The New "Third Country" Rules; Admissibility of asylum claims

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Explanatory Memorandum to the Statement of Changes in Immigration Rules presented to Parliament on 10 December 2020 (HC 1043)

6.3 The changes to the Rules on Place of Claim and Inadmissibility are being laid as part of the ambition to overhaul our approach to asylum and illegal migration, delivering a firm but fair system. These measures will support our efforts to intensify the response to small boats and clandestine entry and lay the groundwork for new legislation next year.

…

7.1 The Immigration Rules do not presently set out an exhaustive list of the places and circumstances in which asylum claims can be properly made. The changes proposed address this shortcoming and reinforces the longstanding principle of designated places of claim.

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Changes to the third country inadmissibility rules

7.2 In broad terms, paragraphs 345AC-345D, as will apply from 1 January 2021 if we make no changes, provide a means to treat as inadmissible to the UK asylum system the claim of someone who has travelled through or has a connection to a safe third country; this will include individuals coming from EU Member States.

7.3 However, as currently drafted, they allow claims to be treated as inadmissible only if the asylum applicant is accepted for readmission by the third country through which they have travelled or have a connection. A stronger approach to disincentivise individuals is needed to deter claimants leaving safe third countries such as EU Member States, from making unnecessary and dangerous journeys to the UK.

7.4 The changes separate the readmission requirement from the inadmissibility decision, allowing us to treat applicants as inadmissible based solely on whether they have passed through one or more safe countries in order to come to the UK as a matter of choice. They will allow us to pursue avenues for their removal not only to the particular third countries through which the applicant has travelled, but to any safe third country that may agree to receive them.

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Inadmissibility of non-EU applications for asylum

345A. An asylum application may be treated as inadmissible and not substantively considered if the Secretary of State determines that:

(i) the applicant has been recognised as a refugee in a safe third country and they can still avail themselves of that protection; or

(ii) the applicant otherwise enjoys sufficient protection in a safe third country, including benefiting from the principle of non-refoulement; or

(iii) the applicant could enjoy sufficient protection in a safe third country, including benefiting from the principle of non-refoulement because:

(a) they have already made an application for protection to that country; or

(b) they could have made an application for protection to that country but did not do so and there were no exceptional circumstances preventing such an application being made, or

(c) they have a connection to that country, such that it would be reasonable for them to go there to obtain protection.

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Safe Third Country of Asylum

345B. A country is a safe third country for a particular applicant, if:

(i) the applicant's life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;

(ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention;

(iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country; and

(iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country."

345C. When an application is treated as inadmissible, the Secretary of State will attempt to remove the applicant to the safe third country in which they were previously present or to which they have a connection, or to any other safe third country which may agree to their entry."

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Exceptions for admission of inadmissible claims to UK asylum process

345D. When an application has been treated as inadmissible and either

(i) removal to a safe third country within a reasonable period of time is unlikely; or

(ii) upon consideration of a claimant's particular circumstances the Secretary of State determines that removal to a safe third country is inappropriate

the Secretary of State will admit the applicant for consideration of the claim in the UK.

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Policy background

- HC 1043: Rules 345A to 345D replaced former paras 345A-E and took effect at the end of the TP at 11pm 31/12/20 in relation to non-EU applications for asylum made thereafter.
- Third Country Rules for applicants entitled to reside in EU countries were unchanged: rr326E-F: deemed 'safe' unless 'exceptional circumstances' as defined.
- Rules respond to the UK's lack of access to the Eurodac fingerprint database following Brexit and the withdrawal from those parts of the CEAS it had opted into- such as 'the Dublin system'.
- The 'family reunion' provisions of Dublin III were saved by the EU Exit Regs 2019 such that they continued to apply to 'take charge/back' requests made to the UK before the end of TP.
- Statistical change since 2016 when UK has received more people than it has transferred to member states under Dublin III.

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Re-admission Agreement before decision?

- Yes and No. Explanatory Memorandum 7.3- 7.4 explain the mischief: separation of the readmission requirement from the inadmissibility decision.
- Previous version of the rules only allowed claims to be treated as inadmissible if the applicant was accepted for readmission- by the TC they travelled through or had a connection: see e.g. archived r345C(vi).
- Yes new r345C does not contain such a requirement, BUT
- Policy guidance: **'Inadmissibility: safe third country cases' (v.5.0, 31/12/20)** at p14 states:
  - *"TCU must thoroughly review what is known about the case and consider whether it meets the requirements of paras 345A to 345B… where it does meet the requirements, no decision must be made before return agreements are obtained"*

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Policy goes further than the Rules

- UASC are specifically excluded under the guidance from the inadmissibility process.
- The 'long-stop':
  - under r345D(i) an asylum applicant claim will be admitted for substantive consideration "where removal to a safe third country within a reasonable period of time is unlikely"; BUT this is not defined.
  - Under the policy: "the agreement by a third country to accept a person's return must be obtained no later than 6 months from the date the person claimed asylum. If there is no such agreement, the person's claim must be admitted for substantive consideration."
- Human Rights claim cannot be treated as inadmissible under the Rules: though can be certified as 'clearly unfounded' under similar provisions in Sch 3 of AI(ToC)A 2004.

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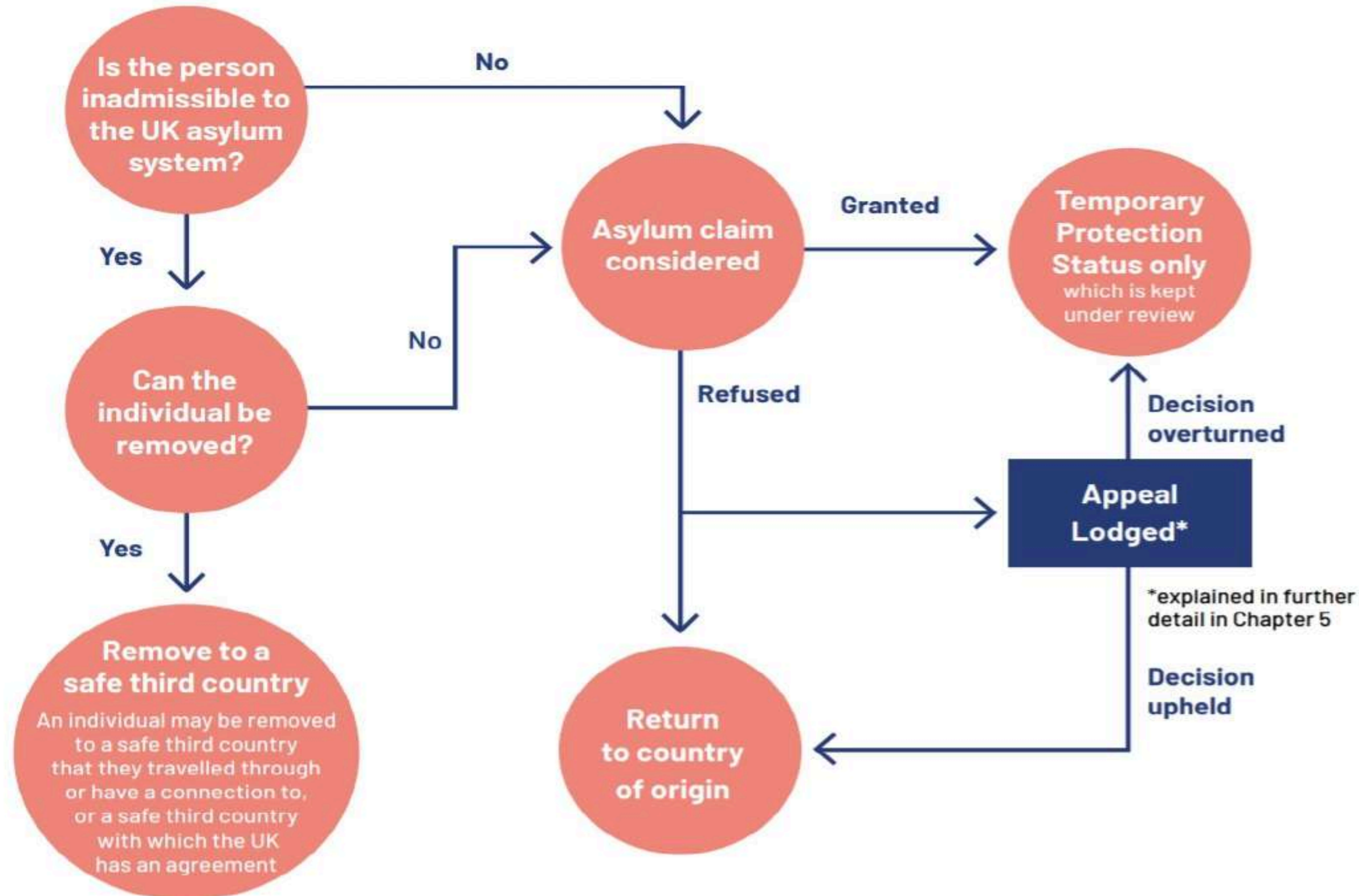
Absence of Definitions in Rules and Policy

- Notably absent from both are definitions for terms in the new rules.
- r345A(iii)(b):
  - "could have made an application for protection to that country";
  - "Exceptional circumstances preventing such an application being made".
- r345A(iii)(c): Safe third country connectivity
  - Yes 'safe third country' r345B(i)-(iv) but no inclusion of previous non-exhaustive criteria to have regard to in previous r345D(i)-(iv) and elaborated in previous version of policy guidance - e.g. v4.0.

Challenging decisions

- Most inadmissibility decisions identified by voluntary disclosure at screening interview: part 3 (Travel and third country); see 'Asylum screening and routing' guidance (v.6.0).
- 'Internal referral' to TCU from NAAU summarising reasons and evidence: not a decision; BUT 'Notice of Intent' to claimant purporting not to be a decision? The guidance template letter does not purport to be a minded to refuse letter nor does it invite reps. Q: procedural fairness?
- The decision: balance of probabilities whether rr345A-B are met. If so, consideration will be given to certification under Sch 3 (parts 2 or 5) to the 2004 Act: appeal rights from abroad on limited grounds.
- Para 353 of IRs does not apply as not decisions on claim itself but reps after HRs certification (or after final determination of in-country appeal before removal if not certified) will be subject of 'fresh claim' process. JRs likely to have suspensive effect.



Source:
New Plan for Immigration Policy Statement

Points to consider (1)

- What is the purpose of these changes?
- How will the Home Office know if someone has travelled through "a safe third country"?
- What are "exceptional circumstances preventing [an application for protection] being made" in that country?
- No returns agreements with safe third countries.
- Human rights claims cannot be deemed inadmissible and must be considered, even if to certify them.
- Issues arising from removal to a third country:
  - Safety, including safety from onward refoulement
  - Lack of connection
  - Reasons why other third country not suitable, e.g. lack of adequate mental healthcare

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Points to consider (2)

- ‘6 month long stop’ only until third country accepts a person’s return.
- Reasonable timescale for removal can start from the point of disclosure of presence in/connection to third country.
- If someone is referred to NRM, the reasonable timescale for removal “will effectively be paused”.
- Inconsistencies between the Rules and the Guidance:
  - Guidance contains ‘6 month long stop’ but not in the Rules.
  - Guidance says UASC not suitable for inadmissibility process but Rules do not say this.

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Points to consider (3)

- What about asylum claims made before January 2021?
- Possible challenges?
  - JR of inadmissibility decision
  - Delay
  - Systemic challenges
- Other countries are adopting similar measures – e.g. Ireland. What does this mean for application of the Refugee Convention internationally?

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“New plan for immigration” policy statement

- “…pursue returns agreements and arrangements with our international partners as part of future migration partnerships”
- “…keep the option open, if required in the future, to develop the capacity for offshore asylum processing…”
- “…introduce new asylum reception centres to provide basic accommodation and process claims…allow for decisions and any appeals following substantive rejection of an asylum claim to be processed fairly and quickly onsite.”
- “…new fast-track appeals process – with safeguards to ensure procedural fairness.”
- “if [asylum applicants] did not come to the UK directly, did not claim without delay, or did not show good cause for their illegal presence…consider them for temporary protection…a temporary period, no longer than 30 months, after which individuals will be reassessed for return to their country of origin or removal to another safe country.”
- Assessing credibility of fear of persecution “on the balance of probabilities”
- New measures for assessing age
- Use of threat “to more carefully control visa availability where a country does not co-operate with receiving their own nationals who have no right to be in the UK”

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Any Questions?

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