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4.1.2.1. Access to the asylum procedure in a state of emergency

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icon showing access to procedure in emergency

Following trends from recent years, several Member States along the EU's borders introduced special rules to manage mass arrivals and to declare a state of emergency in specific situations. While the goal of such measures was to assist the authorities in monitoring and managing inflows and detecting cases of smuggling, UNHCR, the Council of Europe and civil society organisations commented on the impact in practice. They warned of the risks for the right to asylum and the principle of *non-refoulement*. Through strategic litigation, civil society organisations challenged these amendments.

The Act on Granting International Protection to Aliens in Estonia was amended, allowing border guards to return persons entering in an unauthorised manner without an individual decision and restricting the places where an application for international protection can be submitted in the case of an emergency due to mass migration.268 Border guards can refuse applications made at certain locations. The Council of Europe's Commissioner for Human Rights expressed her concerns about the legislation, suggesting that the authorities should ensure that access to the asylum procedure is facilitated even in these cases, for example, by ensuring the transfer of applicants from the border to the designated areas.269 The government replied that the legislation was prepared in compliance with the latest ECtHR case law, and the possibility of immediate returns was closely linked with a person's behaviour and the possibility to enter the country through legal entry points.270 UNHCR regretted that the legislation significantly restricts the possibility to seek asylum for persons who have entered irregularly.271

An amendment was passed in Finland to allow the authorities to centralise the reception of applicants at the border during an exceptionally high number of arrivals.272 The Council of Europe's Commissioner for Human Rights expressed similar concerns as they had for Estonia, 273 and the Finnish government assured the body that the new law would be applied in accordance with international and EU laws.274 The Finnish Refugee Advice Centre assessed that the legislation was not sufficiently precise to define the situation in which the restrictions could apply.275

Lithuania passed amendments to the Law on the Legal Status of Aliens in 2021, which entered into force in January 2022. According to this law, during a state of emergency or an extreme

situation due to a mass influx, foreigners may lodge an application for international protection from abroad within consular posts designated by the Minister of Foreign Affairs.276 Throughout the year, additional amendments were passed to clarify when an application is considered to be lodged under this procedure, when the Border Guard should still accept applications for international protection from persons who have crossed the border in an irregular manner, and circumstances when the application is not accepted.277

Under an urgent preliminary ruling procedure, the CJEU ruled on legislation introduced in the summer of 2021 in Lithuania. The court stated that any third-country national or stateless person has the right to make an application for international protection on the territory of the state, even if the person stays illegally on the territory. In addition, the court highlighted that the national legislation is in breach of EU law when it allows to detain an applicant on the sole ground that the person was staying illegally *(see Section 4.6)*. Despite the ruling, the Lithuanian Red Cross Society observed that border guards continued to return applicants at the border, and persons wishing to apply for international protection at the consulate in Minsk, Belarus could only do so if they already had a valid travel document and a valid document confirming their legal stay in Belarus. The organisation underlined that according to the border guard's daily press releases, 11,211 persons were not allowed to enter the country's territory between 1 January and 31 December 2022.278

The state of emergency was extended in Latvia as well, meaning that applicants could not submit an application for international protection in the administrative territories near the border, except for official border crossing points or immigration detention facilities. In the case of a Chechen family who tried to enter Latvia in 2017, the ECtHR ruled in 2022 that they did not provide sufficient evidence that they had tried to apply for asylum with the Latvian authorities. The same family had repeatedly tried to apply for international protection in Lithuania and Poland, and in those cases, the court found violations of the European Charter of Human Rights (ECHR).

The special conditions to submit an asylum application, which were introduced by the Hungarian government in May 2020, were extended until 31 December 2023.279 According to these rules, applicants must submit a declaration of intent to apply for international protection at a Hungarian embassy in a non-EU country (currently only in Belgrade or Kyiv), which is then considered by the asylum authority. Infringement procedures launched by the European Commission in 2020 were still ongoing and a referral to the CJEU was made in July 2021.280

The Council of Europe expressed its concern that 3 years after the Ilias and Ahmed judgment, the authorities still did not reassess the legal presumption of Serbia being a safe third country, 281 which has led to the rejection of declarations of intent to apply for international protection on the territory of Hungary. UNHCR assessed that these rules "effectively deny asylum seekers the right to access a fair and efficient asylum procedure".282 The Hungarian Helsinki Committee published an information note which analyses national case law related to the legislation, noting changes in the practice of the National Directorate-General for Aliens Policing (NDGAP) as well. The organisation observed that the authority had reverted to the practice of refusing to even accept an application for international protection.283 In a recent case, the Budapest Regional Court noted that the rules should only apply on epidemiological grounds and a visa to submit an

asylum application could only be rejected if the persons wishing to apply for asylum were COVID-19 positive.

Poland passed amendments to its legislation allowing for the immediate rejection of an application for international protection from persons crossing the border in an irregular manner.[284] Through strategic litigation, the Association for Legal Intervention filed several court cases, while national courts found that the legislation had no legal basis and was incompatible with the Polish constitution.[285] Three cases were communicated by the ECtHR.[286] In one of the cases, *R.A. and Others* v *Poland*,[287] UNHCR intervened as a third party, recalling that national authorities have a clear legal obligation to ensure asylum seekers' access to territory and to the asylum procedure.[288] The Association for Legal Intervention also reported on increasing violence toward migrants by border guards at the Polish-Belarusian border.[289]

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