <http://hudoc.echr.coe.int/eng?i=001-147287>

30 *N.D. and N.T. v. Spain*, (app. nos. 8675/15 and 8697/15), ECtHR, 03.10.2017, para. 104, available at: <http://hudoc.echr.coe.int/eng?i=001-177683> The case was referred to the Grand Chamber on 29.01.2018.

31 *M.A. and others v. Lithuania* (app. no. 59793/17), ECtHR, 11.12.2018, para. 119, available at: <http://hudoc.echr.coe.int/eng?i=001-188267>

32 *Ibid.*, para. 84.

33 UN High Commissioner for Refugees (UNHCR), Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018, para. 7, available at: <http://www.refworld.org/docid/5acb33ad4.html>

34 *Ibid.* See also: UN High Commissioner for Refugees (UNHCR), Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23.03.2016, available at: <http://www.refworld.org/docid/56f3ee3f4.html>

35 James C. Hathaway, ‘Taking refugee rights seriously: A reply to Professor Hailbronner’, *Verfassungsblog*, 12.03.2016, available at: <http://verfassungsblog.de/taking-refugee-rights-seriously-a-reply-to-professor-hailbronner/>

2 The sudden increase of asylum arrivals at Storskog

The first reports of unprecedented increase in asylum arrivals to Norway at the Storskog border crossing with Russia appeared in March 2015. The Norwegian Broadcasting Corporation (NRK) reported on 4 March 2015 about the arrival of five Syrian asylum-seekers at Storskog, bringing the total number of asylum-seekers during the first three months of 2015 to ten.³⁶ Normally, this number of asylum-seekers would arrive at Storskog during an entire year.³⁷ In the next few months, the number of asylum arrivals increased, and international media, including the Wall Street Journal, soon reported on this new and safer ‘arctic route’ for asylum-seekers.³⁸

According to data from the Norwegian Directorate of Immigration (UDI), 65 asylum applicants arrived at Storskog in August, 410 in September and 2 190 in October, totalling circa 2 750 cases so far that year.³⁹ The highest number of asylum arrivals at Storskog was registered in November, during which circa 2 700 additional asylum-seekers arrived,⁴⁰ bringing the total number of Storskog cases to 5 464.⁴¹ Asylum arrivals at Storskog stopped on 30 November 2015 as a result of circumstances discussed in this report in section 5 below. Since then, the number of asylum-seekers arriving at Storskog has been negligible.⁴²

It should be noted that the total number of all asylum applications submitted in the whole of Norway during 2015 was 31 150.⁴³ Storskog cases thus constituted 17.5% of the total number of all asylum applications submitted in Norway that year.

36 NRK Finnmark, “Politiet frykter ny flyktningerute til Norge via Russland”, 04.03.2015, available at: <https://www.nrk.no/finnmark/politiet-frykter-ny-flyktningerute-til-norge-via-russland-1.12242100>

37 Ibid.

38 The Wall Street Journal, “To a New Home via the Arctic: Some refugees head north for a safer route to Europe”, 04.09.2015, available at: http://online.wsj.com/public/resources/documents/print/WSJ_-A008-20150904.pdf

39 Utlendingsdirektoratet (UDI), Beredskap høsten 2015: Rapport fra egevalueringen, April 2016, pp. 13-14, available at: http://multimedia.aftenbladet.no/dokumenter/udi_evaluering.pdf alternative link: http://www.noas.no/wp-content/uploads/2018/08/udi_evaluering.pdf

40 Ibid. p. 15.

41 See the statistical overview in section 2.2 below.

42 During 2016, asylum-seekers arriving at Storskog were registered only in three instances, see: Justis- og beredskapsdepartementet, Høringsnotat – Evaluering og videreføring av midlertidige endringer i utlendingsloven vedtatt på bakgrunn av forslag i Prop. 16 L (2015–2016), 19.01.2017, p. 3. available at: <https://www.regjeringen.no/no/dokumenter/evaluering-og-videreforing-av-midlertidige-endringer-i-utlendingsloven-vedtatt-pa-bakgrunn-av-prop.-16-l-2015-2016/id2526794/>

43 Utlendingsdirektoratet (UDI), Asylsøknader etter statsborgerskap og måned (2015), available at: <https://www.udi.no/statistikk-og-analyse/statistikk/asylsoknader-etter-statsborgerskap-og-maned-2015/>

2.1 Government's initial framing of the arrivals

Representatives of the Norwegian government initially described the asylum-seekers arriving at Storskog as 'migrants, not refugees.' For example, the head of the Norwegian consulate in Murmansk gave the following statement to the Norwegian News Agency (NTB) in early November 2015, which was then repeated by other national news outlets:

"It has turned out that many of those who arrive through the border to Norway are migrants with some form of residence permit in Russia, or a residence permit that has expired and then they got an expulsion decision [from the Russian authorities]. They are different from refugees with a real need for protection."⁴⁴

This government's framing of asylum-seekers arriving at Storskog as 'migrants, not refugees' has helped justify the policy of denying access to a proper asylum procedure, as discussed in the report. As rightly noted by Jørgen Carling, when 'migrants' are conceptualised as 'not refugees', the fact that any migrant may be a refugee becomes obscured.⁴⁵ Without access to a fair and effective asylum procedure, the actual need for asylum cannot be properly determined.

As revealed in the statistical overview section below, the government's framing was inaccurate.

2.2 Statistical overview

As noted above, the total number of all asylum applications submitted in Norway during 2015 was 31 150.⁴⁶ According to statistics from the Directorate of Immigration (UDI), which is the first instance in Norway's asylum procedure, 5 464 of these asylum-seekers arrived at the Storskog border crossing with Russia during the same year.⁴⁷ These cases are referred to as 'Storskog-cases'.

The Norwegian authorities found that only 679 of the applicants who arrived at Storskog had some kind of residence permit in Russia or at least a multiple entry visa to Russia.⁴⁸

The three largest groups of persons who arrived at Storskog in 2015 originated from refugee producing countries engaged in internal armed conflicts. The largest group consisted of 1 706 Syrian nationals, comprising 31.2% of the arrivals, followed by 1 638 applicants from Afghanistan (30%) and 403 from Iraq (7.4%).⁴⁹ The fourth largest group consisted of 362 stateless persons (6.6%), including Palestinians from Syria. The fifth largest group consisted of 300 nationals of Pakistan (5.5%).

Initially, the UDI refused to assess the merits of 1 316 of these individual Storskog cases, thus declaring the applications inadmissible and referring the applicants to Russia, described as a safe third

44 Abc nyheter, "Hemmelig diplomati for russisk avklaring", 06.11.2015, available at: <https://www.abcnyheter.no/nyheter/politikk/2015/11/06/194881680/hemmelig-diplomati-russisk-avklaring>

45 Jørgen Carling, "Refugee Advocacy and the Meaning of 'Migrants'", PRIO Policy Brief 2, 2017, available at: <https://www.prio.org/Publications/Publication/?x=10471>

46 Utlendingsdirektoratet (UDI), Asylsøknader etter statsborgerskap og måned (2015), available at: <https://www.udi.no/statistikk-og-analyse/statistikk/asylsoknader-etter-statsborgerskap-og-maned-2015/>

47 Email from UDI's statistics department (statistikk@udi.no) to NOAS, 19.09.2018.

48 Ibid.

49 Ibid.

country.⁵⁰ Refusal of merits assessment meant that the UDI would not assess the risks the applicants faced in their country of origin. Only individual risks faced in Russia were assessed, as discussed further below. However, the UDI has eventually reversed their own inadmissibility decisions in 772 of these cases. Accordingly, the resulting total number of Storskog-cases where the UDI has refused to assess the merits of asylum claims was 544.⁵¹ In other words, the UDI has eventually denied merits assessment in 10% of all Storskog-cases.

Some asylum applications were withdrawn or shelved for various reasons, including when asylum-seekers travelled further to other European countries. Some of these have later been reopened. Today, asylum procedure remains discontinued in a total of 999 Storskog cases.⁵²

The Directorate of Immigration eventually assessed 3 908 of the individual Storskog cases on the merits. Out of these, 1 733 received protection in Norway.⁵³ The remaining 2 175 were rejected by the UDI and thus required to return to their country of origin.⁵⁴

The Immigration Appeals Board (UNE), which is the second instance in Norway's asylum procedure, received appeals in circa 2 395 Storskog cases.⁵⁵ Circa 475 of these were appeals against UDI's inadmissibility decisions, where the UDI deemed Russia a safe third country.⁵⁶ UNE disagreed with UDI's inadmissibility decision in circa 205 of these appeals, returning them to the UDI for merits assessment.⁵⁷ In circa 270 cases, out of which circa 125 concerned Syrian nationals, UNE agreed with the UDI that Russia constituted a safe third country for the individual applicants.⁵⁸

In conclusion, the amended 'safe third country' provision in Norway's Immigration Act,⁵⁹ discussed further below, was eventually used to deny assessment of asylum applications on their merits in only circa 5% of all Storskog cases.

2.3 Government's initial reaction

Based on interviews with several arriving asylum-seekers, the NRK reported on 20 October 2015 that Russia had begun issuing expulsion decisions to asylum-seekers leaving from Russia to Norway in order to prevent their return.⁶⁰ The Norwegian Ministry of Justice and Public Security reacted immediately.

50 Ibid.

51 Ibid.

52 Ibid. Discontinued cases are in Norwegian described as "henlagt".

53 Ibid.

54 Ibid.

55 Email from UNE's statistics department (esa@une.no) to NOAS, 16.10.2018. Although UNE defines Storskog cases as those concerning individual asylum applicants arriving at Storskog in the period from 01.01.2015-30.11.2018, the number of arrivals at Storskog after 30.11.2015 is statistically insignificant.

56 Ibid.

57 Ibid.

58 Ibid.

59 Norwegian Immigration Act, section 32(1)(d), available at: <https://lovdata.no/NLE/lov/2008-05-15-35/§section32>

60 NRK Finnmark, "Russland utviser flyktninger for å forhindre retur", available at: <https://www.nrk.no/finnmark/russland-utviser-flyktninger-for-a-forhindre-retur-1.12613354>

On the same day, the Ministry instructed the UDI to apply relevant provisions of the Norwegian Immigration Act to deny asylum-seekers arriving at Storskog the right to have their asylum cases considered on the merits.⁶¹ Two specific provisions were mentioned in the instruction: 1) a provision based on the concept of a ‘safe first country of asylum’ applicable in cases where an asylum-seeker already benefited from international protection in another country;⁶² and 2) a separate provision based on the concept of a ‘safe third country’ applicable in cases where an asylum-seeker arrived to Norway after having stayed in a country where she was not persecuted and where her asylum case “will be assessed.”⁶³ Hardly consistent with these two provisions, the same instruction specified that it was to be considered irrelevant whether Russia would in fact readmit an asylum-seeker falling under either of the two provisions.

The instruction to refuse examination of asylum claims on the merits and to simultaneously disregard the issue of readmission has created “refugees in orbit”. This refers to a situation when refugees end up in a legal limbo without access to proper status determination, as the responsibility for the assessment of their asylum claims is shunted from one state to another. It often results from applying a ‘safe third country’ concept without proper legal safeguards.⁶⁴ As argued further below, the ensuing denial of an entire catalogue of substantive rights listed in the Refugee Convention to refugees, who applied for asylum under Norwegian jurisdiction, could hardly be squared with Norway’s international obligations.

In addition, a separate issue which emerged was whether an asylum-seeker with an uncertain residence status in Russia, if actually readmitted there from Norway, would be able to get her asylum application considered in a fair and effective asylum procedure in Russia. These issues were exacerbated by expedited legislative amendments discussed below.

61 Justis- og beredskapsdepartementet, Instruks til Utlendingsdirektoratet for behandlingen av asylsøknader fremsatt av personer som har reist inn i Norge fra Russland, GI-12/2015, 10.10.2015, available at: <https://www.regjeringen.no/no/dokumenter/gi-122015-asylsoknader-fra-personer-som-har-reist-inn-i-norge-fra-russland--behandling-og-prioritering/id2458496/>

62 Norwegian Immigration Act, section 32(1)(a), available at: <https://lovdata.no/NLE/lov/2008-05-15-35/section32> This provision has not been amended. It states the following: “An application for a residence permit under section 28 [asylum] may be refused examination on its merits if (a) the applicant has been granted asylum or another form of protection in another country”.

63 Norwegian Immigration Act, section 32(1)(d), see hyperlink in the previous footnote. This provision was amended later on 16 November 2015, as further discussed in section 3.1 below. Before the amendment, the provision stated the following: “An application for a residence permit under section 28 [asylum] may be refused examination on its merits if [...] (d) the applicant has travelled to the realm after having stayed in a state or an area where the foreign national was not persecuted, and where the foreign national’s application for protection will be examined.”

64 See e.g., Judith Kumin, “Protection of, or protection from, refugees?”, *Refugees Magazine Issue 101 (Asylum in Europe)*, 01.09.1995, available at: <http://www.unhcr.org/publications/refugeemag/3b543d444/refugees-magazine-issue-101-asylum-europe-protection-protection-refugees.html>

3 Expedited changes in legislation and practice

The prospect of Norway becoming a new first Schengen country of arrival for asylum-seekers prompted a quick reaction from the government as well as Parliament. The Ministry of Justice decided to amend the Immigration Act in an expedited legislative procedure – without public consultation. The need for this expedited process was explained in the legislative proposal:

“The Ministry has decided to make an exception from the main rule on general consultation, as the large influx of asylum-seekers that Norway now experiences necessitates that special measures be adopted quickly. It is the Ministry’s assessment that the need to be able to quickly adopt changes in the Immigration Act that can help handle the large influx must prevail over the interest that affected public and private institutions and organisations are given the opportunity to comment the proposal.”⁶⁵

The Ministry of Justice presented the proposal to Parliament on Friday afternoon, 13 November 2015.⁶⁶ Parliament adopted the bill on Monday morning, 16 November 2015.⁶⁷ It entered into force four days later, on 20 November 2015.⁶⁸

Among others, two key legislative amendments were introduced. First, a key legal safeguard was removed from the ‘safe third country’ provision, specifically the requirement that an asylum application “will be assessed” in a safe third country. Second, the independence of the Immigration of the Appeals Board was affected as the power of the Ministry of Justice and Public Security was extended to give general instructions to the Board on interpretation of the law and exercise of discretion. These changes were immediately followed by several binding ministerial instructions to the immigration authorities, creating further obstacles for asylum-seekers, including on their access to legal aid. The legislative amendments and changes in practice are discussed in the subsections below.

When adopting the legislative amendments, Parliament specified that they will be temporary and automatically repealed on 1 January 2018.⁶⁹ However, on 8 December 2017, Parliament adopted a proposal put forward by the Ministry of Justice and Public Security⁷⁰ to make permanent the expeditiously adopted legislative changes of November 2015. The proposal was not accepted in its

65 Prop. 16 L (2015–2016), *Endringer i utlendingsloven (innstramninger)*, p. 7, section 3, available at: <https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/>

66 *Ibid.*

67 Lovvedtak 5 (2015–2016), available at: <https://www.stortinget.no/globalassets/pdf/lovvedtak/2015-2016/vedtak-201516-005.pdf>

68 Lov om endringer i utlendingsloven (innstramninger), LOV-2015-11-20-94, available at: <https://lovdata.no/dokument/LTI/lov/2015-11-20-94>

69 Lovvedtak 5 (2015–2016), available at: <https://www.stortinget.no/globalassets/pdf/lovvedtak/2015-2016/vedtak-201516-005.pdf>

70 Prop. 149 L (2016–2017), *Endringer i utlendingsloven mv. (videreføring av innstramninger mv.)*, 16.06.2017, available at: <https://www.regjeringen.no/no/dokumenter/prop.-149-l-20162017/id2556657/>; See also: Justis- og beredskapsdepartementet, *Høringsnotat – Evaluering og videreføring av midlertidige endringer i utlendingsloven vedtatt på bakgrunn av forslag i Prop. 16 L (2015–2016)*, 19.01.2017, available at: <https://www.regjeringen.no/no/dokumenter/evaluering-og-videreforing-av-midlertidige-endringer-i-utlendingsloven-vedtatt-pa-bakgrunn-av-prop.-16-l-2015-2016/id2526794/>

entirety, as the Parliament decided to repeal the power of the Ministry to instruct the Immigration Appeals Board (UNE).⁷¹ Hence, the Appeals Board regained its independence on 1 January 2018 by 56 votes against 41.⁷² However, the crucial safeguard in the amended ‘safe third country’ provision, which required that applicant’s asylum claim “will be considered in that country”, was not restored. A counter proposal to restore this important legal safeguard was turned down by 78 against only 18 votes in Parliament.⁷³

3.1 Removal of a key legal safeguard from the ‘safe third country’ provision

The so called ‘safe third country’ provision in section 32(1)(d) of Norway’s Immigration Act could originally only be applied to deny examination on merits in cases where it could be established that an asylum application, originally submitted in Norway, “will be assessed” in a safe third country. This safeguard has been repealed as shown by the strikethrough below:

“An application for a residence permit under section 28 [asylum] may be refused examination on its merits if [...]
d) the applicant has travelled to the realm after having stayed in a state or an area where the foreign national was not persecuted, ~~and where the foreign national’s application for protection will be examined.~~”⁷⁴

Only five members of Parliament voted against this part of the proposal, while 96 members voted in favour.⁷⁵

The Ministry of Justice simply stated in its proposal that the safeguard went “beyond what follows from Norway’s international obligations.”⁷⁶ The proposal further stated that the deletion was necessary because the safeguard “makes it difficult to reject persons that have a residence permit in a third country on other ground than a protection need.”⁷⁷

It appears the Ministry was concerned that the UDI and UNE would not be able to effectively reject asylum applications from persons who already enjoyed a non-protection related residence permit in Russia. Persons who have a protection related residence permit in a third country could already be denied merits assessment under another provision in the Norwegian Immigration Act, namely

71 Lovvedtak 6 (2017–2018), available at: <https://www.stortinget.no/globalassets/pdf/lovvedtak/2017-2018/vedtak-201718-006.pdf>

72 Stortinget, Voteringsoversikt, Endringer i utlendingsloven mv. (videreføring av innstramninger mv.), Romertall I § 76 annet ledd, available at: <https://www.stortinget.no/nn/Saker-og-publikasjoner/Saker/Sak/Voteringsoversikt?p=67734&dnid=1>

73 Stortinget, Voteringsoversikt, Endringer i utlendingsloven mv. (videreføring av innstramninger mv.), Forslag nr. 4, available at: <https://www.stortinget.no/nn/Saker-og-publikasjoner/Saker/Sak/Voteringsoversikt?p=67734&dnid=1>

74 Norwegian Immigration Act, section 32(1)(d), available at: <https://lovdata.no/NLE/lov/2008-05-15-35/section32>

75 Stortinget, Voteringsoversikt for sak: Endringer i utlendingsloven (innstramninger), Romertall I, § 32 første ledd, bokstav d), available at: <https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/Voteringsoversikt?p=63964&dnid=1>

76 Prop. 16 L (2015–2016), Endringer i utlendingsloven (innstramninger), p. 12, section 5.3, available at: <https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/>

This assertion was implicit in the Ministry’s later proposal to make the amendment permanent, see: Prop. 149 L (2016–2017), Endringer i utlendingsloven mv. (videreføring av innstramninger mv.), pp. 22-23, 16.06.2017, available at: <https://www.regjeringen.no/no/dokumenter/prop.-149-l-20162017/id2556657/>; See also: Justis- og beredskapsdepartementet, Høringsnotat – Evaluering og videreføring av midlertidige endringer i utlendingsloven vedtatt på bakgrunn av forslag i Prop. 16 L (2015–2016), 19.01.2017, pp. 14-15, available at: <https://www.regjeringen.no/no/dokumenter/evaluering-og-videreforing-av-midlertidige-endringer-i-utlendingsloven-vedtatt-pa-bakgrunn-av-prop.-16-l-2015-2016/id2526794/>

77 Prop. 16 L (2015–2016), Endringer i utlendingsloven (innstramninger), p. 12, section 5.3, available at: <https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/>

section 32(1)(a).⁷⁸ However, persons holding other types of residence permits in a third country, that were not protection related, may be prevented – as a matter of law or practice in that third country – from seeking asylum there. In such case, the requirement that the asylum application “will be assessed” in a third country would have prevented Norway from denying merits assessment under section 32(1)(d). Removal of the safeguard, as shown by the strikethrough above, was thus formally presented to Parliament as a solution to this issue.

The proposal emphasised that denying merits assessment in any case must be subject to protection against *refoulement*, as this follows from Norway’s international obligations, including Article 3 in the European Convention of Human Rights (ECHR), as well as Norway’s own Constitution.⁷⁹ Importantly, the Ministry further noted:

“For asylum-seekers that have resided in a third country without any form of residence permit, the requirement of effective protection against removal to a place where they would risk treatment in violation of Article 3 ECHR etc. could mean that they must have a possibility to apply and get their application for asylum assessed.”⁸⁰

While it is positive that the Ministry noted this at the proposal stage, the issue has neither been clarified in domestic law nor in the subsequent instructions from the Ministry. Adding to the confusion, the Storskog portfolio has been subsequently subjected to the ministerial instruction, which stated, among other things, the following: “If the applicant has a residence permit in, or a visa of a longer duration allowing more entries to Russia, it must be presumed that the applicant will be able to continue to stay in Russia on the same grounds upon return. Return to Russia in such cases will therefore, as a starting point, not involve a violation of ECHR Article 3.”⁸¹ The relevant instructions from the Ministry to the UDI and UNE are further discussed in section 3.3 below.

Questions regarding the correct application of the law and the ministerial instructions in Storskog cases have led to correspondence going back and forth, over several months, between the UDI and the Ministry.⁸² Meanwhile, the processing of Storskog cases continued in both asylum bodies, i.e. the UDI and UNE, exposing asylum-seekers to the risk of chain *refoulement*.

3.1.1 Criticism

The first, basic flaw of the amended section 32(1)(d) of Norway’s Immigration Act, both in legal and practical terms, is that it implicitly assumes third states’ consent. Although Norway has a readmission agreement with Russia,⁸³ this agreement does not cover allocation or sharing of responsibility for asylum-seekers and their asylum applications. The readmission agreement is “without prejudice to” (i.e. it does not affect) other international legal obligations of the state parties – including, explicitly, obligations under the Refugee Convention, as stated in Article 18(1)(a) of the readmission agreement. The same is true for other readmission agreements.⁸⁴

78 Norwegian Immigration Act, section 32(1)(a), available at: <https://lovdata.no/NLE/lov/2008-05-15-35/section32> The provision states the following: “An application for a residence permit under section 28 [asylum] may be refused examination on its merits if [...] a) the applicant has been granted asylum or another form of protection in another country”.

79 Prop. 16 L (2015–2016), *Endringer i utlendingsloven (innstramninger)*, pp. 11-12, sections 5.2 and 5.3, available at: <https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/>

80 *Ibid.*, p. 12, section 5.3.

81 Justis- og beredskapsdepartementet, *Rask saksbehandling for asylsøkere som har hatt opphold i Russland*, jf. utlendingsloven §§ 32 og 90, GI-13/2015, 25.11.2015, section 2.2., available at: <https://udiregelverk.no/no/rettskilder/departementets-rundskriv-og-instrukser/gi-132015/>

82 This correspondence is discussed in section 4.2 of the report below.

83 Agreement between Norway and Russia on readmission, in force since 01.12.2008, available at: <https://www.udiregelverk.no/en/documents/bilateral-agreements/2007-06-08e2/>

84 See for example Article 14(1) of the Agreement between Norway and Ukraine on the readmission of persons, 13-02-2008 nr 2 Bilateral, in force since 01.09.2011, available at: <https://lovdata.no/dokument/TRAKTATEN/traktat/2008-02-13-2>

A readmission agreement is not an instrument that shifts legal responsibilities owed to asylum-seekers under the Refugee Convention from one state to another. The legal mechanism for allocating responsibility for asylum applications between European states, the so called Dublin system, would also be unworkable without a formal agreement of the participating states. This agreement is currently expressed in its third iteration, known as the Dublin III Regulation.⁸⁵ As acknowledged in the preamble to the Dublin Convention of 1997, which preceded the EU Dublin regulations, a formal agreement on allocation of responsibility for assessing asylum applications was needed “to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum.”⁸⁶ Simple readmission agreements that preceded the system were hardly a viable workaround – both legally and in practice.

The second flaw of the amended provision is that it reduces the entire scope of refugee protection to the obligation of *non-refoulement*. As noted in the previous section, the only safeguard that has been kept in the ‘safe third country’ provision is a basic *non-refoulement* guarantee, required, *inter alia*, by Article 3 of the ECHR. The safeguard requiring access to an asylum procedure in a third country was explicitly deemed by the Ministry as going beyond Norway’s international obligations.⁸⁷ This assertion by the Ministry was wrong, as it failed to take into account the entire catalogue of substantive rights provided in the Refugee Convention that goes beyond the definition of a refugee in Article 1A and the *non-refoulement* obligation set out in Article 33.⁸⁸ Sending a refugee to a third country where her Convention rights will not be fulfilled amounts to “unlawful rights-stripping”, as rightly noted by Hathaway.⁸⁹

A conduct of a state in breach of its international obligations is in international law referred to as “internationally wrongful”, since it entails international legal responsibility. Elements of an internationally wrongful act are set out in Article 2 of Draft Articles on State Responsibility, prepared by the UN’s International Law Commission (ILC).⁹⁰ There is no doubt that conduct attributable to a state can consist of actions as well as omissions.⁹¹ Crucially, as expressed in Article 47 of the ILC’s

85 The Regulation determines which member state is responsible for the examination of an application for asylum, see: European Union: Council of the European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L 180/31-180/59; 29.6.2013, (EU) No 604/2013, available at: <http://data.europa.eu/eli/reg/2013/604/oj>

86 European Union, Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (“Dublin Convention”), 15.06.1990, Official Journal C 254, 19/08/1997, p. 0001 - 0012, no longer in force, date of end of validity: 16.03.2003, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=cel-ex%3A41997Ao819%2801%29>

87 Prop. 16 L (2015–2016), Endringer i utlendingsloven (innstramminger), p. 12, section 5.3., available at: <https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/>

88 As noted in section 1.2 of the report, the Refugee Convention provides for an entire catalogue of rights, ranging from juridical status (Articles 12-16) to gainful employment (Articles 17-19), welfare (Articles 20-24) and administrative measures (Articles 25-34), including the right to identity papers (Article 27) and travel documents (Article 28).

89 James C. Hathaway, ‘Taking refugee rights seriously: A reply to Professor Hailbronner’, *Verfassungsblog*, 12.03.2016, available at: <http://verfassungsblog.de/taking-refugee-rights-seriously-a-reply-to-professor-hailbronner/>

90 Article 2 of the ILC’s Draft Articles states the following: “There is an internationally wrongful act of a State when conduct consisting of an action or omission: a. Is attributable to the State under international law; and b. Constitutes a breach of an international obligation of the State.” Cited from: International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

91 As the International Law Commission notes, “Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two.” Cited from: International Law Commission (ILC), Annual Report (2001), Commentary to the Articles on State Responsibility, Chap. IV, Commentary to Article 2, p. 35, para. 4, available at: <http://legal.un.org/docs/?path=../ilc/reports/2001/english/chp4.pdf&lang=EFSSAC>

Draft Articles, “Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.” As further explained by ILC, “In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of Article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.”⁹² Hence, in the absence of a formal agreement to allocate or share responsibility for asylum-seekers and their asylum applications between the states concerned, the Refugee Convention has to be presumed to be based on the principle of individual responsibility of each state party.⁹³ If Norway simply returns a refugee (within the meaning of the definition in the Refugee Convention), for example a Syrian national, to Russia, where she is subsequently denied the rights contained in the Refugee Convention, this will constitute an internationally wrongful act of both Norway and Russia.

Third, in light of the above, the amended section 32(1)(d) of the Norwegian Immigration Act is arguably not a ‘safe third country’ provision but an exclusion clause. In its amended form, the purpose of the provision is no longer to refer asylum-seekers to have their asylum application assessed in a third country. Instead, the purpose is to simply *exclude* applicants who had previously stayed in a third country, including Convention refugees – without ensuring that the third country will respect the totality of their substantive rights under the Refugee Convention. It is important to remember in this regard that lawful exclusion grounds are explicitly and exhaustively enumerated in Articles 1D(1), 1E and 1F of the Refugee Convention. Under Article 1E of the Convention, persons who satisfy the refugee definition may be excluded from refugee status because they already enjoy a status which, possibly with limited exceptions, corresponds to that of nationals in a country where they do not risk persecution.⁹⁴ The threshold for exclusion pursuant to this provision is high. As noted in UNHCR’s ‘*Note on the Interpretation of Article 1E*,’ the provision is applicable to persons with a stable residence status in a country where they enjoy rights comparable to that of nationals, provided the divergences are “few in number and only minor in character.”⁹⁵ Crucially, “no difference is allowed” as regards protection from forced removal.⁹⁶ Article 1E can thus only apply to persons who are “fully protected against deportation or expulsion.”⁹⁷ The amended section 32(1)(d) of the Norwegian Immigration Act has only a safeguard against *refoulement*, without requiring full protection against any forced removal from a third country as guaranteed to its nationals. Similar domestic legislation that circumvents the strict requirements posed by Article 1E has been critically noted for example by Hathaway and Foster.⁹⁸

92 Ibid., Commentary to Article 47, p. 124, para. 3.

93 See also: Violeta Moreno-Lax, “The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties”, in G.S. Goodwin-Gill and P. Weckel (eds.), *Migration & Refugee Protection in the 21st Century: Legal Aspects*, The Hague Academy of International Law Centre for Research, Leiden/Boston: Martinus Nijhoff, 2015, pp. 665-721, at pp. 693-694, available at: <http://www.unhcr.org/events/conferences/59632a847/legality-safe-third-country-notion-contested-insights-law-treaties.html>

94 Article 1E of the Refugee Convention states the following: “This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.”

95 UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees, March 2009, para. 13, available at: <https://www.refworld.org/docid/49c3a3d12.html>

96 Ibid., para. 14.

97 Ibid., specified in footnote 10 of the UNHCR’s note. The same point is highlighted in the Oxford Commentary, see: Andreas Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p. 575 at para. 14. See further (in Norwegian): Terje Einarsen, *Retten til vern som flyktning*, Cicero Publisher Bergen, 2000, p. 553-557.

98 James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, pp. 505-509.

A fourth issue, which has been completely overlooked, concerns the compatibility of the amended provision with the Dublin III Regulation. While Russia is not a member of the Dublin system, Norway is a member fully bound by the Dublin Regulation. Article 3(1) of the Regulation obliges all Member States to “examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones.” Article 3(3) of the Regulation recognizes the right of the Member States “to send an applicant to a safe third country”, meaning outside the Dublin system. The provision specifies, however, that domestic rules allowing such practice must be “subject to the rules and safeguards laid down in Directive 2013/32/EU [the Asylum Procedures Directive].” While Norway is not bound by the Procedures Directive,⁹⁹ it is bound by the Dublin Regulation. Norway arguably cannot ignore the Directive to the extent the Regulation itself refers to the Directive and demands its application. A crucial safeguard in respect to the concept of a ‘safe third country’, which is clearly an applicable safeguard within the meaning of Article 3(3) of the Dublin III Regulation, is contained in Article 38(1)(e) of the Procedures Directive. This safeguard requires that, within the third country, “the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.” By introducing a ‘safe third country’ rule in its domestic legislation that fell short of the requirements of Article 3(3) of the Dublin III Regulation and Article 38(1)(e) of the EU Procedures Directive, Norway created a strong incentive for persons with real protection needs to flee from Norway, apply for asylum in other member states and stay hidden there until the time limits for Dublin-returns expire. According to data from the UDI published by the NRK in March 2017, some 1 000 asylum-seekers who had arrived at Storskog have subsequently left Norway and applied for asylum in other Member States.¹⁰⁰

3.2 Temporary suspension of Immigration Appeals Board’s independence

The Prime Minister of Norway, Erna Solberg, announced the following in an article published in *Aftenposten* on 12 November 2015:

“We shall be able to instruct, among other things, on matters of legal interpretation, principles for exercising discretion and general assessments of facts, for example which facts shall be considered when assessing the general security situation in different countries.”¹⁰¹

The statement concerned a legislative proposal, which would affect the assessment of asylum cases by the Immigration Appeals Board (UNE).¹⁰² At that time, UNE was still an independent appeal body, which was assessing appeals against decisions made by the Directorate of Immigration (UDI). Anders Anundsen, the Minister of Justice at the time, explained the need for the possibility to instruct UNE on NRK Radio in the following way:

99 European Union: Council of the European Union, 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), 29 June 2013, OJ L 180/60-180/95; 29.6.2013, 2013/32/EU, available at: <https://eur-lex.europa.eu/eli/dir/2013/32/oj>

100 NRK, Sykkelberget, (see the data in the infographic “Hvor er Storskog-flyktingene i dag?”), available at: https://www.nrk.no/finnmark/xl/sykkelberget_-_historien-om-asylstrommen-pa-storskog-1.13445624

101 Erna Solberg, “Slik skal Regjeringen få kontroll med flyktingstrømmen”, *Aftenposten*, 12.11.2015, available at: <https://www.aftenposten.no/meninger/kronikk/i/dLPX/Slik-skjal-Regjeringen-fa-kontroll-med-flyktingstrommen--Erna-Solberg>

102 Prop. 16 L (2015–2016), *Endringer i utlendingsloven (innstramminger)*, p. 9, section 4.7.1, available at: <https://www.regjeringen.no/no/no/dokumenter/prop.-16-l-20152016/id2461221/>

“The challenge today is that when for example the authorities instruct the UDI, because the authorities consider Russia to be a safe third country, UNE will be able to overrule this afterwards, if they make a different assessment. This will be changed now with our proposal.”¹⁰³

On 16 November 2015, guarantees concerning UNE’s independence in matters of law interpretation and exercise of discretion were removed from section 76(2) of the Immigration Act, as indicated by the strikethrough below:

~~“The Ministry’s general right of instruction shall not confer the right to instruct in relation to decisions in individual cases. Nor may the Ministry instruct the Immigration Appeals Board on law interpretation or exercise of discretion. The Ministry may issue instructions regarding prioritisation of cases.”¹⁰⁴~~

Only ten parliamentarians voted against this, while 95 voted in favour.¹⁰⁵ As a result, the independence of the Immigration Appeals Board in the field of asylum was effectively removed, except the guarantee of non-interference in individual cases, which also applies to the UDI.¹⁰⁶

While there is some support for the assertion that the general right of instruction includes the right to instruct on general assessments of facts,¹⁰⁷ it is questionable whether this may apply even if such assessment does not reflect the actual reality.

Stripping UNE of its independence in the field of asylum seriously undermined UNE’s legitimacy as an appeal body in Norway’s asylum system. The issue whether UNE was at that point still able to guarantee the right to an effective remedy in line with Article 13 of the European Convention of Human Rights has not been tried in court.

On 1 January 2018, Parliament reversed this amendment by 56 votes against 41, thus restoring UNE’s independence.¹⁰⁸

3.3 Ministerial instructions to the immigration authorities

The Ministry of Justice and Public Security quickly followed up the legislative changes by issuing several instructions to the immigration authorities. On 25 November 2015, the Ministry instructed the UDI and UNE to issue inadmissibility decisions in Storskog cases pursuant to the amended ‘safe third country’ provision¹⁰⁹ and a separate ‘first country of asylum’ provision concerning persons already benefitting from international protection in another country.¹¹⁰ These asylum applications

103 NRK Radio, Dagsnytt atten, 13.11.2015, at 4:25, available at: <https://radio.nrk.no/serie/dagsnytt-atten/NMAG03022615/13-11-2015>

104 Prop. 16 L (2015–2016), Endringer i utlendingsloven (innstramninger), p. 24, available at: <https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/>

105 Stortinget, Voteringsoversikt for sak: Endringer i utlendingsloven (innstramninger), Romertall I, § 76 annet ledd annet og tredje punktum, available at: <https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/Voteringsoversikt/?p=63964&dnid=1>

106 Chapter 14 of the Immigration Act nevertheless allows the Ministry to interfere in individual cases “out of regard for fundamental national interests or foreign policy considerations”, subject to a number of legal safeguards.

107 NOU 2010: 12, p. 128, available at: <https://www.regjeringen.no/no/dokumenter/nou-2010-12/id626164/>

108 Stortinget, Voteringsoversikt, Endringer i utlendingsloven mv. (videreføring av innstramninger mv.), Romertall I § 76 annet ledd, available at: <https://www.stortinget.no/n/Saker-og-publikasjoner/Saker/Sak/Voteringsoversikt/?p=67734&dnid=1>

109 Norwegian Immigration Act, section 32(1)(d), available at: <https://lovdata.no/NLE/lov/2008-05-15-35/section32>

110 Norwegian Immigration Act, section 32(1)(a), see hyperlink above.

were thus not to be assessed on the merits.

The ministerial instruction described Russia, for the first time, as “a safe country” for “most third country nationals.”¹¹¹ The instruction required that the UDI and UNE assess whether there are “specific indications that the individual applicant nevertheless risks treatment in violation of Article 3 ECHR upon return to Russia.”¹¹² If there were such specific indications in an individual case, the case would have to be assessed on the merits.

However, the ministerial instruction specified that the UDI and UNE must operate with the following presumption: “If the applicant has a residence permit in, or a visa of a longer duration allowing more entries to Russia, it must be presumed that the applicant will be able to continue to stay in Russia on the same basis upon return. Return to Russia in such cases will therefore as a starting point not involve a violation of ECHR Article 3.”¹¹³ This presumption would not be easily overturned in practice, as the ministerial instruction effectively removed key procedural safeguards.

According to the instruction, inadmissibility decisions were to be “implemented immediately” and no deadline for departure would be set, “so that the foreigner must leave Norway immediately.”¹¹⁴ Furthermore, the instruction demanded that on appeal “no suspensive effect shall be granted, unless compelling reasons so require”,¹¹⁵ leaving the term ‘compelling reasons’ unspecified. In addition, the instruction required that no lawyer be automatically appointed in Storskog cases that were denied merits assessment, except for unaccompanied minors.¹¹⁶ The right to free legal assistance was still in place at that point, but asylum-seekers had to find a lawyer on their own. It should be mentioned in this context that, according to the instruction, all efforts were to be made to issue inadmissibility decisions “while asylum-seekers are present at the Storskog border checkpoint.”¹¹⁷ Since lawyers were not automatically appointed, asylum-seekers would either remain uninformed about UDI’s decisions for a prolonged period or, in some cases, they would be informed about the decisions by the police at the same time as the police effectuated their return. The consequences of this are discussed in more detail in section 4.1 below.

Furthermore, the instruction introduced a new, hybrid version of the concept of a ‘safe third country’, mixed with the concept of a safe country/area of origin. This issue is discussed in section 4.2 below.

Eventually, since Russia has largely refused to readmit asylum-seekers who have arrived at Storskog, the Ministry issued new instructions to the immigration authorities. On 29 April 2016, the Ministry instructed the UDI and UNE to assess the merits of Storskog cases of applicants with a known address in Norway, if they only had a single entry visa to Russia that was no longer valid.¹¹⁸ This

111 Justis- og beredskapsdepartementet, Rask saksbehandling for asylsøkere som har hatt opphold i Russland, jf. utlendingsloven §§ 32 og 90, GI-13/2015, 25.11.2015, section 2.2, available at: <https://udiregelverk.no/no/rettskilder/departementets-rundskriv-og-instrukser/gi-132015/>

112 Ibid.

113 Ibid.

114 Ibid, section 3.

115 Ibid.

116 Ibid.

117 Ibid.

118 GI-07/2016 – Storskogporteføljen – behandling av asylsøknader fremsatt i 2015 fra personer med visum til Russland som var gyldig for én innreise (engangsvisum), 29.04.2016, available at: <https://udiregelverk.no/no/rettskilder/departementets-rundskriv-og-instrukser/gi-072016/>

was followed on 30 November 2016 by another ministerial instruction, where the UDI and UNE were instructed to also assess the merits of cases of persons whose multiple entry visas to Russia or residence permits in Russia had expired.¹¹⁹

3.3.1 Criticism

It is undeniable that the removal of crucial procedural safeguards by the ministerial instruction of 25 November 2015 exposed refugees to the risk of chain *refoulement*. As since pointed out by the Immigration Appeals Board (UNE), there have been instances where UNE reversed UDI's inadmissibility decisions after the asylum applicants had already been deported.¹²⁰ Some of such cases have been widely reported on in the Norwegian media. For example, in February 2016, the Norwegian authorities assisted two Yemeni nationals, allowing their return from Russia back to Norway.¹²¹ They had been deported one month earlier from Norway to Russia, after both the UDI and UNE refused to assess their cases on the merits. They were both unable to access the asylum procedure in Russia. When they were brought back to Norway, their Russian visas were just about to expire. In another publicised case,¹²² a Syrian national was denied merits assessment of his asylum request in Norway and subsequently deported to Russia. From there, he travelled to Turkey in order to avoid detention and potential *refoulement* to Syria, as he did not have a residence permit in Russia. He was subsequently brought back from Turkey to Norway, after UNE reversed UDI's inadmissibility decision.

It also deserves to be highlighted that the ministerial instruction contained no analysis of, or even mentioned, the asylum system in Russia. The explicit presumption was simply that Russia was safe for most third country nationals. Only specific, individual circumstances could invalidate this general assumption in an individual case. At that point, however, it was clear that the presumption that Russia had a well-functioning asylum system was highly problematic.

The Norwegian Country of Origin Information Centre (Landinfo)¹²³ published a short report on Russia's asylum system already on 16 November 2015.¹²⁴ The report was thus published on the same day as the Norwegian Parliament voted to adopt the legislative changes. As Landinfo is administratively organised under the UDI, which again falls under the Ministry of Justice, one must assume that the Ministry knew, or should have known, that the report from Landinfo was imminent.¹²⁵ Yet, neither

119 GI-15/2016 – Storskogporteføljen – behandling av asylsøknader fremsatt i 2015 fra personer som har flerreisevisum eller oppholdstillatelse i Russland som er utløpt i tid, 30.11.2016, available at: <https://udiregelverk.no/no/rettskilder/departementets-rundskriv-og-instrukser/gi-152016/>

120 Prop. 149 L (2016–2017), Endringer i utlendingsloven mv. (videreføring av innstramninger mv.), 16.06.2017, p. 36, available at: <https://www.regjeringen.no/no/dokumenter/prop.-149-l-20162017/id2556657/>. See also: Prop. 90 L (2015–2016), Endringer i utlendingsloven mv. (innstramninger II), 05.04.2016, p. 175, available at: <https://www.regjeringen.no/no/dokumenter/prop.-90-l-20152016/id2481758/>

121 NRK Finnmark, "Asylsøker ble returnert til Russland – nå blir han hentet tilbake til Norge", 03.02.2016, available at: <https://www.nrk.no/finnmark/abdullah-far-komme-tilbake-til-norge-1.12784942>; NRK Finnmark, "Nå får også Ahmed (36) komme tilbake til Norge", 04.02.2016, available at: <https://www.nrk.no/finnmark/na-far-ogsaa-ahmed-36-komme-tilbake-til-norge-1.12787534>; see also: NOAS, "Russland ikke trygt – regjeringsinstruks må omgjøres", 06.02.2016, available at: <https://www.noas.no/russland-ikke-trygt-regjeringsinstruks-ma-omgjoeres/>

122 Aftenposten, "Ble utvist fra Storskog i 2015, havnet i Tyrkia. Nå er han tilbake til Norge", 28.05.2016, available at: <https://www.aftenposten.no/norge/i/xPOGX/Ble-utvist-fra-Storskog-i-2015-havnet-i-Tyrkia-Na-er-han-tilbake-til-Norge>

123 Landinfo is an independent body within the Norwegian Immigration Authorities. It is responsible for collecting, analysing and presenting objective and updated country of origin information.

124 Landinfo, Respons, Russland: Asylsystemet og rettigheter for asylsøkere, 16.11.2015. The report has since been updated and its original version is no longer available on Landinfo's website. The original version from 16.11.2015 is nevertheless preserved on NOAS' server at: https://www.noas.no/wp-content/uploads/2017/09/landinfo_russland_16112015.pdf

125 The UDI can instruct Landinfo only on administrative matters and on what issues to prioritise, as mentioned in the official 'white paper' presented to Parliament, see: St.meld. nr. 21 (2003–2004), p. 26, available at: <https://www.regjeringen.no/no/dokumenter/stmeld-nr-21-2003-2004/id584999/>

the Ministry nor Parliament opted to wait to consider the report. Moreover, the report was neither mentioned in the ministerial instruction nor in the UDI's circular, both issued 25 November 2015 (see further below), even though the report had been published by then.

Landinfo's report on the Russian asylum system listed several issues that should have raised serious concern, including references to documented instances of *refoulement* from Russia, as well as arbitrariness and corruption pervading the application and decision processes. It also referred to the conclusions of a detailed, comprehensive report by the *Civic Assistance Committee* – a Russian non-governmental organization working in the field of asylum in a long-term collaboration with UNHCR.¹²⁶ Referring to these conclusions, Landinfo noted, among other issues, the problem of non-admission to the asylum procedure in Russia, unfounded refusals and ineffective appeals.¹²⁷

¹²⁶ Civic Assistance Committee, *Russia as a country of asylum*, 2015. Note: The Russian version of the report was published October 15, 2015. An English translation was published in autumn 2016 and is available at: <https://refugee.ru/en/publications/russia-as-a-country-of-asylum/>

¹²⁷ Landinfo, *Respons, Russland: Asylsystemet og rettigheter for asylsøkere*, 16.11.2015, p. 5, available at: https://www.noas.no/wp-content/uploads/2017/09/landinfo_russland_16112015.pdf

4 Implementation issues and consequences

The following section discusses issues that complicated the implementation of the legislative changes as well as the consequences that these changes entailed. The first subsection highlights the consequences of ceasing automatic appointment of lawyers in asylum cases that were denied assessment on the merits. The second subsection examines the implementation of the legislative changes by the UDI. The third subsection briefly notes UNHCR's concerns. The fourth subsection looks at the initial practice of the Immigration Appeals Board (UNE). The fifth subsection discusses two cases assessed by the UNE's Grand Board that established, among other things, that the issue concerning the possibility for readmission was irrelevant. Finally, the sixth subsection looks at how this Grand Board's approach was later abandoned.

4.1 Ceasing automatic appointment of lawyers

In accordance with the ministerial instruction of 24 November 2015 to the Police Directorate,¹²⁸ the task to inform individual asylum-seekers about the UDI's decisions to deny examination of their asylum claims on the merits (inadmissibility decisions) was relegated to the police. This change was necessary as a consequence of stopping automatic appointment of lawyers in Storskog cases.¹²⁹ Up until that point, the UDI had automatically appointed a lawyer in each asylum case with a negative outcome, who would both inform the applicant about UDI's decision and prepare an appeal. As lawyers were not involved in many of these cases, the task to inform applicants of UDI's inadmissibility decisions was to be performed by the police.

In practice, this rendered the right to appeal meaningless, as the police would notify the applicants about inadmissibility decisions at the same time as effectuating their returns. In cases where the police could not establish sufficient cooperation with the Russian side to effectuate return, the asylum-seeker remained uninformed about both the negative decision from the UDI as well as about the eventual impossibility of readmission to Russia. In many cases, the police authorities were unable to inform asylum-seekers about the inadmissibility decisions from the UDI anyway, as they lacked information of their whereabouts. The Parliamentary Ombudsman has since concluded that the failure to inform asylum-seekers about the inadmissibility decisions from the UDI violated domestic administrative law.¹³⁰

128 Justis- og beredskapsdepartementet, Instruks – Rutiner for rask håndtering av personer som ankommer over norskrussisk landegrense (Storskog) uten gyldig visum eller annen gyldig innreisetillatelse til Norge, 15/7814- EST, November 24, 2015, section 3.3, available at: <https://www.regjeringen.no/no/dokumenter/instruks---rutiner-for-rask-handtering-av-personer-som-ankommer-over-norskrussisk-landegrense-storskog-uten-gyldig-visum-eller-annen-gyldig-innreisetillatelse-til-norge/id2474019/> See also: Utlendingsdirektoratet (UDI), Rundskriv om behandlingen av asylsøknader fra personer som har reist inn i Norge fra Russland (Storskog-porteføljen), RS 2015-013, section 8.1, 25.11.2015, available at: <https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2015-013/>

129 As mentioned in section 3.3 of the report above, the right to free legal assistance was still effective at that point, but asylum-seekers would need to find and contact a lawyer on their own. In many cases, they were unable to do so.

130 Sivilombudsmannen, Politiets utlendingsenhets (PUs) manglende underretning om avvinningsvedtak i asylsøknadene over Storskog, 23.01.2018, available at: <https://www.sivilombudsmannen.no/uttalelser/politiets-utlendingsenhets-underretning-vedtak-a-avvise-behandling-asylsoknader-storskogportefoljen/>

Despite the findings and conclusions of the Parliamentary Ombudsman on the illegality of the practice, the situation persists to this day. As a result of a later change in section 17-18 of the Immigration Regulations,¹³¹ asylum-seekers arriving after 7 December 2015, whose applications are denied assessment on the merits pursuant to the amended ‘safe third country’ provision¹³² or a separate ‘first country of asylum’ provision,¹³³ are no longer eligible for free legal assistance without means assessment. Furthermore, since 1 October 2016, such inadmissibility decisions “may be implemented immediately”, in accordance with section 90(3) of the Immigration Act. Since lawyers are not involved in most of these cases, the police authorities have continued to inform asylum-seekers about UDI’s inadmissibility decisions at the same time as effectuating their returns.¹³⁴ The current practice is discussed in more detail in section 6 below.

4.2 Implementation by the Directorate of Immigration (UDI)

It should be noted at the outset that the UDI had issued first decisions in 80% of all Storskog cases already by the end of 2015.¹³⁵ This did not mean, however, that the case processing was simple, as it involved serious logistical and legal issues.

Logistically, processing of cases was initially difficult, as the instruction of 25 November 2015 from the Ministry¹³⁶ (discussed in section 3.3 above) specified that “it shall be endeavoured that decisions to refuse assessment on the merits are made while asylum-seekers are present at the Storskog border checkpoint.”¹³⁷ While registration of asylum application was done by the police, the UDI was primarily responsible for the assessment of the applications. According to a self-evaluation report by the National Police Directorate, it was pointed out to the Ministry that the area at the Storskog border crossing was not suitable for accommodating that many people.¹³⁸ Both the police and the UDI were nevertheless ordered to process the cases already at the border crossing, as the Ministry insisted that these cases be processed right there, pointing out that the signal effect was important, both in respect to Russia and asylum-seekers.¹³⁹ As this has quickly proven unworkable, asylum-seekers were eventually accommodated in other places, including at a hastily built reception centre in Kirkenes called Vestleiren. That place was clearly not adapted to accommodate vulnerable

131 See: Forskrift om endring i forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften), available at: <https://lovdata.no/dokument/LTI/forskrift/2015-12-07-1402> See also: Justis - og beredskapsdepartementet, Høringsnotat: Høring – endringer i utlendingslovgivningen (innstramminger II), Section 10.3.4.1, pp. 99-100, available at: <https://www.regjeringen.no/contentassets/2ff18fdco6674a43ae3fa26da4532abc/horingsnotat.pdf>

132 Norwegian Immigration Act, section 32(1)(d), available at: <https://lovdata.no/NLE/lov/2008-05-15-35/§section32>

133 Norwegian Immigration Act, section 32(1)(a), see hyperlink above.

134 Utlendingsdirektoratet (UDI), vedlegg 4 til UDIs virksomhetsrapport for 2017, Rapport 2017: Virkninger av regelverks- og praksisendringer i 2016/2017, p. 7, available at: <https://www.noas.no/wp-content/uploads/2019/01/05-effekt-av-lovendringer-2016-5.pdf>

135 Email from UDI’s statistics department (statistikk@udi.no) to NOAS, 18.01.2019.

136 Justis- og beredskapsdepartementet, Rask saksbehandling for asylsøkere som har hatt opphold i Russland, jf. utlendingsloven §§ 32 og 90, GI-13/2015, 25.11.2015, available at: <https://udiregelverk.no/no/rettskilder/departementets-rundskriv-og-instruks/ gi-132015/>

137 Ibid., section 3.

138 Politidirektoratet (POD), Den langsomme krisen – asylkomster over Storskog grensepasseringssted – erfaringer fra høsten 2015, undated, p. 14, available at: <https://www.noas.no/wp-content/uploads/2017/09/PU-rapport-Storskog.pdf>. The POD’s report is further discussed in section 5 below.

139 Ibid. Apparently, the idea to process asylum applications directly at the border was suggested to Jøran Kallmyr, at the time the State Secretary at the Ministry of Justice, by law professor Peter Ørebech, who has been teaching and publishing on the Law of the Sea, Fisheries Law and EU Law, see: NRK, Sykkelberget (video documentary), 28.03.2017, at 29:10, available at: <https://tv.nrk.no/program/mddp12001117/sykkelberget>; See further NRK, Sykkelberget (newspaper article), 28.03.2017, available at: https://www.nrk.no/finnmark/xl/sykkelberget_-historien-om-asylstrommen-pa-storskog-1.13445624; See also commentary by André Møkkelgjerd (senior advisor at NOAS), ‘Politisk villspor’, Nordlys, 07.04.2017, available at: <https://nordnorskdebatt.no/article/politisk-villspor>

groups, as pointed out in a critical report from the Office for Children, Youth and Family Affairs (*Bufetat*).¹⁴⁰

The legislative changes and instructions have also caused confusion about correct legal interpretation and application among case workers in the UDI, as reflected in a self-evaluation report leaked to the media in April 2016:

“Respondents in group discussions in the asylum section talk about strong steering by the Ministry in the days before and after the instruction entered into force on November 25. This relates to both the wording of the regulations (instructions and circulars) as well as their application. [...]

The survey and the group discussions show that one of the biggest challenges was to get everyone in the department to understand what the instructions meant, both in professional/technical and procedural terms”.¹⁴¹

The Directorate followed up the ministerial instruction of 25 November 2015 with a circular on the same day.¹⁴² The circular noted that there might be cases where the residency status of an asylum applicant in Russia will be uncertain, including where the applicant’s residency permit had expired or where the permit was of a short duration. According to the circular, such cases required assessment of whether there were “specific indications that the individual applicant nevertheless risks treatment in violation of Article 3 ECHR upon return to Russia.”¹⁴³ However, in accordance with the instruction, the circular further specified that, “If the applicant has a residence permit in, or a visa of a longer duration allowing more entries to Russia, it must be presumed that the applicant will be able to continue to stay in Russia on the same basis upon return. Return to Russia in such cases will therefore as a starting point not involve a violation of ECHR Article 3.”¹⁴⁴

As instructed by the Ministry, the same circular also required the application of a new, hybrid version of the concept of a ‘safe third country’, mixed with the concept of a ‘safe country/area of origin’.¹⁴⁵ While referring to the amended ‘safe third country’ provision,¹⁴⁶ the circular listed several examples of countries, including Turkey, as well as certain areas, including Kurdistan in Northern Iraq and Kabul in Afghanistan, noting that applications for asylum from persons originating from such countries or areas will be “most often manifestly unfounded”. According to the circular, merits assessment was to be denied in such cases, irrespective of the risk of deportation from Russia to the country/area of origin.

140 Pål Christian Bergstrøm (a regional director of Bufetat at the time), Rapport – Befaring Ankomstsenter Finnmark i Kirkenes 20-21 nov 2015, 22.11.2015, available at: https://drive.google.com/file/d/oB_ZT2oyHFuldUmFaRk1EM2pXTGs/view

The report was first publicised by the newspaper Nordlys, see: Nordlys, “Rystende rapport: Fant høygravid kvinne og barn med vannhode i kaldt bomberom”, 28.02.2016, available at: <https://www.nordlys.no/vestleiren/asylsokere/kirkenes/rystende-rapport-fant-hoygravid-kvinne-og-barn-med-vannhode-i-kaldt-bomberom/s/5-34-376160>

141 Utlendingsdirektoratet (UDI), Beredskap høsten 2015: Rapport fra egevalueringen, April 2016, p. 67, available at: http://multimedia.aftenbladet.no/dokumenter/udi_evaluering.pdf alternative link: http://www.noas.no/wp-content/uploads/2018/08/udi_evaluering.pdf

142 Utlendingsdirektoratet (UDI), Rundskriv om behandlingen av asylsøknader fra personer som har reist inn i Norge fra Russland (Storskog-porteføljen), RS 2015-013, 25.11.2015, available at: <https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2015-013/>

143 Ibid., section 3.

144 Ibid.

145 Ibid.

146 Norwegian Immigration Act, section 32(1)(d), available at: <https://lovdata.no/NLE/lov/2008-05-15-35/§section32>

The novelty of this hybrid concept related to three aspects. First, asylum applications submitted by persons originating from the countries listed in the circular had not previously been generally viewed as manifestly unfounded. Second, instead of assessing the merits of these supposedly manifestly unfounded applications in an accelerated procedure,¹⁴⁷ in which Norway usually assesses asylum applications submitted by asylum-seekers originating from advanced, mostly Western, democracies¹⁴⁸ within 48 hours, the applications were to be denied merits assessment altogether. Third, the asylum-seeker would not be returned from Norway to her country of origin but to Russia, referred to as a safe third country.

In a letter of 21 April 2016,¹⁴⁹ the UDI asked the Ministry to change the instruction of 25 November 2015,¹⁵⁰ proposing a number of revisions. In UDI's words, the main reason for the request was the following:

“Decisive for the request to change practice is new and specific information about effectuated returns from Russia, including to Syria, and that this concerns persons who apparently did not pose any other challenge to the Russian authorities other than staying illegally on the territory.”¹⁵¹

In the letter, the UDI proposed that the cases of asylum-seekers who have previously stayed in Russia be assessed on the merits “where it is probable that the person's visa/residence permit will be cancelled on return” as well as where the asylum-seeker “will have problems with renewing a permit that expires after return to Russia.”¹⁵² Specifically, the UDI requested the following revision of the Ministry's instruction (strikethrough indicates proposed deletion; underlined text addition):

“If the applicant has a residence permit in, or a visa of a longer duration allowing multiple entries to Russia, it ~~must~~ may normally be assumed that the applicant will be able to continue to stay in Russia on the same grounds upon return. Return to Russia in such cases will therefore as a starting point not involve a violation of ECHR Article 3.”¹⁵³

The UDI's proposal further recommended a revision of the hybrid concept, which would nevertheless allow denial of merits assessment in cases of applicants originating from countries that “Norwegian authorities consider to comply with their international human rights obligations to an acceptable level”.¹⁵⁴ Asylum-seekers originating from such countries would still be denied merits assessment and returned to Russia irrespective of the risk of deportation from Russia to the country of origin.

147 Utlendingsdirektoratet (UDI), 48-timersprosedyren, RS 2011-030, 27.06.2011, available at: <https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2011-030/>

148 For an up to date list of countries in the 48-hour procedure see: Utlendingsdirektoratet (UDI), Land i 48-timersprosedyren, RS 2011-030V, available at: <https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2011-030/rs-2011-030v/>

149 Utlendingsdirektoratet (UDI), Praksisforeleggelse etter utlendingsloven – retur av asylsøkere til Russland i medhold av utlendingsloven § 32, ref. 15/09788-34, 21.04.2016, available at: <http://www.noas.no/wp-content/uploads/2018/08/01-Praksisforeleggelse-UDI-Storskog.pdf>

150 Justis- og beredskapsdepartementet, Rask saksbehandling for asylsøkere som har hatt opphold i Russland, jf. utlendingsloven §§ 32 og 90, GI-13/2015, 25.11.2015, available at: <https://udiregelverk.no/no/rettskilder/departementets-rundskriv-og-instrukser/gi-132015/>

151 Utlendingsdirektoratet (UDI), Praksisforeleggelse etter utlendingsloven – retur av asylsøkere til Russland i medhold av utlendingsloven § 32, ref. 15/09788-34, 21.04.2016, p. 6., available at: <http://www.noas.no/wp-content/uploads/2018/08/01-Praksisforeleggelse-UDI-Storskog.pdf>

152 Ibid., p. 7.

153 Ibid.

154 Ibid.

The Ministry answered to UDI's proposal to change practice in a letter of 3 May 2016, requesting several clarifications.¹⁵⁵ Among other things, the Ministry asked the UDI what was meant by situations "where it is probable that the person's visa/residence permit will be cancelled on return" and situations where the applicant "will have problems with renewing a permit that expires after return to Russia."¹⁵⁶ In their subsequent answer to the Ministry, the UDI provided examples of problems that may occur with Russian study visa and business visa.¹⁵⁷ Among other things, the UDI pointed out that study visa may not be renewed after completion of studies or if a student leaves Russia without notifying the university, in which case the visa may get cancelled.¹⁵⁸ Regarding business visa, the UDI noted that hundreds of such visa invitations were issued by fictitious Russian firms to Syrian businessmen and that such visa may also get cancelled.¹⁵⁹

On 24 June 2016, the Ministry rejected UDI's proposal to change the wording of the instruction, noting that the instruction already required merits assessment if there were specific indications that the individual applicant risked treatment in violation of Article 3 of the ECHR upon return to Russia.¹⁶⁰

4.3 Concerns of the United Nations High Commissioner for Refugees (UNHCR)

While UNHCR does not reject the concept of a 'safe third country' as such, it points out that any application of the concept must come with a number of specific legal safeguards in order to ensure that rights of refugees under refugee and human rights law are upheld.¹⁶¹

In a letter of 23 December 2015, UNHCR expressed serious legal concerns to the Norwegian government.¹⁶² It noted, among other things, that the new legislative changes and instructions introduced in Norway to address the Storskog situation "appear to have created a hybrid between the concepts of 'safe third country' and the 'safe country of origin', without applying all of the established criteria and procedural safeguards for the implementation of these concepts".¹⁶³

155 Justis- og beredskapsdepartementet, Praksisforeleggelse etter utlendingsloven–retur av asylsøkere til Russland i medhold av utlendingsloven § 32, JD ref. 15/6357-HBK, UDI ref. 15/09788-34, 03.05.2016, available at: <http://www.noas.no/03-svar-fra-justis-030516/>

156 *Ibid.*, p.2.

157 Utlendingsdirektoratet (UDI), Bestilling - Praksisforeleggelse etter utlendingsloven – Retur av asylsøkere til Russland i medhold av utlendingsloven § 32, UDI ref. 15/09788-39/GBS, JD ref. 15/6357, 18.05.2016, available at: <http://www.noas.no/wp-content/uploads/2018/08/04-Praksisforeleggelse-UDI-Storskog.pdf>;

158 *Ibid.* p. 3-4.

159 *Ibid.* p. 4-5.

160 Justis- og beredskapsdepartementet, Rundskriv, Storskogporteføljen, tilbakemelding på praksisforeleggelse, GI-08/2016, ref. 15/6357, 24.06.2016, available at: <https://www.udiregelverk.no/no/rettskilder/departementets-rundskriv-og-instrukser/gi-082016/>

161 UN High Commissioner for Refugees (UNHCR), Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018, available at: <http://www.refworld.org/docid/5acb33ad4.html>. See also: UN High Commissioner for Refugees (UNHCR), Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23.03.2016, available at: <http://www.refworld.org/docid/56f3ee3f4.html>

162 UN High Commissioner for Refugees (UNHCR), UNHCR Observations on the Law Proposal "Prop. 16L (2015-2016) Endringer i utlendingsloven (innstramninger)", Instructions GI-12/2015, GI-13/2015 and 15/7814-EST". Circular "RS 2015-013", and amendment to the "Immigration Regulation, §§ 17-18", December 23, 2015, available at: <http://www.noas.no/wp-content/uploads/2016/04/UNHCR-brev-23-desember-2015.pdf>

163 *Ibid.*, para. 11.

These concerns were followed up two months later in a separate letter from UNHCR to the Norwegian government.¹⁶⁴ The letter pointed out that there were not adequate safeguards in place in Norway to prevent chain *refoulement*, and that it cannot be concluded that holders of multi-entry visas to Russia are generally protected from removal from Russia. It further highlighted the deficiencies of the asylum system in Russia, pointing out that “asylum-seekers in the Russian Federation are at risk of arrest, detention and expulsion at all stages of the asylum process.”¹⁶⁵ In regard to the last point, UNHCR also noted the following:

“In 2014, UNHCR and its partners intervened in 77 cases of potential forced return of asylum-seekers, resulting in these individuals gaining access to the asylum procedure, including from international airports. In 2015, 117 cases of forced return were prevented by UNHCR and its partners – including cases at risk of expulsion, extradition and removal from transit zones of international airports.

However, it is important to note that for many of these cases UNHCR was only alerted to the need to intervene by partners or by the refugee community. UNHCR is concerned that there may have been other persons who were unable to apply for asylum, and who have already been removed from the territory.”¹⁶⁶

On 20 March 2016, UNHCR presented to the Norwegian government its records of interviews with one Afghan and 20 Syrian asylum-seekers, who were deported from Norway to Russia in the period from December 2015 to March 2016. The main findings were summarised in a separate letter to the Ministry, which is now publicly available.¹⁶⁷ The letter noted several issues, including the following:

a. While some of the applicants have a relatively secure status in the Russian Federation, holding permanent or temporary residence permits, others have a weak legal status with time-limited student or business visas; our colleagues also interviewed at least one individual with an expired student visa. In UNHCR’s view, given the limitations in the Russian asylum system, holders of time-limited visas may be at risk of deportation once their visas expire.

b. Several applicants report of not having received information about the right to legal representation and state that they have not been able to obtain legal counsel while in Norway. In one case, an explicit request for a lawyer by the applicant was allegedly not responded to.

[...]

d. Some of the applicants claim they did not receive information about the right to appeal and had limited practical opportunity to appeal the decisions by the Norwegian Directorate of Immigration (UDI). One applicant only appears to have been verbally informed that his application had been rejected. Applicants also report of the decision letters being issued near the border and on the same day they were to be deported. It is thus questionable whether they have been able to exercise their right to an effective remedy.”¹⁶⁸

164 UN High Commissioner for Refugees (UNHCR), UNHCR observations regarding the processing of asylum claims from persons who have arrived to Norway from the Russian Federation, 15.02.2016, available at: <http://www.noas.no/wp-content/uploads/2016/04/UNHCR-brev-15-februar-2016.pdf>

165 Ibid., p. 5.

166 Ibid. pp. 7-8.

167 UN High Commissioner for Refugees (UNHCR), Interviews with Syrian asylum-seekers expelled from Norway to the Russian Federation, 33/RRNE/2016, 30.03.2016, available as the last annex to: NOAS h ringssvar til evaluering av videref ring av midlertidige endringer fra Prop. 16 L (2015-2016), 10.03.2017, available at: <http://www.regjeringen.no/no/dokument/dep/jd/hoeringer/2017/evaluering-og-videreforing-av-midlertidige-endringer-i-utlendingsloven-vedtatt-pa-bakgrunn-av-prop.-16-l-2015-2016/Download/?vedleggId=25cd8a4e-3a84-400c-a2cf-dbd2906037c7>

168 Ibid.

Unfortunately, these letters had no discernible effect on the government. When the Ministry in January 2017 presented its evaluation of the legislative amendments, proposing to make them permanent, the letters from UNHCR were not even mentioned.¹⁶⁹ The letters were first made public by NOAS in the annex to our critical comments on the Ministry's evaluation/proposal.¹⁷⁰ It is worth mentioning that UNHCR also criticised this proposal, referring to its previous concerns and evaluations.¹⁷¹

Arguably, the information about the situation of asylum-seekers in Russia provided by UNHCR did initially have some impact on the practice of the Immigration Appeals Board (UNE). However, the effect has been minimised after the related issues were assessed by UNE's Grand Board, as discussed below.

4.4 The initial approach of the Immigration Appeals Board (UNE)

By 6 July 2016, the Immigration Appeals Board (UNE) had overturned 12 out of 20 Storskog-cases, ruling that the UDI was wrong to refuse assessment on the merits.¹⁷² UNE's approach in these initial cases did not imply that all persons without a residence permit or even visa in Russia would automatically get their asylum cases assessed on the merits in Norway. Instead, UNE drew a distinction between "persons who had spent a short time" and "persons who had spent a long-time period" in Russia, explicitly presuming that the latter group, while having no other option than to seek asylum, would be able to overcome the difficulties of the Russian asylum system.¹⁷³ Subject to an individual assessment, UNE's conclusion in the latter category of cases was that the risk of deportation from Russia was "so low it was merely theoretical."¹⁷⁴

In a later proposal to make the legislative amendment of the 'safe third country' provision permanent, the Ministry of Justice referred to UNE's practice, pointing out some aspects on which UNE had based its decisions.¹⁷⁵ Among the cited reasons were "individual abilities to navigate the Russian asylum system, for example due to having a social network and a long term stay in Russia, in addition to the risk of deportation from Russia to Syria being theoretical (very low)."¹⁷⁶ In addition, "some weight was placed on the fact that the asylum-seekers had the possibility to get other types of permits."¹⁷⁷

169 Justis- og beredskapsdepartementet, Høringsnotat – Evaluering og videreføring av midlertidige endringer i utlendingsloven vedtatt på bakgrunn av forslag i Prop. 16 L (2015–2016), 19.01.2017, available at: <https://www.regjeringen.no/no/dokumenter/evaluering-og-videreforing-av-midlertidige-endringer-i-utlendingsloven-vedtatt-pa-bakgrunn-av-prop.-16-l-2015-2016/id2526794/>

170 Norsk organisasjon for asylsøkere (NOAS), NOAS hørings svar til evaluering av videreføring av midlertidige endringer fra Prop. 16 L (2015–2016), 10.03.2017, available at: <https://www.regjeringen.no/no/dokumenter/evaluering-og-videreforing-av-midlertidige-endringer-i-utlendingsloven-vedtatt-pa-bakgrunn-av-prop.-16-l-2015-2016/id2526794/?uid=df3c0240-a1c7-4853-b953-a59a1c-51bcbd>

171 UN High Commissioner for Refugees (UNHCR), UNHCR Observations on the proposed amendments to the Norwegian Immigration Act [Høringsbrev – Evaluering og videreføring av midlertidige endringer i utlendingsloven vedtatt på bakgrunn av forslag i Prop. 16 L (2015–2016)], 17.03.2017, available at: <https://www.regjeringen.no/contentassets/38a846ba11284dfe96f-37776c43a4bc1/unhcr.pdf?uid=UNHCR.pdf>

172 Utlendingsnemnda (UNE), "Nemndmøter i Storskog-saker", February 22, 2016, available at: <https://www.une.no/aktuelt/arkiv/2016/nemndmoter-i-storskog-saker/> Note that here (unlike in the statistical overview section 2.2 above), the reference to 'cases' does not refer to the number of individuals affected by the decision. A case may refer here to an individual as well as a family with several family members.

173 Ibid.

174 Ibid.

175 Justis- og beredskapsdepartementet, Høringsnotat – Evaluering og videreføring av midlertidige endringer i utlendingsloven vedtatt på bakgrunn av forslag i Prop. 16 L (2015–2016), 19.01.2017, p. 16, available at: <https://www.regjeringen.no/no/dokumenter/evaluering-og-videreforing-av-midlertidige-endringer-i-utlendingsloven-vedtatt-pa-bakgrunn-av-prop.-16-l-2015-2016/id2526794/>

176 Ibid.

177 Ibid.

4.4.1 Criticism

Even according to UNE's own presentation of available country information, the risk of *refoulement* generally faced by asylum-seekers in Russia can hardly be seen as "merely theoretical." For example, in a case successfully overturned on 10 March 2016, UNE stated the following:

"In February 2016, three Syrians were attempted removed from return centres in Dagestan to Syria. UNHCR, the Civic Assistance Committee (CAC) and Fedotov, Chairman of the Presidential Council for Civil Society and Human Rights, managed to stop the forced returns and the men were taken back to the return centres in Dagestan.

UNHCR knows of three specific instances of forced returns to Syria in the beginning of 2015, that is long after the Federal Migration Service (FMS) instruction [not to return Syrians] from 2012. UNHCR has further prevented returns in 117 cases in 2015 where they feared *refoulement*. Of these cases, 50 concerned Syrian nationals that had received an expulsion order and were placed in a return centre pending their deportation. A representative of a Syrian advocacy organisation in St. Petersburg had heard that nine Syrians were stopped and returned at the border in Moscow in October 2015. However, the event is not verified.

From 2014, UNHCR knows of three confirmed instances where Syrians were refused entry to Russia. They are concerned that there are more returns they do not know about.

Civic Assistance Committee knows of five cases of forced returns to Syria in 2014, of which one got a rejection on the asylum application after being returned. Civic Assistance Committee knows also of four Syrian nationals, who were not allowed into Russia and who have not succeeded in lodging their asylum applications at the airport. They were sent by plane back to Syria. Others have reported of 11 cases of forced returns of Syrians to Syria in 2013 after having applied for asylum at the return centres. They have eventually withdrawn their applications and were returned."¹⁷⁸

It should be noted that assessment on the merits in the case cited above¹⁷⁹ was initially denied respectively by the UDI (on 27 November 2015), Oslo County Court (*Oslo byfogdembete*), which denied the request for suspensive effect of UDI's decision (on 22 December 2015),¹⁸⁰ as well as by UNE (on 24 December 2015). After the decision by the Oslo County Court was appealed to the Borgarting Court of Appeal (on 21 January 2016), UNE decided to reverse its own previous negative decision (on 10 March 2016). Disturbingly however, UNE made the following comment in the reversal decision:

"Even though the Board considers the risk that the complainants will be returned by force to Syria upon their return to Russia as absolutely minimal, the Board has placed a decisive weight on the fact that the complainants are Syrian nationals, that is nationals that per this day are protected against return to the home country according to Immigration Act, section 28, first paragraph, letter b."¹⁸¹

There are at least three issues with this conclusion. First, UNE's suggestion that the decisive element in the case was the nationality of the applicants is legally difficult to comprehend. It is important to bear in mind that the risk assessment in this case was not part of a standard asylum procedure. Instead, the issue before the Board was whether this case had to be assessed on the merits at all.

¹⁷⁸ UNE's reversal decision of 10.03.2016, available on file at NOAS, p. 5.

¹⁷⁹ Ibid.

¹⁸⁰ Oslo County Court (Oslo byfogdembete), case no.: 15-194898TVI-OBYF, 22.12.2015, available at: https://www.domstol.no/globalassets/upload/obyf/internett/aktuelt/2781_001.pdf

¹⁸¹ UNE's reversal decision of 10.03.2016, available on file at NOAS, p. 6.

Potentially, any migrant from any country could be a refugee or otherwise in need of international protection, even if not originating from a war-torn country. Without some form of merits assessment, it is impossible to determine whether an asylum-seeker needs international protection or not. If such assessment is unavailable or highly unreliable in Russia, it is unjustifiable to reject merits assessment in Norway and refer the person to Russia – irrespective of the nationality of the applicant.

Second, based on the evidence referred to by UNE itself above, it is difficult to see the risk of *refoulement* from Russia as “absolutely minimal”. The available evidence clearly showed that the risk was neither a speculation, nor purely hypothetical or construed. Admittedly, the precise extent of *refoulement* practice by Russian authorities could not be determined. Yet, UNE’s conclusion seems to be based on an implicit assumption that UNHCR, relevant non-governmental organisations and the refugee community in Russia would register more instances of *refoulement* if the practice was prevalent. However, taking into consideration UNHCR’s limited resources, difficult constraints facing non-governmental organisations in Russia, not to mention the refugee community, available data is likely to reveal only a part of the picture.

Furthermore, according to UNE, the adequacy of procedural legal safeguards in the Russian asylum system was not in itself a decisive issue and therefore did not need to be examined in detail:

“The Board believes that the problems related to lodging an application for asylum [in Russia] is not in itself of a decisive importance for the determination of whether the complainants are safe from being returned to Syria. The same applies to deficiencies of the process itself, including complaint procedure, access to interpreters, etc. When it comes to outcomes of the applications, predictability seems to be low, also for Syrians.”¹⁸²

Insufficient procedural safeguards may result in failure of granting a proper legal status necessary to ensure legal protection against detention and subsequent deportation. It is therefore difficult to see how the conclusion of an “absolutely minimal” risk of chain *refoulement* could be reached if no real examination of procedural legal safeguards in the Russian asylum system was made.

Third, UNE’s remark that Syrians, (in cases where their asylum applications are assessed on the merits) are protected due to the risk posed by generalised violence in Syria, in accordance with section 28(1)(b) of the Immigration Act, ignored UDI’s established practice. According to UDI’s practice note on Syria, “most applicants from Syria will fulfil the conditions for refugee status pursuant to the Immigration Act section 28 first paragraph letter a”¹⁸³ because “asylum-seekers from Syria have a well-founded fear of persecution that can be connected to one or several of the Convention grounds, mainly imputed political opinion.”¹⁸⁴ Recognition pursuant to letter a and letter b comes with the same set of rights under Norwegian domestic law. However, refusing merits assessment in cases concerning refugees within the meaning of the Refugee Convention has additional consequences under the Convention, as discussed further in section 4.5.1 below.

182 Ibid., p. 5.

183 Utlendingsdirektoratet (UDI), PN 2015-002 Asylpraksis Syria, 22.06.2015, section 2, available at: <https://www.udiregelverk.no/no/rettskilder/udi-praksisnotater/pn-2015-002/>

184 Ibid. section 5. Note as well that of the cases assessed on the merits in 2016, UDI recognised 7405 Syrian nationals as Convention refugees, while only 2 were given another form of asylum and another 7 humanitarian protection, see: UDI, Asylvedtak etter statsborgerskap og utfall (2016), available at: <https://www.udi.no/statistikk-og-analyse/statistikk/asylvedtak-etter-statsborgerskap-og-utfall-2016/>

4.5 UNE's Grand Board cases

UNE's highest decision-making body, the Grand Board, held hearings in two cases concerning Storskog on 21-22 June 2016.¹⁸⁵ The reason for getting the cases before the Grand Board was the tendency in UNE to assess Storskog cases inconsistently.¹⁸⁶ Decisions by the Grand Board were intended to create a precedent to ensure a more consistent practice. The decisions in the two cases from the Grand Board, both dated 5 July 2016, are now publicly available in their entirety in Norwegian.¹⁸⁷

The main legal issue assessed by the Grand Board was whether there was any evidence indicating that section 73 of the Immigration Act prevents Norway from returning third-country nationals to Russia. This provision refers to the *non-refoulement* principle following from Article 3 of the European Convention on Human Rights. The Grand Board pointed out that the assessment concerned three key questions. First, does the applicant have a well-founded fear of persecution or face a real risk of torture or inhuman or degrading treatment or punishment in Russia if returned there? Second, is there a real risk for the applicant to be returned from Russia to Syria? And third, does the applicant have a well-founded fear of persecution or face a real risk of exposure to torture, or inhumane or degrading treatment or punishment if returned from Russia to Syria?¹⁸⁸

The facts in the two cases were quite similar. The first case concerned a young male Syrian, who escaped the war in Syria in fear of forced recruitment and arrived to Russia in July 2014. On arrival to Norway in September 2015, he still had student visa to Russia allowing multiple entries. The visa expired some months later.¹⁸⁹ He had stayed one year and two months in Russia before he arrived to Norway.¹⁹⁰

The second case also concerned a young male Syrian, who first arrived to Russia in February 2013 on a student visa. He later applied for a temporary residence permit in Russia and was granted a temporary legal permit valid from August 2013 until August 2016, including a multi-entry visa.¹⁹¹ As in the first case, this applicant had also stayed one year and two months in Russia before he arrived to Norway.¹⁹²

In both decisions, the Grand Board noted practical obstacles that might prevent the applicant's return to Russia, including visa cancellation and difficulties in renewing visas at the Russian embassy. The majority nevertheless refrained from taking a position on the issue, as this was, in their view, not relevant for the outcome of the case. According to the majority, the issue of readmission to Russia was merely a practical issue to be negotiated by the Norwegian and the Russian authorities.¹⁹³

185 A summary of the two cases in Norwegian is available at: Utlendingsnemnda (UNE), "Stornemnd: Retur til Russland", June 24, 2016, available at: <https://www.une.no/kildesamling/stornemndavgjorelser/stornemnd-retur-til-russland/>

186 Ibid.

187 The first case, UNESV-2016-1, 05.06.2016, is available at: <https://www.noas.no/wp-content/uploads/2017/12/UNESV-2016-1.pdf> and the second case, UNESV-2016-2, 05.06.2016, at: <https://www.noas.no/wp-content/uploads/2017/12/UNESV-2016-2.pdf>

188 UNESV-2016-1, op. cit., p. 12; UNESV-2016-2, op. cit., p. 11.

189 UNESV-2016-1, op. cit., p. 13.

190 Ibid., p. 19.

191 UNESV-2016-2, op. cit., p. 12-13.

192 Ibid., p. 18.

193 UNESV-2016-1, op. cit., pp. 18-19; UNESV-2016-2, op. cit., p. 18.

The Grand Board concluded in both cases that there was no clear evidence indicating that the principle of *non-refoulement* expressed in section 73 of the Immigration Act prevented Norwegian authorities from returning the two Syrians to Russia. However, neither of the two decisions were unanimous, as the Board split between the majority and a dissenting minority. The majority consisted of three Board chairs and two Board members. The minority consisted of two board members.

According to the majority's assessment,¹⁹⁴ both applicants would be able to secure a legal stay in Russia upon return. They found that third-country nationals had the possibility to apply for asylum in Russia, noting that the Board was aware of the difficulties surrounding this process:

"The Grand Board has considered that there may be a waiting period in Russia before application for asylum will be registered and that the complainant might possibly be without legalised stay in the country during this period. The Board has noted that the waiting period varies in the different regions and that this is easier outside the largest cities. Persons can also get quicker access to the asylum procedure through support from UNHCR or local NGOs that assist asylum-seekers legally and otherwise. Although there can be problems connected to accessing the asylum system in Russia, the majority finds, overall, that it is not sufficiently established that the complainant will not get access to the Russian asylum system."¹⁹⁵

The majority emphasised that the applicants were young, healthy men with a previous long-term stay in Russia.¹⁹⁶ The Board therefore assumed they must have acquired a social network, including among the Syrian diaspora in Russia and that they also could contact UNHCR and local NGO's to help them overcome bureaucratic obstacles in the application process. In the majority's view, the applicants had sufficient experience with the Russian society and bureaucracy. The majority held that the risk of *refoulement* from Russia to Syria generally faced by persons seeking asylum in Russia was low. Written confirmations received from UNHCR of recent deportations from Russia to Syria were held by the majority as pertaining only to isolated instances. In majority's view, the number of confirmed *refoulement* cases from Russia was limited.

According to the assessment of the minority,¹⁹⁷ the information from UNHCR clearly indicated a real risk of *refoulement* from Russia to Syria. The minority found that the Russian asylum system did not provide effective protection to Syrians against *refoulement* and that forced return to Russia would therefore constitute a breach of international law. The minority emphasised the problems concerning the Russian asylum system, including its ineffectiveness and the risk of deportation that applicants generally face before their asylum applications are assessed.

To conclude, the Grand Board decisions have established a precedent on two important points. First, the prospect of readmission was seen as irrelevant. This precedent was later deemed untenable and overturned by UNE itself, as discussed in the section 4.6. Second, young male Syrians who had previously stayed in Russia for a long-term period, in both cases one year and two months, were assumed to be able to overcome the bureaucratic obstacles of the Russian asylum system. According to our experience at NOAS, this second precedent was largely not followed by UNE in subsequent cases, as UNE refused merits assessment of several Syrians who had only spent a few days transiting through Russia on their way to Norway.

194 UNESV-2016-1, op. cit., pp.18-21; UNESV-2016-2, op. cit., p. 20.

195 UNESV-2016-1, op. cit., p. 19; UNESV-2016-2, op. cit., p. 18.

196 Ibid.

197 UNESV-2016-1, op. cit., pp.21-22; UNESV-2016-2, op. cit., p. 21.

4.5.1 Criticism

The Grand Board's decisions in the cases described above had at least three key flaws. First of all, contrary to the Majority's assessment, the issue of readmission was not a simple issue of effectuation. The Refugee Convention obliges the state parties to not only ensure *non-refoulement* but also to grant refugees the rest of the Convention's substantive rights. The applicants applied for asylum in Norway and were present under the Norwegian jurisdiction. Without any clear agreement from the Russian authorities to overtake the responsibility for assessing the asylum applications of the applicants, the legal obligations following from the Convention were owed to them by Norway. Without any possibility to return to Russia, they would be left in orbit, with no country willing to assess their need for international protection and grant them all substantive rights following from the Refugee Convention.

Secondly, the Grand Board failed to refer to important sources on Russian asylum law and its application by the Russian authorities. In 2015, the Civic Assistance Committee published a comprehensive analysis of the Russian asylum system.¹⁹⁸ Although only accessible in Russian until late 2016, an English summary of the report was available on the website of the Civic Assistance Committee at the time, which was cited in a report by Landinfo, published 16 November 2015.¹⁹⁹ The summary reads as follows:

“[...] the procedure for determining refugee status in Russia is not fair. There is a problem of non-admission to the procedure, people are getting unfounded refusals, the appeal is ineffective – the majority of the courts side with the Federal Migration Service. Those who received status may at any time lose it without good reason. So people, including many genuine refugees entitled to the status, become illegal immigrants and are threatened with expulsion.”²⁰⁰

The Grand Board's assessment avoided serious analysis of procedural legal safeguards in the Russian asylum system. Instead, the assessment focused mostly on the number of documented instances of *refoulement*. As already pointed out, the available data probably did not reveal the entire picture of Russia's *refoulement* practice.

Thirdly, even if Russia's inadequate asylum system would not result in deportation to Syria but 'only' in lack of fulfilment of the substantive rights contained in the Refugee Convention, it would still be a breach of the Convention attributable to both Norway and Russia, as previously discussed in section 3.1.1 above.

4.6 Abandoning Grand Board's precedent on irrelevance of readmission prospects

On 28 November 2017, the Immigration Appeals Board (UNE) issued a new decision in a Storskog case, in which it concluded that the applicant's prospect of readmission to Russia was unrealistic.

198 Civic Assistance Committee, Russia as a country of asylum, 15.10.2015, an English translation was published in autumn 2016 and is available for download at: <https://refugee.ru/en/publications/russia-as-a-country-of-asylum/>

199 Landinfo, Respons, Russland: Asylsystemet og rettigheter for asylsøkere, 16.11.2015. Note: the report has since been updated and its original version is no longer available on Landinfo's website. The original version from 16.11.2015 is preserved on NOAS' server at: https://www.noas.no/wp-content/uploads/2017/09/landinfo_russland_16112015.pdf

200 *Ibid.*, p. 5.

In that case, UNE thereby reversed its own previous negative decision of 1 March 2017, in which it previously denied merits assessment of the applicant's asylum application.²⁰¹ This is the last UNE decision in a Storskog case that was registered by us at the Norwegian Organisation for Asylum Seekers (NOAS).

The case concerned a Syrian applicant, who applied for asylum in Norway in September 2015, after only having spent 19 days in Russia. To get to Russia, the applicant had obtained a Russian work visa, that allowed multiple entry until the end of July 2018, at least formally. However, the visa was issued under false premises, as the inviting company in fact did not exist. The applicant alleged that re-entry to Russia was therefore impossible. In its previous decisions of 3 February 2017 and 1 March 2017 in the same case, UNE noted that the applicant would be able to legalise further stay in Russia through the Russian asylum system. At the same time, UNE considered readmission merely a practical question of effectuation that had to be negotiated between the Norwegian and Russian authorities.

The new decision of 28 November 2017 in this case marked a clear break from the UNE's Grand Board precedent, in which the majority had previously held that the issue of readmission was merely a practical question of effectuation (see section 4.5 above.)

In the process of reassessing the case, UNE invited a senior advisor from the National Police Immigration Service (*Politiets utlendingsenhet*, referred to as PU) to provide information about the possibility of readmission to Russia of asylum-seekers who arrived to Norway via Storskog. To illustrate the futility of Norway's readmission efforts, especially of asylum-seekers with an uncertain residence status in Russia, it is worth quoting the relevant part of UNE's last decision in the case in its entirety:

"He [a senior advisor at PU] explained, among other things, that readmission of third country nationals required submitting a readmission request, including in cases where there is a valid travel document. One is dependent on acceptance from the embassy in such cases, including with a valid travel document. There was only one case where a third country national has returned without travel documents, but this was a special case.

There is a disagreement between the Norwegian and the Russian authorities. The Norwegian position is that it is not even necessary to notify the Russian authorities. Russia does not agree with this.

There was a complete stop of readmissions from January to February 2016. After that, there was a slight progress with readmissions, but it is maximum 50 persons who have been readmitted after February 2016. There was an agreement to take back those that still had a residence permit in Russia, but Russia reserved the right to assess who had a valid permit.

Russia maintained that these were difficult cases to assess, they required more time than 14 days and additional notification. PU switched therefore to ordinary requests and subsequent notifications.

What made the present case different from others was that the complainant has a multiple entry visa valid for three years. Russians have only accepted those with a permanent residence permit, not multiple entry visa or temporary permits.

In this case, the readmission request was first rejected on the grounds that the request was not in accordance with the [readmission] agreement. PU corrected the request and sent it back. After that, it took a long time, and a new rejection is dated April 2017, but PU only received it in August 2017.

201 UNE's reversal decision of 28.11.2017, available on file at NOAS.

The Russian migration service was reorganised last year, moved from the Federal Migration Service, and is now under the Ministry of Interior. Cooperation has changed; it is uniformed personnel that has moved there from other places. They have become more formal, and changed their formulations.

EU sent a strongly worded letter to Russia in November 2016 with a complaint that Russia did not comply with the common readmission agreement. They received a strongly worded letter back in December 2016 or January 2017. After that, readmissions have become more and more difficult also for the EU.

PU previously received responses to requests through the Norwegian embassy in Moscow, and now is back to that, but there was a period when answers were sent to the Russian embassy in Oslo, which in turn should have informed [PU]. This was not understood by the embassy in Oslo, and answers from the Russian authorities were therefore left there without a follow-up.

The Russian authorities have not wanted to readmit to Russia the group that arrived [to Norway] through Storskog. There is now a new practice [by Russia] of referring to the fact that a person has been out of Russia for more than 180 days. Russian authorities are looking at the possibilities to reject these kinds of cases.

It is [the advisor's] assessment that now there is little to be done when it comes to readmission of the complainant to Russia. He is also sceptical of whether they would now be willing to readmit persons even with permanent permits. There has not been a difference between those with "correct" or "incorrect" permits, they have been equally unwilling to accept readmission in both types of cases.

February 2016 was the last time an ordinary readmission took place of a person who did not have a permanent residence permit in Russia.

The Russian authorities do not differentiate between how long the person concerned has lived in Russia, only types of permits. The Russian authorities know who arrived through Storskog, this is something they have in their registers.

Three persons who have tried to return without PU were stopped and returned with cancelled Russian permits and three years' entry bans. All three have found doors to Russia closed. He does not know of more than one case, besides the present case, where the person concerned is now in the same situation. However, there are some who are somewhere in Europe after traveling from Norway.

The Russian authorities have on some occasions accepted readmission of persons with permanent residence permits even if they were outside Russia for longer than six months.²⁰²

In the above-cited decision of 28 November 2017, UNE maintained that the Norwegian authorities had made no error when they initially refused merits assessment in the case. Among other sources, UNE cited the following passage from page 395 of the book 'The Refugee in International Law' by Goodwin-Gill and MacAdam, published by the Oxford University Press in 2007:

"At present, the most that can be said is that international law permits the return of refugees and asylum seekers to another state if there is substantial evidence of admissibility, such as possession of a Convention travel document or other proof of entitlement to enter."²⁰³

202 UNE's reversal decision of 28.11.2017, available on file at NOAS, pp. 5-6.

203 Ibid. p. 8.

After considering additional sources, namely UNHCR's legal considerations on EU-Turkey Cooperation,²⁰⁴ Article 38(2)(a) of the EU Procedures Directive²⁰⁵ and the judgment of the European Court of Human Rights in *Ghorbanov and Others v. Turkey*,²⁰⁶ UNE concluded with the following:

"The Board cannot after this see that what is available provides a clear answer as to whether a clear international legal obligation can be inferred regarding preliminary assessment of, and conclusion on, whether a foreigner has legal and actual access to a third country, where conditions in the Immigration Act section 32(1)(d) are otherwise met.

In any case, the Appeals Board however finds that it cannot be in accordance with neither Norwegian domestic law nor international law to not consider the absence of factual and legal access to a third country, where this is established afterwards."²⁰⁷

As a result, the Syrian applicant could finally get his asylum application assessed on the merits. The clear information from the senior advisor from the National Police Immigration Service on zero readmission prospects was vital to this conclusion. After that point, denial of the entire catalogue of substantive rights listed in the Refugee Convention in respect to refugees present under Norwegian jurisdiction could certainly not be squared with Norway's legal obligations.

4.6.1 Criticism

While the final result of UNE's decision cited above was very welcome, it was partly convoluted. UNE did not specify at what point the issue of readmission became relevant. The only answer UNE provided in this regard was: "not initially" but "afterwards". It is not clear, however, after what. After Norway received a negative answer from Russia? If so, how long, and on what levels, did the states in question have to negotiate before the issue of readmission became relevant? If, as UNE stated in its last decision, both Norwegian domestic law and public international law required consideration of accessibility "afterwards", namely on 28 November 2017, then why not previously, i.e. on 1 March 2017, when UNE rejected the same case, stating that readmission prospects were irrelevant?

204 Specifically, UNE cited the following sentence from section 2.1 of the UNHCR's considerations: "Application of the concept requires an individual assessment of whether the previous state will readmit the person", omitting the rest of the listed requirements. UNE pointed out in this regard that "UNHCR did not state anything about the degree of certainty required to establish the availability of legal access to a third country". See: UN High Commissioner for Refugees (UNHCR), Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23.03.2016, available at: <http://www.refworld.org/docid/56f3ee3f4.html>.

205 Specifically, UNE pointed out that this provision "probably only contains a requirement of a certain form of connection between the foreigner and the third country, not a requirement of factual and legal access." The wording of Article 38(2)(a) is as follows: "2. The application of the 'safe third country' concept shall be subject to rules laid down in national law, including: (a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country", see: European Union: Council of the European Union, 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), 29 June 2013, OJ L 180/60-180/95; 29.6.2013, 2013/32/EU, available at: <https://eur-lex.europa.eu/eli/dir/2013/32/oj>.

206 Specifically, UNE pointed out that the issue of access to a third country has so far not been directly assessed by the European Court of Human Rights, but that its case law "may nevertheless indicate that the Court will consider factual and legal access to the third country as relevant criteria when assessing whether a return is in line with Convention obligations". In this connection UNE cited the following sentence from paragraph 32 of the *Ghorbanov* judgment: "All of the above leads the Court to conclude that the applicants – refugees recognised by the UNHCR – were illegally deported to Iran, a non-member State of the Council of Europe, in the absence of a legal procedure providing safeguards against unlawful deportation, and without a guarantee from the Iranian authorities that the applicants would be admitted to Iran", see: *Ghorbanov and Others v. Turkey* (app. no. 28127/09), ECtHR, 03.12.2013, para. 32, available at: <http://hudoc.echr.coe.int/eng?i=001-138584>

207 UNE's reversal decision of 28.11.2017, available on file at NOAS, p. 9. Note that section 32(1)(d) of the Immigration Act refers to the amended 'safe third country' provision in the Norwegian Immigration Act (cited above in section 3.1 of the report), available at: <https://lovdata.no/NLE/lov/2008-05-15-35/section32>

The ‘wait and see’ approach adopted by UNE to the relevance of readmission hardly represents a good faith application of the Refugee Convention, in line with its object and purpose, as required by Article 26 of the Vienna Convention on the Law of Treaties.²⁰⁸ It certainly does not seem to be in line with the intention of the contracting parties to the Refugee Convention to “do everything within their power to prevent this problem [of refugees] from becoming a cause of tension between States”, expressed in the Convention’s preamble.

As previously noted, the issue of readmission is not a simple issue of effectuation in cases where merits assessment is denied on the basis of a third country concept. If an asylum claim is assessed on the merits and rejected in a decision concluding that the person is not a refugee or otherwise in need of international protection, then the issue of readmission, usually to the country of origin, is normally indeed just a question of effectuation. However, denial of merits assessment on the basis of a third country concept means that persons entitled to the entire set of substantive rights under the Refugee Convention will not get their rights fulfilled unless and until their case is assessed on the merits somewhere. Without any clear agreement with Russia to overtake the responsibility for assessing asylum applications of the applicants, the fulfilment of the Convention obligations was owed to the applicants by Norway already from the outset.²⁰⁹

208 United Nations, Vienna Convention on the Law of Treaties, 23.05.1969, United Nations, Treaty Series, vol. 1155, p. 331.

209 See also related critique of the amended section 32(1)(d) above in section 3.1.1 of this report.

5 Continuing denial of access to territory

Tor Espen Haga, chief of the National Police Immigration Service (PU) in Finnmark during the winter of 2015/2016, has since explained to the media how he at the time “physically stood up on the border and rejected asylum-seekers.”²¹⁰ The decisive factor mentioned by Haga was the government’s decision that Russia shall be considered a safe country. According to Haga, “this meant that we could turn asylum-seekers and say that they had to seek asylum in Russia.”²¹¹

A more detailed description of measures taken by the police regarding asylum-seekers arriving through the border crossing at Storskog was to be published in a self-evaluation report by the National Police Directorate (*Politidirektoratet*, referred to as POD). In June 2016, two months after the report was to be published, POD changed its mind and decided not to publish the report, drawing criticism from the media.²¹² What appears to be a finalized version of the report was nevertheless accessible for several months in 2016 and 2017 on POD’s own server, discoverable by a simple Google-search.²¹³

According to the POD’s report, the arrivals of asylum applicants at Storskog stopped completely on 30 November 2015. The report provides insight into “counter measures” at the Norwegian national border that have in effect stopped further arrivals of asylum-seekers. It should be noted that an individual intending to cross the border from Russia to Norway first hands her passport to a Russian official at the Russian side, who in turn delivers the passport to a Norwegian official at the Norwegian national border. The passport is checked at the Norwegian side and then given back to the Russian official, who then returns it to the individual waiting at the Russian side. If everything is in order, the individual is subsequently allowed to pass the Russian checkpoint and approach the Norwegian national borderline. The POD’s report described countermeasures against persons not holding visas to Norway:

“After the legislative changes were adopted, and Russia was portrayed as a safe third country, the police could initiate counter measures against the asylum influx. That is why the Russian authorities were notified on Sunday, November 29, that Norwegian Police from 07.00 am on Monday, November 30, would stand on the borderline, perform advanced passport control and advise all persons without a valid entry permit to turn before they reach the national border. That is exactly how the procedure was implemented the next day – the first three handed passports were checked and sent back with the message that these persons did not meet the requirements to enter

210 NRK Finnmark, “Testet Russland på vegne av regjeringen”, 28.03.2017, available at: <https://www.nrk.no/finnmark/testet-russland-pa-vegne-av-regjeringen-1.13446183>

211 Ibid.

212 NRK Finnmark, “Politiet nekter å offentliggjøre Storskog-rapport”, 01.07.2016, available at: <https://www.nrk.no/finnmark/politiet-nekter-a-offentliggjore-storskog-rapport-1.13022965>; Verdens Gang (VG), “VG mener: Slutt med hemmeligholdet”, 09.07.2016, available at: <https://www.vg.no/nyheter/meninger/i/vLqOB/vg-mener-slutt-med-hemmeligholdet>

213 Politidirektoratet (POD), Den langsomme krisen – asylankomster over Storskog grensepasseringssted – erfaringer fra høsten 2015, undated. The report had previously been accessible on POD’s server under the following link (inactive): https://www.politiet.no/vedlegg/lokale_vedlegg/politidirektoratet/Vedlegg_3734.pdf The report is now accessible at NOAS’ server at: <https://www.noas.no/wp-content/uploads/2017/09/PU-rapport-Storskog.pdf>

Norway and should not be sent to the borderline. None of these persons were sent. The next two passports were also sent back, but the two owners cycled anyway to the borderline. After being advised to turn back, they stopped and turned. After this event, no third nationals were sent to the national border.”²¹⁴

Whether the above terms “advised to turn back” are a euphemism for a physical pushback is difficult to say. However, it appears rather clear that the two cyclists mentioned above were denied the opportunity to apply for asylum while under Norwegian jurisdiction at the Norwegian national border. Without independent monitoring at the border, it is difficult to ascertain whether the same did not happen previously to other asylum-seekers.

On 24 November 2015, the Ministry issued an instruction to the Police Directorate,²¹⁵ which instructed the police on the Norwegian side of the border to consistently notify the Russian border guards that persons without an entry permit to Norway will be sent back to the Russian side. According to the instruction, the Russian border guards must be requested to not let such persons through the Russian checkpoint. Specifically, the instruction, which is still in force, states the following:

“When handing over the travel documents back to the Russian border guard, a written note in Russian must be handed over at the same time, addressed to the Russian authorities, stating that the holders of the specified travel documents do not have a valid visa to Norway and that entry for these persons is to be considered illegal entry according to Article 10(4) of the readmission agreement. Russian authorities are therefore to be requested to not let these persons through the Russian side. Furthermore, the note must state that persons who do not have a valid entry permit to Norway will be rejected and returned to Russia and that this will as a main rule also apply to persons who apply for asylum in Norway.”²¹⁶

It should be noted that Article 10(4) of the readmission agreement between Norway and Russia²¹⁷ simply specifies that unlawfulness of entry “shall be established by means of the travel documents of the person concerned in which the necessary visa or residence authorisation for the territory of the requesting State is missing.” Just like the rest of the readmission agreement, it says nothing about allocation of responsibility for asylum applications submitted under the jurisdiction of the respective countries, as previously pointed out in section 3.3.1 above.

After both high and low level meetings between the Norwegian and the Russian side regarding administration of the border crossing at Storskog,²¹⁸ the Russian side does no longer seem to permit people, including asylum-seekers, to approach the Norwegian national border, unless they have an entry permit. In 2016, asylum-seekers arriving at Storskog were registered only in three instances.²¹⁹

214 Ibid., p. 16.

215 Justis- og beredskapsdepartementet, Instruks – Rutiner for rask håndtering av personer som ankommer over norskrussisk landegrense (Storskog) uten gyldig visum eller annen gyldig innreisetillatelse til Norge, 15/7814- EST, 24.11.2015, available at: <https://www.regjeringen.no/no/dokumenter/instruks---rutiner-for-rask-handtering-av-personer-som-ankommer-over-norskrussisk-landegrense-storskog-uten-gyldig-visum-eller-annen-gyldig-innreisetillatelse-til-norge/id2474019/>

216 Ibid, section 3.1.

217 Agreement between Norway and Russia on readmission, in force since 01.12.2008, available at: <https://www.udiregelverk.no/en/documents/bilateral-agreements/2007-06-08e2/>

218 Dokument nr. 15:2(2015–2016), spørsmål nr. 256 besvart 1. desember 2015 av justis- og beredskapsminister Anders Anundsen, p. 143, available at: <https://www.stortinget.no/globalassets/pdf/dokumentserien/2015-2016/dok-15-2-2015-2016.pdf>

219 Justis- og beredskapsdepartementet, Høringsnotat – Evaluering og videreføring av midlertidige endringer i utlendingsloven vedtatt på bakgrunn av forslag i Prop. 16 L (2015–2016), 19.01.2017, p. 3. available at: <https://www.regjeringen.no/no/dokumenter/evaluering-og-videreforing-av-midlertidige-endringer-i-utlendingsloven-vedtatt-pa-bakgrunn-av-prop.-16-l-2015-2016/id2526794/>

According to the ministerial instruction, an asylum-seeker without an entry permit to Norway approaching the border crossing at Storskog will also receive a formal refusal to approach the Norwegian national border from the Norwegian authorities.²²⁰ This has been further explained in a letter from the Ministry of Justice and Public Security to NRK:

“In connection with the sharp increase of arrivals this fall, it has been decided through dialogue between the chief of police, the National Police Directorate and the Ministry of Justice and Public Security to inform all those at the Russian border that access to Norwegian territory requires a valid visa. The leaflet that is being drawn in these days is based on a letter from 2012. It will be added to the documents when they are evaluated on the Norwegian side and transferred to the individual when he or she receives the documents back on the Russian side. It is not a message to Russian border guards.”²²¹

As a result of these border practices and the apparent cooperation from the Russian border officials, Norway has effectively abolished the institute of asylum on its border with Russia. It should be noted that these border procedures may also affect Russian citizens, as they do not generally enjoy visa-free access to Norway.²²²

5.1 Criticism

The events of 30 November 2015 at the Norwegian national border, described in the POD’s self-evaluation report above, imply a violation of the prohibition of collective expulsion in Article 4 of Protocol No. 4 to the European Convention on Human Rights (ECHR). It seems rather clear from the report that the two cycling asylum-seekers were denied the opportunity to apply for asylum while they were under Norwegian jurisdiction at the Norwegian national border and under “effective control”²²³ of the Norwegian border guards.

The requests from the Norwegian side to the Russian border guards to not let persons without visa approach the Norwegian national border are also problematic, as they in effect deprive the Refugee Convention of its practical meaning. By denying access to the Norwegian territory at Storskog to persons without visa, asylum-seekers are in practice denied access to the asylum procedure. These requests can therefore hardly be squared with the legal obligation to implement the Refugee Convention in line with the principle of good faith,²²⁴ which “obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized”.²²⁵

220 Justis- og beredskapsdepartementet, Instruks – Rutiner for rask håndtering av personer som ankommer over norskrussisk landegrense (Storskog) uten gyldig visum eller annen gyldig innreisestillatelse til Norge, 15/7814- EST, 24.11.2015, section 3.1, available at: <https://www.regjeringen.no/no/dokumenter/instruks---rutiner-for-rask-handtering-av-personer-som-ankommer-over-norskrussisk-landegrense-storskog-uten-gyldig-visum-eller-annen-gyldig-innreisestillatelse-til-norge/id2474019/>

221 NRK Finnmark, “Mener Norge selv kunne stoppet asylstrømmen”, 10.11.2015, available at: <https://www.nrk.no/finnmark/mener-norge-selv-kunne-stoppet-asylstrommen-1.12647229>. See also: Dokument nr. 15:2(2015–2016), spørsmål nr. 183 besvart 19. november 2015 av justis- og beredskapsminister Anders Anundsen, p. 52 and spørsmål nr. 256 besvart 1. desember 2015, p. 143, available at: <https://www.stortinget.no/globalassets/pdf/dokumentserien/2015-2016/dok-15-2-2015-2016.pdf>

222 The list of countries with a visa-free access to Norway is available at: Utlendingsdirektoratet (UDI), Personer som ikke trenger visum for å besøke Norge (visumfri), available at: <https://www.udi.no/ord-og-begreper/personer-som-ikke-trenger-visum-for-a-besoke-norge/>

223 N.D. and N.T. v. Spain, (app. nos. 8675/15 and 8697/15), ECtHR, 03.10.2017, para. 54, available at: <http://hudoc.echr.coe.int/eng?i=001-177683>

224 The principle is expressed, inter alia, in Article 26 of the Vienna Convention on the Law of Treaties.

225 International Court of Justice (ICJ), *Gab ikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25.09.1997, ICJ Reports 1997, pp. 78-9, para. 142, available at: <https://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>

Setting aside the issue of jurisdiction for the moment, Norway's shared responsibility for chain *refoulement* could potentially become apparent for example in cases concerning nationals of countries characterized by generalized violence, such as Syria or Yemen, where a passport delivered from the Russian side to the Norwegian border authorities indicates that the person is without legal residence in Russia. It bears repeating, however, that any migrant from any country could be a refugee or otherwise in need of international protection, even if not originating from a war-torn country. Even Russian citizens, for example from Chechnya, may be refugees.²²⁶ Without some form of merits assessment, it is impossible to determine whether an asylum-seeker needs international protection.

Admittedly, there are clear jurisdictional obstacles preventing a legal challenge against such border practices. The Norwegian approach of requesting the Russian border guards to prevent asylum-seekers from reaching the Norwegian national border is in principle comparable to the Italian approach of requesting the Libyan coastguard to prevent asylum-seekers from ever reaching Italian territorial waters. In both situations, jurisdiction within the meaning of Article 1 of the ECHR is neither established by presence of asylum-seekers on the territory of the requesting state nor extraterritorially through effective control of the authorities of the requesting state over the individuals in question.

However, it should be noted in this context that jurisdictional obstacles posed by current case law of the European Court of Human Rights on extraterritorial jurisdiction might not necessarily be insurmountable.²²⁷ As recently pointed out by Violeta Moreno-Lax and Mariagiulia Giuffr :

“Knowingly entering into an agreement with unsafe countries, such as Libya and Turkey, where risks of (direct and indirect) refoulement, in both its material and procedural facets, are blatant and reliably documented, with the result of heightening the possibility of an Article 3 ECHR violation, instead of diminishing or avoiding it, should be adjudged to trigger the action of the ECHR. Equally, action that fosters the curtailment of the right to leave – which is the direct consequence of the EU-Turkey deal/EU-Libya MoU – is incompatible with Article 2 Protocol 4 ECHR and may lead to responsibility on the part of the EU Member States for unjustifiable/disproportionate interference with the freedom to exit Turkey and/or Libya of (forced/voluntary) migrants. The eventual violation that may result from the combination of support delivered by EU countries, on one hand, and direct action in contravention of the relevant standards by Turkey/Libya, on the other hand, will be jointly attributable to Turkey/Libya and the EU Member States for their independent contribution to a single harmful outcome [...].”²²⁸

The possibility that the Norwegian practice of denying access to the asylum procedure on its border with Russia might in future be found in breach of its *non-refoulement* obligations should not *a priori* be ruled out.

226 That a person is from Chechnya could be evident to the Norwegian border guards from the information in the passport about the place of issuance of the passport.

227 Miles Jackson, “Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction”, in *European Journal of International Law*, Volume 27, Issue 3, 01.12.2016, pp. 817–830, available at: <https://academic.oup.com/ejil/article/27/3/817/2197250>

228 Violeta Moreno-Lax and Mariagiulia Giuffr , “The Rise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Forced Migration Flows”, 31.03.2017, S. Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar, forthcoming), p. 25, available at SSRN: <http://dx.doi.org/10.2139/ssrn.3009331>

6 Beyond Storskog

The amended section 32(1)(d) of the Immigration Act, stating that merits examination of an asylum application “may be refused” if “the applicant has travelled to the realm after having stayed in a state or an area where the foreign national was not persecuted” has since been applied also in respect to third countries other than Russia.

According to a recent impact assessment report from the Norwegian Directorate of Immigration (UDI), the above cited provision was applied by the UDI in five such cases during 2017, referring asylum applicants to Bosnia and Ukraine.²²⁹ Four of these decisions have been later overturned by the *Immigration Appeals Board* (UNE).²³⁰ No such decisions were issued by the UDI in 2016.²³¹ In 2018, the UDI issued seven such decisions.²³²

Interestingly, the UDI has attempted to apply the provision to certain asylum-seekers who have previously stayed in Greece. Establishing the responsibility of Greece pursuant to the Dublin III Regulation was thereby not deemed necessary. This attempt has failed however, as Greece responded negatively and requested that Norway apply the Regulation.²³³

As highlighted by the Ministry in its proposal to make the amended ‘safe third country’ provision permanent, UNE applied the provision in circa 40 cases by May 2017 that concerned persons who have stayed in Brazil, United Arab Emirates, Malta, Hungary, Romania, Italy and Greece.²³⁴ It should be noted that cases that are assessed on the merits and rejected by the UDI may nevertheless be refused merits assessment on appeal by UNE. This may happen when new information revealed during the appeal process shows that the applicant has previously stayed in a safe third country.²³⁵

It is important to highlight that the right to free legal assistance has been effectively abolished in asylum cases where the assessment on the merits is denied either pursuant to the amended ‘safe third country’ provision cited above²³⁶ or a separate ‘first country of asylum’ provision concerning persons already benefitting from international protection in another country.²³⁷ Asylum-seekers arriving after 7 December 2015, whose applications are denied assessment on the merits pursuant to those two

229 Utlendingsdirektoratet (UDI), vedlegg 4 til UDIs virksomhetsrapport for 2017, Rapport 2017: Virkninger av regelverks- og praksisendringer i 2016/2017, p. 6, available at: <https://www.noas.no/wp-content/uploads/2019/01/05-effekt-av-lovendringer-2016-5.pdf>

230 Ibid.

231 Ibid.

232 Email from UDI's statistics department (statistikk@udi.no) to NOAS, 27.11.2018. Unfortunately, the UDI was not able to list the specific third countries that the applicants were referred to in 2018.

233 Utlendingsdirektoratet (UDI), Oppdatering på status i saker etter GI-07/2017 Instruks om tolking av utlendingsloven § 32 – overføring av asyl-søkere til Hellas i henhold til Dublin III-forordningen, 14.05.2018, p.2, available at: <https://www.noas.no/wp-content/uploads/2019/01/06-utl-32-Dublin-Hellas.pdf>

234 Prop. 149 L (2016–2017), Endringer i utlendingsloven mv. (videreføring av innstramminger mv.), 16.06.2017, p. 21, available at: <https://www.regjeringen.no/no/dokumenter/prop.-149-l-20162017/id2556657/>

235 Arguably, the correct approach would be to return such cases back to the UDI for new assessment.

236 Norwegian Immigration Act, section 32(1)(d), available at: <https://lovdata.no/NLE/lov/2008-05-15-35/section32>

237 Norwegian Immigration Act, section 32(1)(a), see hyperlink above.

provisions, are no longer eligible for free legal assistance without means assessment, as a result of an amendment of section 17-18 of the Immigration Regulations.²³⁸ This poses the issue of whether such applicants in reality will ever find a lawyer willing to take on the case, since the County Governor (*Fylkesmannen*) might deny an application for free legal assistance.²³⁹ In practice, such applications are almost never granted to asylum-seekers.

According to the UDI's impact assessment report, the loss of free legal aid in these asylum cases has led to logistical difficulties concerning the issue of how to deliver UDI's refusals of merits assessment (inadmissibility decisions) to the applicants.²⁴⁰ According to the report, the coordination between the UDI and the National Police Immigration Service (PU) has not worked very well. At certain times, PU was willing to convey these decisions. This meant in practice that the UDI had to wait until it issued a sufficient number of inadmissibility decisions before it could forward them to PU, which would then notify the applicants about the decisions at the same time as effectuating their removal from Norway. More recently, the UDI had to inform asylum-seekers about inadmissibility decisions itself due to PU's lack of cooperation. The report points out that loss of free legal aid in these cases has not achieved the intended effect to remove these asylum-seekers from Norway as soon as possible, as they in practice have to stay "a disproportionately long time" in reception centres without knowing about the outcome of their applications.²⁴¹

It is important to highlight in this context that, since 1 October 2016, inadmissibility decisions issued pursuant to the two provisions "may be implemented immediately", in accordance with section 90(3) of the Immigration Act. Pursuant to this provision, a time limit for requesting suspensive effect shall only be given "if it is not clear that the application should be refused examined on its merits". This amendment was proposed in 2016 as part of a larger legislative package of restrictions of the rights of asylum-seekers and refugees.²⁴² In the preparatory works, the Ministry "emphasizes in this context that, when rejecting to a safe third country, it must be expected that in practice it will be clear in the vast majority of cases that rejection shall take place."²⁴³ The Ministry further specified that if time limit for requesting suspensive effect is given, it may be set to be "very short, for example to a few hours".²⁴⁴ The Ministry further mentioned that section 42 of the Public Administration Act²⁴⁵ in any case continues to apply, even if no time limit is given. This provision generally allows submitting a request for deferred implementation of an administrative decision (i.e. suspensive effect). As pointed

238 See: Forskrift om endring i forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften), available at: <https://lovdata.no/dokument/LTI/forskrift/2015-12-07-1402> See also: Justis - og beredskapsdepartementet, Høringsnotat: Høring – endringer i utlendingslovgivningen (innstramminger II), Section 10.3.4.1, pp. 99-100, available at: <https://www.regjeringen.no/contentassets/2ff18fdco6674a43ae3fa26da4532abc/horingsnotat.pdf>

239 Statens Sivilrettsforvaltning, Rundskriv om fri rettshjelp, SRF-1/2017, ref. 2016/393 VDA, 20.12.2016, available from: <http://www.sivilrett.no/getfile.php/3923887.2254.zjwbunjwnklnqk/Rundskriv+SRF-1-2017+om+fri+rettshjelp++endret+versjon+1+9+2017.pdf>

240 Utlendingsdirektoratet (UDI), vedlegg 4 til UDIs virksomhetsrapport for 2017, Rapport 2017: Virkninger av regelverks- og praksisendringer i 2016/2017, p. 7, available at: <https://www.noas.no/wp-content/uploads/2019/01/05-effekt-av-lovendringer-2016-5.pdf>

241 Ibid.

242 Prop. 90 L (2015–2016), Endringer i utlendingsloven mv. (innstramminger II), 05.04.2016, p. 175, available at: <https://www.regjeringen.no/no/dokumenter/prop-90-l-20152016/id2481758/>

243 Ibid.

244 Ibid.

245 Norwegian Public Administration Act, Lov om behandlingssåten i forvaltningssaker (forvaltningsloven), available at: <https://lovdata.no/dokument/NL/lov/1967-02-10> An up to date unofficial translation of the Public Administration Act (last updated 16.06.2017) is available at: <https://www.sdir.no/contentassets/83952ba07df145b18d035886ddd28bfo/public-administration-act.pdf?t=1548236045225>

out by the UDI, if a foreigner requests suspensive effect, the UDI will have to consider the request before the inadmissibility decision is implemented.²⁴⁶ If suspensive effect is requested, it is not given automatically, but subject to individual assessment – the same applies to requests for suspensive effect that reach UNE.

The combination of the restriction of the right to free legal assistance along with the possibility to immediately implement decision to deny merits assessment of asylum claims has implications for the right to an effective remedy under Article 13 of the European Convention of Human Rights. It should be recalled that in *M.A. and others v. Lithuania*, “an appeal before an administrative court against a refusal of entry was not an effective domestic remedy within the meaning of the Convention because it did not have automatic suspensive effect”.²⁴⁷ This implies also a serious risk of *refoulement* in breach of Article 3 of the Convention. As pointed out by UNE, there have been instances where UNE reversed UDI’s inadmissibility decisions after the asylum applicants had already been deported.²⁴⁸

Another recent legislative amendment, which has so far not been used, should also be mentioned in this context. Passed in 2016, a new section 32(5) of the Immigration Act opens for immediate rejection by police officers of asylum-seekers at Norway’s borders with Nordic neighbouring countries “in a crisis situation with an extraordinarily high number of arriving asylum seekers.” Application of this provision requires prior activation by the King in Council, which in practice means by the government. The preparatory works explicitly presumed that, if activated, Norway will cease to abide by the Dublin III regulation as a response to a collapse of the Dublin system if other states stop registering a large number of asylum-seekers transiting through their territory.²⁴⁹

246 Utlendingsdirektoratet (UDI), vedlegg 4 til UDIs virksomhetsrapport for 2017, Rapport 2017: Virkninger av regelverks- og praksisendringer i 2016/2017, p. 8, available at: <https://www.noas.no/wp-content/uploads/2019/01/05-effekt-av-lovendringer-2016-5.pdf>

247 *M.A. and others v. Lithuania* (app. no. 59793/17), ECtHR, 11.12.2018, para. 119, available at: <http://hudoc.echr.coe.int/eng?i=001-188267>

248 Prop. 149 L (2016–2017), Endringer i utlendingsloven mv. (videreføring av innstramninger mv.), 16.06.2017, p. 36, available at: <https://www.regjeringen.no/no/dokumenter/prop.-149-l-20162017/id2556657/>. See also: Prop. 90 L (2015–2016), Endringer i utlendingsloven mv. (innstramninger II), 05.04.2016, p. 175, available at: <https://www.regjeringen.no/no/dokumenter/prop.-90-l-20152016/id2481758/>

249 Prop. 90 L (2015–2016), Endringer i utlendingsloven mv. (innstramninger II), 05.04.2016, p. 34, available at: <https://www.regjeringen.no/no/dokumenter/prop.-90-l-20152016/id2481758/>