**Please cite as:** EUAA, '4.1.1 Arriving to the European Union: Access to territory ' in *EASO Asylum Report 2021*, Januar 2022.

# 4.1.1 Arriving to the European Union: Access to territory



Challenges at the external borders of the EU continued and were reported to be exacerbated throughout 2020.[250] UNHCR noted the important decrease in arrivals by sea and land, but it observed an "increasing number of credible reports about pushbacks at European borders".[251] At the request of the European Parliament, FRA prepared a report on fundamental rights challenges at the EU's external borders and put forward some recommendations which could potentially improve fundamental rights compliance in border management. Together with the Council of Europe's Special Representative on Migration and Refugees, FRA also published guidance on the key safeguards in European law related to border management.[252] In addition, ECRE/ELENA drafted a legal note on securing and advancing access to asylum through international legal avenues, focusing on the principle of *non-refoulement*.

At the beginning of 2020, the Grand Chamber of the European Court of Human Rights (ECtHR) overturned the Chamber's judgment from 2017 and ruled in *N.D. and N.T.* v *Spain* that – in this particular case - an immediate return without the possibility to challenge the removal was not in breach of the right to an effective remedy, according to the ECHR in conjunction with the prohibition of collective expulsion under Protocol No 4. However, academic sources noted that this decision does not mean that pushbacks would be allowed and noted that the judgment confirmed the principles elaborated in earlier ECtHR case law, namely that pushbacks remain an illegal practice under the ECHR, Article 3 and that states must guarantee effective access to the asylum procedure.[253] In the context of the Asylum Procedures Directive, Article 3, this is guaranteed for applications made in the territory, including at the border, in the territorial waters or in transit zones of Member States. At the end of 2020, the Spanish Constitutional Court ruled that the specific asylum regime for Ceuta and Melilla is constitutional, basing its argumentation largely on the judgment in *N.D. and N.T.* v *Spain* and noting that the legislation must be applied in compliance with human rights instruments and international protection principles.

In May 2020, the ECtHR declared the case of a Syrian family to be inadmissible when they applied for short-term visas at the Belgian Embassy in Beirut to submit an application for international protection in Belgium, but the Immigration Office rejected their request. The court found that the family did not fall under the jurisdiction of Belgium in the sense of the ECHR, and thus, they cannot invoke Belgium's obligations under Articles 3 and 13. It also found Article 6 inapplicable, noting that entry to Belgium did not engage a civil right under the meaning of that article.

The ECtHR provided further guidance related to the right to asylum and the prohibition of collective expulsions in
July 2020, assessing a case that involved Polish border guards repeatedly refusing entry for nationals of Chechnya at the Terespol border crossing point with Belarus, even though they made it clear they intended to apply for asylum. The court unanimously found violations of the prohibition of torture or inhuman or degrading treatment, the prohibition of collective expulsion and the right to an effective remedy. Academic sources analysed the case in the light of the *N.D. and N.T.* v *Spain* judgment earlier that year, addressing the impact of whether the applicants tried to cross at an official entry point or in an irregular manner.[254]

Similar complaints about access to Poland were heard by the ECtHR, involving four applicants from Tajikistan who tried to cross the Polish-Ukranian border at Medyka several times to apply for asylum. They were refused entry and were returned to the Ukraine.[255] As a result of the growing concerns, a consortium of Polish NGOs set up a website at the beginning of 2020 which reports on the situation at the Polish-Belarusian border and the challenges encountered by potential applicants in accessing the asylum procedure. In an effort to address the various concerns, UNHCR offered to assist the Polish authorities in meeting their obligations under EU and international laws.[257]

Impediments to access to the asylum procedure were also reported in other areas. Civil society organisations cited the growing number of incidents along the Spanish-French, Italian-French and Italian-Swiss borders.[258] The French Council of State found that the authorities had manifestly infringed on the right to asylum when both the border police and the judge on appeal refused a woman from the Central African Republic and her 5-year-old son to enter the country from Italy, even though she expressed her wish to apply for asylum. In addition, civil society organisations and media highlighted the growing number of persons attempting to cross the Channel between France and the United Kingdom.[259]

UNHCR reported pushbacks into Serbia from neighbouring countries.[260] Furthermore, civil society observed difficulties in accessing the asylum procedure at airports. For example, the National Association of Border Assistance to Foreigners in France observed the lack of information on the right to seek asylum and highlighted the important role of the police in either hampering or facilitating the process.[261] The Irish Refugee Council noted unclarity on the instructions related to immigration control measures which target people with false documentation arriving by aircraft, where these people may have been returned before they had the opportunity to ask for asylum.[262]

***Turkish-Greek border***

The situation at the Turkish-Greek border escalated at the end of February 2020, when several thousands of people arrived following active encouragement by Turkish actors to take the land route to Europe through Greece.[263] In response, the Greek government passed an urgent legislative act suspending applications for 1 month from people arriving illegally following the publication of that act.[264]

The presidents of the European Council, the European Commission and the European Parliament, the president of Croatia (the country which held the rotating Presidency of the Council in the first

half of 2020) and the Prime Minister of Greece visited the Greek borders to gain better insight into the situation.[265] For rapid assistance, the European Commission presented an Action Plan for immediate measures to support Greece in managing the situation as a contribution to the extraordinary Justice and Home Affairs Council.[266] This involved financial assistance up to EUR 700 million for Greece, a new return programme coordinated by Frontex and appeals: i) to Member States to respond to the Civil Protection Mechanism to provide necessary supplies; ii) to EASO's call to provide 160 national experts to be deployed in Greece; and iii) to provide assets to launch two rapid border intervention operations by Frontex.[267] The Council of the EU in its statement underlined that: "The EU and its Member States remain determined to effectively protect EU's external borders. Illegal crossings will not be tolerated. In this regard, the EU and its Member States will take all necessary measures, in accordance with EU and international law. Migrants should not be encouraged to endanger their lives by attempting illegal crossings by land or sea. The Council calls upon the Turkish government and all actors and organisations on the ground to relay this message and counter the dissemination of false information. The EU will continue to actively fight human smuggling".[268]

Members of the European Parliament (MEPs) discussed the common EU response with the European Commission President[269] and the representative of the Croatian presidency.[270] The Council of Europe's Commissioner for Human Rights underlined that "(e)verything must be done to de-escalate violence in the border region, including by ensuring that law enforcement authorities refrain from using excessive force".[271] UNHCR called for "calm and easing of tensions on Turkey's borders with the European Union" and underlined that "(n)either the 1951 Convention Relating to the Status of Refugees nor EU refugee law provides any legal basis for the suspension of the reception of asylum applications".[272] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) urged the Greek authorities "not to resort to such a legislative measure again, even when faced by a potential increased influx of migrants".[273] ECRE appealed to the EU and national policy-makers to "stay calm and stay human", condemned the Greek legislative act and put forward recommendations on resolving the situation.[274] In a joint statement, 85 civil society organisations expressed their "deep concern" about the situation and its management.[275] Academia and think tanks also widely commented on the conflict, and the EU and Greek response to it.[276]

MEPs raised questions[277] on information that the crew of a Danish patrol boat, which was monitoring the Aegean Sea as part of the Frontex Operation Poseidon, refused an order from the national representative to return 33 rescued migrants to an inflatable boat and escort them back to Turkish territorial waters, in fear of endangering their lives.[278] The order was withdrawn and the vessel was then ordered to the Greek island of Kos, where the migrants were transferred to the Greek authorities. MEPs also raised questions based on journal reports about alleged pushbacks in the Aegean Sea, putting forward six cases when Frontex was allegedly present.[279] Civil society organisations and academia also expressed doubts concerning the legality of the actions.[280]

Frontex launched an internal inquiry into the incidents,[281] the European Ombudsman opened an inquiry to assess the agency's complaints mechanism,[282] the European Commission called the agency to organise an extraordinary Management Board meeting[283] and the European Parliament's LIBE Committee requested the agency's director to reply to a set of questions[284] and debated the situation with him during a hearing.[285] The Frontex Management Board Working

Group's final report concluded that "it has not been possible to completely resolve the incidents beyond any reasonable doubt", but it still put forward a set of recommendations to prevent any doubts of such incidents in the future.[286] The allegations and their follow-up were again accompanied by several comments from civil society organisations, academia and think tanks.[287]

**Hungarian-Serbian border**

The transit zones at the Hungarian-Serbian border were closed in May 2020 as a response of the Hungarian authorities to the judgment in Joined Cases C-924/19 PPU and C-925/19, *FMS and Others*,[288] and in December 2020, the CJEU also ruled on the infringement procedure launched by the European Commission in 2015, noting that the country "has failed to fulfil its obligation to ensure effective access to the procedure for granting international protection" *(see Section 2 and case law on the transit zones in Section 4.8).*

The Hungarian government introduced special conditions to submit asylum applications as of May 2020 until the end of 2020,[289] which was then extended until 30 June 2021.[290] According to the new rules, applicants must submit a declaration of intent at a Hungarian embassy in a non-EU country,[291] which is then assessed by the asylum authority. Apart from a few exceptions, this applies to all persons wishing to apply for asylum, whether arriving to or already present in the territory of the country. For example, persons who cross the border irregularly and indicate their intention to apply for asylum are directed to the nearest Hungarian embassy in a non-EU country, Serbia or Ukraine. The authority may conduct a remote interview with the applicant at the embassy and informs the embassy about the outcome of the assessment within 60 days. For a positive decision, the embassy issues a travel document which is valid for 30 days and allows the applicant to travel to Hungary, where he or she has to confirm the intention to submit an asylum application to the border police immediately when entering the country. For a negative decision, the authority informs the embassy and does not have an obligation to provide a reason for the rejection.

The National Directorate-General for Aliens Policing (NDGAP) shared that 26 persons submitted the declaration of intent at the Hungarian embassy in Belgrade up to 31 December 2020, and four people within an Iranian family unit were granted travel documents. In addition, the authority did not take a decision on the cases for 46 people who had indicated their intent, but they then disappeared before the authority received their declarations. The European Commission decided to launch an infringement procedure and sent a letter of formal notice to Hungary in October 2020, noting that it considered the new rules to be "an unlawful restriction to access the asylum procedure"[292] and it proceeded to send a reasoned opinion in February 2021, as it considered the reply from the Hungarian authorities not to be adequate.[293]

The Hungarian Helsinki Committee assessed the new legislation to be "de facto removing Hungary from CEAS", as the asylum procedure can only be initiated outside of the country, and at the same time, the recast Asylum Procedures Directive does not apply to requests submitted to diplomatic representations.[294] UNHCR stated that "(t)his enactment further undermines the effective access to territory and asylum for those fleeing wars and persecution which had already been seriously constrained before".[295]

**Western Balkan route**

In autumn 2020, public attention turned to the situation in the Western Balkans, when Commissioner Ylva Johansson took note of a report from the Danish Refugee Council on alleged pushbacks from Croatia to Bosnia and Herzegovina reaching a monthly high since May 2019[296] and assured to discuss the reported incidents with Croatian authorities.[297] Earlier in 2020, the Council of Europe Anti-Torture Committee undertook a five-day rapid reaction visit to the country to examine the situation of people who attempted to enter the country but were apprehended by the police.[298] Meanwhile, the Council of Europe's Commissioner for Human Rights published a statement and reiterated her call to the Croatian authorities to "stop pushbacks and border violence and eradicate impunity for serious human rights violations committed against migrants by law enforcement officers".[299] Civil society organisations have also published examples of incidents throughout the year.

The Croatian Ministry of the Interior released a statement noting that it was "faced with a second wave of serious unfounded accusations against the Croatian policy" and agreed to investigate the incidents.[301] It added that the ministry had zero tolerance for unlawful use of coercion by Croatian police officers against any population and as zero tolerance for not prosecuting criminal or misdemeanour offences which were committed by police officers, and it strongly condemned and in no way supported such actions. The European Commission sent a senior mission to visit two border crossing points and drafted a memorandum of understanding with the Croatian authorities to work towards an independent border monitoring mechanism.[302]

However, the European Ombudsman launched an inquiry against the European Commission based on a complaint from Amnesty International, which claimed that Croatia did not set up a monitoring mechanism to supervise the border management operations compliance with fundamental rights and EU law, even though it received EU funding for it, and charged that the European Commission failed to follow up on how the funding was spent.[303]

Civil society organisations in Slovenia were concerned about the draft amendment of the Foreigners' Act, which would allow the closing of borders and potentially prevent new arrivals to submit an asylum application in the event of a complex crisis in the field of migration.[304]

The Administrative Court in Slovenia issued a new judgment in the case of an applicant from Cameroon who claimed to have been returned with others from Slovenia to Croatia based on an extradition agreement, without the possibility to apply for asylum, and then informally returned from Croatia to Bosnia and Herzegovina. The court confirmed its initial judgment that the Slovenian police violated the EU Charter of Fundamental Rights, Articles 18, 19(1) and 19(2) during its procedures.

The court in Italy ruled that returns to Slovenia based on informal readmission agreements are illegal. The case concerned a Pakistani applicant who arrived in Italy through Bosnia and Herzegovina, Croatia and Slovenia, and expressed his wish to the Italian police to apply for asylum. Instead, within a few hours, he was rejected to Slovenia, then to Croatia and then back to Bosnia and Herzegovina. The court also underlined that the Italian authorities should have known, based on UNHCR and civil society sources, that readmission to Slovenia would lead to an informal readmission to Croatia and then return to Bosnia and Herzegovina and that the applicant would be

at risk of ill treatment by the police in the other countries.

The AIDA report for Austria mentioned the cases of a Moroccan and a Syrian national who stated to have asked for asylum after crossing the green border between Slovenia and Austria. Instead, they were returned to Slovenia, then to Croatia and finally to Bosnia and Herzegovina. The Austrian Ministry of the Interior clarified that these persons did not express their wish to ask for asylum.[305]

**Central Mediterranean route**

Deliberations continued throughout the year on search and rescue operations and disembarkation in the Central Mediterranean route. UNHCR underlined that legitimate health concerns due to the COVID-19 pandemic can be addressed through various measures and they should not be invoked to limit disembarkations.[306] The Council of Europe's Commissioner for Human Rights published a report focusing on the developments in the Central Mediterranean area and formulated a set of recommendations to ensure that the approach used by countries to attempt sea crossings are compliant with their human rights obligations. Among them, the Commissioner reiterated her call to review all co-operation activities with the Libyan Coast Guard and called for better cooperation with NGOs saving lives at sea.[307]

Delays in finding a safe haven for asylum seekers fleeing through Libya received public attention several times throughout the year, for example, in the case of approximately 180 people stranded on two cruise vessels[308] or three incidents involving merchant vessels.[309] The Council of Europe's Commissioner for Human Rights expressed her concerns over delays and non-response to search and rescue operations in a letter to the Maltese Prime Minister,[310] who replied acknowledging the issues which were raised but noting that due to the local situation during the COVID-19 outbreak "Malta is simply not in a de facto position, at present, to ensure a 'safe place' to any person rescued at sea".[311] Since the Armed Forces of Malta, the Malta Police Force and the Civil Protection Department were focusing on curbing the spread of the pandemic, the government assessed that the country was not in position to guarantee the disembarkation of a large number of migrants. Nonetheless, Malta continued to coordinate emergency cases by sea and provided medical attention and food to ensure the protection of lives and to preclude inhuman and degrading treatment.

The Head of the Civil Protection Department in Italy ordered in April 2020 that people who were rescued at sea or who arrived independently by sea needed to quarantine on specially-equipped ships before disembarkation.[312] This measure was heavily criticised by international and national civil society organisations for leaving potentially vulnerable adults and children in destress and without adequate medical and psychological support.[313]

The standard operating procedures developed by the European Commission in 2019 – based on the Malta Declaration signed by the ministers of France, Germany, Italy and Malta[314] – guided the relocation exercises following disembarkations in 2020 as a temporary arrangement.[315] In many cases, the voluntary relocation process contributed to facilitate disembarkations in Italy and Malta, and to demonstrate concrete European solidarity through the relocation of 1,509 asylum applicants overall from Malta and 1,273 applicants from Italy to other EU Member States. Nevertheless, academic analysis underlined the risk of this process being a "quick-fix measure".[316]

### *Western Mediterranean route*

The Spanish-Moroccan border at Ceuta and Melilla continued to receive attention for limiting access to international protection and reports about incidents persisted, including after the ECtHR judgment in *N.D. and N.T.* v *Spain*.[317] As seen in the data in *Section 4.1.2*, arrivals to the Canary Islands significantly increased. The EU Commissioner for Home Affairs visited the island[318] *(see Section 4.7)*, and the IOM and UNHCR undertook a joint visit to assess the situation.[319] The two organisations noted the mixed profile of persons arriving and that some flee persecution, while others leave due to extreme poverty. They underlined the challenge that this complexity adds to adequately addressing the situation.[320]

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