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ACCESS TO ASYLUM DENIED AT POLISH-BELARUSIAN BORDER

In the recent months EU countries bordering Belarus have experienced sharp increase in the number of migrants irregularly crossing their external borders from the direction of Belarus. It is a result of the recent policy implemented by the Belarusian authorities aimed at exerting a political pressure on the EU. Lukashenko's regime is accused of facilitating arrivals of third country nationals to EU borders and encouraging them to enter the EU in an unauthorised manner.¹

Since the beginning of August, Polish Border Guard report daily on multiple groups of migrants, including those from Iraq, Afghanistan, Somalia and Syria, attempting to irregularly cross the Polish-Belarusian border and being returned to Belarus. Reports do not specify the legal basis for the actions of Border Guards and do not indicate through which border crossings these persons are being returned to Belarus, which raises concerns regarding the legality of such actions, considering that Belarus has suspended the readmission agreement concluded with the EU. According to journalists and NGOs, Border Guard officers apprehend and send back to Belarus also migrants who have expressed their wish to apply for international protection. Migrants are being escorted to the border line and left there, usually in the middle of the forest. As a result, they often get lost, walking the forest for days and trying to enter either Poland or Belarus, while being denied entry to either of the states. They often lack food, water, warm clothes, and proper shelter, while the temperatures at night can drop to as low as 2-4 degrees. Some of migrants are in critical condition and require immediate medical assistance. In recent days, the bodies of several foreigners who had died of exhaustion were found at the border.

At the same time, since mid-August a group of migrants from Afghanistan have been stranded at the Polish-Belarusian border in Usnarz Gorny. On the Belarusian side, migrants are cordoned off by the Belarusian Border Guard, which prevents them from returning to Belarus, while on the Polish side they are cordoned off by Polish Border Guard officers, preventing them from entering the territory of Poland. Each of the persons in this group repeatedly, directly and in the presence of Polish officers, have expressed their wish to apply for international protection in Poland, but the relevant procedures in this regard have never been initiated. On 25 August 2021, the European Court of Human Rights issued an interim measure obliging Polish authorities to provide migrants with food, clothing, medical assistance and - if possible - temporary shelter.² The order has not been implemented until today as according to the official position of Polish government, the group of migrants is on the territory of Belarus. However, the foreigners were also directly contacted by employees of non-governmental organizations and a member of the Polish Parliament. This indicates that they are under the jurisdiction of the Polish authorities.

In August 2021, two amendments of national law have entered into force, affecting the situation at the border. Firstly, the Regulation of 13 August 2021, allowed to place twice as many migrants in guarded centres than before. Secondly, the Regulation of 20 August 2021, introduced provisions according to which persons

¹ EUobserver, Lukashenko's refugee-abuse to see new EU sanctions, 8.09.2021, <https://euobserver.com/world/152839>.

² ECtHR, *Amiri and Others v. Poland*, app no 42120/21.

unauthorized to enter Poland are instructed about the obligation to immediately leave the territory of Poland and are returned to the state border line. The Regulation does not provide exceptions for persons seeking international protection which, according to Polish Ombudsman, contradicts the Geneva Convention on the Status of Refugees and the Constitution of the Republic of Poland.³

Furthermore, on 23 August 2021, a government draft act amending the provisions of the migration law was submitted. It provides for a simplified procedure of returning migrants who have crossed the border of Poland in an unauthorized manner. According to the draft law the foreigner may be returned from Poland even if he/she make application for international protection and without assessing the risk of human rights violation. Appeal against the removal order shall not have suspensive effect. The proposed provision also allows for leaving their applications for international protection without examination. The amendments, which were criticised by civil society organisations⁴, ODIHR⁵ and UNHCR⁶ as violating non-refoulement principle, are now being proceeded by the Parliament.

On 2 September 2021, a state of emergency was introduced in part of the Podlaskie and Lubelskie provinces. The regulation of the President of the Republic of Poland limited the possibility of staying in places indicated in the act, located in the immediate vicinity of the border with Belarus. Journalists and employees of monitoring organizations have not been included among those exempted from the ban. As a result, it is currently not possible for any independent observers to monitor the situation at the Polish-Belarusian border.

According to Helsinki Foundation for Human Rights (HFHR), the situation on the Polish-Belarusian border violates the provisions of both domestic and European law. Available information shows that migrants stranded at the Polish-Belarusian border in the town of Usnierz Gorny, as well as at least some of the migrants apprehended in the last weeks on the remaining parts of the border and sent back to Belarus, applied to representatives of the Polish authorities for international protection. Pursuant to the provisions of EU law, since the moment of expressing wish to apply for international protection migrants should be treated as “applicants for international protection” and should be provided with the possibility of formally submitting asylum application (Article 6 of the Directive 2013/32/EU). They should also have the right to remain on the territory of the Member State pending the examination of the application. Regarding other migrants, i.e., those not applying for international protection, proceedings on entry refusal or on return should be initiated in accordance with the provisions of the Directive 2008/115/EU. Neither national law nor EU law provide for the possibility of returning migrants from the EU territory without issuing an appropriate decision.

Denying migrants applying for international protection the right to enter Poland and sending them back to Belarus may lead to violation of the right to asylum (Article 18 of the Charter of Fundamental Rights of the EU), prohibition of collective expulsions of foreigners (Article 19 of the Charter) and violation of the principle of non-refoulement (Article 33(1) of the 1951 Geneva Convention on the Status of Refugees). It is worth noting that Belarus has already been recognised by the European Court of Human Rights⁷ as a country which is not safe for asylum-seekers. Regardless of the circumstances of crossing the border, it is the duty of the authorities to investigate, as part of an appropriate procedure, the individual situation of the migrant and not to return him or her from Poland if this would lead to a violation of their rights.

³ Letter of Polish Ombudsman to Minister of Interior and Administration of Poland, 25.08.2021, <https://bip.brpo.gov.pl/sites/default/files/Wystapienie%20RPO%20do%20MSWiA%2025.08.2021.pdf>.

⁴ HFHR comments: <https://www.hfhr.pl/wp-content/uploads/2021/09/HFPC-uwagi-do-projektu-ustawy-o-cudzoziemcach-i-o-udzielaniu-ochrony06092021.pdf>; Legal Intervention Association comments: <https://interwencjaprawna.pl/wp-content/uploads/2021/01/Komentarz-SIP-do-projektu-ustawy-druk-1507.pdf>.

⁵ OSCE Office for Democratic Institutions and Human Rights, Urgent opinion on draft amendments to the Aliens Act and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland and Ministerial Regulation on Temporary Suspension of Border Traffic at Certain Border Crossings, 10.09.2021, [https://bip.brpo.gov.pl/sites/default/files/2021-09/Opinia_ODIHR_10.09.2021_\(jez.angielski\).pdf](https://bip.brpo.gov.pl/sites/default/files/2021-09/Opinia_ODIHR_10.09.2021_(jez.angielski).pdf).

⁶ UNHCR, Observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265), 16.09.2021, <https://www.refworld.org/docid/61434b484.html>.

⁷ ECtHR, *M.K. and Others v. Poland*, apps nos 40503/17, 42902/17 and 43643/17, § 178 and *D.A. and Others v. Poland*, app no 51246/17, § 64.

In the opinion of HFHR, Poland is conducting mass illegal pushbacks at its border with Belarus. The legislative framework combined with the official statements of the members of Polish government⁸ seem to prove the existence of such systemic practice. Not only HFHR is concerned about illegal practices at the eastern border of Poland. Similar concerns have been raised, among others, by International Organisation for Migration (IOM)⁹ and Polish Ombudsman¹⁰. For these reasons, HFHR calls the European Commission to take action against Poland for unlawfully restricting access to the asylum procedure at its border with Belarus.

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⁸ Polska Times, Granica Polski z Białorusią. MSWiA: Nie ma zgody na wjazd do naszego kraju osób, które mogą stanowić zagrożenie dla naszych obywateli, 18.08.2021, <https://polskatimes.pl/granica-polski-z-bialorusia-mswia-nie-ma-zgody-na-wjazd-do-naszego-kraju-osob-ktore-moga-stanowic-zagrozenie-dla-naszyc/ar/c1-15761172>

⁹ IOM, Conditions for Migrants at EU-Belarus Border of Utmost Concern, 6.09.2021, <https://www.iom.int/news/conditions-migrants-eu-belarus-border-utmost-concern>.

¹⁰ Letter of Polish Ombudsman to Prime Minister of Poland, 20.08.2021: <https://bip.brpo.gov.pl/sites/default/files/Wystapienie%20generalne%20do%20PRM%2020.08.2021.pdf>.