Please cite as: EUAA, '4.1.1. Access to territory' in *Asylum Report 2023*, Maggio 2023.

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icon showing border check and approval

With the mass arrival of displaced persons following the Russian invasion of Ukraine, in addition to the overall increase of asylum seekers through new routes into Europe, EU+ countries continued their efforts to provide access to protection, while effectively managing their borders. Nevertheless, on a number of occasions it was reported that safe access to territory was not always effectively provided.

As FRA underlined in its annual report, “serious fundamental rights violations against migrants and refugees at the EU’s external land and sea borders persisted” and fatalities at borders continued to increase.233 The agency provided an overview of the deaths and disappearances in different border regions based on IOM reports.234

The European Parliamentary Research Service published an update of its briefing on search and rescues in the **Mediterranean Sea**, noting that the region had witnessed the largest number of casualties and missing persons compared to other migratory routes.235 The Council of Europe’s Commissioner for Human Rights noted that “pushbacks and the serious violations of human rights that they entail now risk becoming a permanent and systemic feature of the way that refugees, asylum seekers and migrants are treated across Europe” and put forward recommendations to stop all forms of this practice and prevent recurrence.236 The Left Group in the European Parliament published the second edition of the Black Book of Pushbacks with testimonies of people on the move having experienced violence at the EU’s borders.237

For the situation on the **Eastern Mediterranean route**, the ECtHR in *Safi and Others* v *Greece* concluded that the Greek authorities had not done all that could be reasonably expected to protect the life of people on a sinking fishing boat, which resulted in the death of 11 people. In a third-party intervention submitted in the ECtHR case of *S.A.A. and Others v Greece*, UNHCR restated that national authorities must protect the right to life and the principle of non-refoulement in search and rescue operations.238 The organisation also published a statement on the issue in February 2022.239 Refugee Support Aegean provided an overview of interim measures granted by the ECtHR against Greece between 1 January and 24 June 2022, including alleged cases of pushbacks.240 The organisation also assessed that the EU-Turkey Statement resulted in preventing people in need of international protection to enter the territory of the EU and kept those arriving to the Greek islands in a legal limbo *(see Section 4.3)*.241

On the **Central Mediterranean route**, search and rescue operations carried out by civil society organisations were at the centre of the debate. Following an incident involving the rescue ship Sea Watch in Italy in 2020, the CJEU ruled on the state's powers to investigate rescue ships and noted that rescue ships may be detained only when there is a clear risk to safety, health or the environment.242

In January 2023, new legislation entered into force in Italy establishing a code of conduct for NGOs carrying out rescues at sea.243 The Association for Juridical Studies on Immigration (ASGI) noted that the legislation does not introduce changes in terms of the requirements for these vessels, but certain formulations of the text in the law could potentially lead to misinterpretation, which could result in the prohibition of disembarkation.244

Civil society organisations in Malta reported on cases when the Maltese authorities had ignored distress signals from drifting vessels.245 UNHCR and the IOM continued to appeal for the urgent disembarkation of all stranded refugees and migrants in the region.246 The Maltese government made a statement to rebut the allegations.ix

Long-persisting concerns on accessing international protection at the Spanish-Moroccan border in Ceuta and Melilla continued in 2022.247 UNHCR,248 the UN Human Rights Office (OHCHR)249 the Council of Europe's Commissioner for Human Rights,250 the Spanish Ombudsperson251 and several civil society organisations252 expressed their deep disturbance about an incident in June 2022, when 23 migrants died and 76 others were injured when trying to cross the fence in Melilla.253 They urged the Spanish authorities to investigate and consider measures to avoid such tragedies in the future. Based on findings from a mission to Spain, the Council of Europe's Commissioner for Human Rights concluded that there was no genuine and effective access to asylum at the border between Nador, Morocco and Melilla, Spain.254

UNHCR called for urgent support to prevent deaths and protect asylum seekers trying to reach the EU through the Central and Western Mediterranean routes.255 The organisation also published its updated risk mitigation strategy for saving lives and offered sustainable solutions to manage situations with perilous journeys in this region.256

At the **eastern borders** of the EU, the war in Ukraine led to legal changes to facilitate access to persons in need of temporary protection,257 while at the same time developments in Belarus led to legal changes that raised concerns about effective access to the territory and to the asylum procedure *(see Section 4.1.2.1 and Box 4).*

Along the **Western Balkan route**, the Council of Europe's Commissioner for Human Rights expressed concern in 2022 that the Bulgarian national border monitoring mechanism documented an increasing number of pushbacks in 2021.258The Bulgarian government underlined that border guards were under constant surveillance and the Frontex Fundamental Rights Office did not identify violations.259 However, the Frontex Fundamental Rights Officer noted in its annual report for 2021 that officers' access to operations remained limited in general and listed issues detected at the Turkish-Bulgarian border based on serious incident reports submitted by Frontex staff and complaints by individuals, as well as reports and information by international organisations, NGOs and public national human rights bodies.260

In Croatia, the first report of the Independent Mechanism for Monitoring the Conduct of Police Officers covering June 2021 to June 2022 was published. The report concludes that “based on observations, irregularities regarding the right to seek asylum and access to the asylum procedure were not established in border police stations” but noted that police officers in isolated cases conducted illicit deterrence in mine-suspected areas. The report made a number of recommendations to improve the identification of applicants for international protection at the border and enhance training for border guards.261 The Ministry of the Interior listed a series of actions for improvements, including distributing the FRA manual translated in Croatian, including the manual in the training for border police, training for police officers on the protection of fundamental rights when performing duties related to the protection of the state border, and developing a plan and programme for additional training on fundamental rights for the intervention police. The standard operating procedures for border control at border crossings and for state border protection were updated, including guidelines for the identification of applicants for international protection and guidelines and rules of conduct for border police officers dealing with persons who express their intention to seek international protection at border crossings.

Nonetheless, the situation at the Croatian border was at the focus of many appeals in several EU+ countries in the context of the Dublin procedure, and courts in various countries ordered the suspension of transfers due to concerns over a possible risk of *refoulement (see Section 4.2)* . The Croatian Ministry of the Interior underlined that it had not received official information on general suspensions of transfers from certain Member States to Croatia. The ministry also underlined that Croatian authorities provide individual guarantees related to acceptance, access to the asylum procedure and prohibition of a return upon request by a Member State.

Civil society organisations also published reports documenting cases of alleged pushbacks from neighbouring countries to Serbia.262 The ECtHR found that the Hungarian authorities failed to protect the life of a person who tried to cross the Tisza river from Serbia to Hungary, and they did not fulfil their duty to properly investigate the incident.

As arrivals have steadily increased along the Western Balkan route, AsyLex noted that the focus of concern has shifted from the Italian-Swiss border to the Swiss borders with Austria and Germany.263

The Austrian Supreme Administrative Court reviewed the judgments of the Regional Administrative Court of Styria for a Moroccan and a Somali applicant. In both cases, the court concluded that the regional court’s assessment was not unreasonable when it came to the conclusion that the applicants made a request for international protection in an audible manner and the border guards denied the request and returned them to Slovenia. However, the court did not comment on the content of the conclusion itself. Thus, the judgments of the Regional Administrative Court finding pushbacks to Slovenia to be unlawful became final.264

After travelling through the EU, perilous journeys continued on the channel between the continent and the UK, with many persons in need of protection staying in make-shift camps while waiting for an attempt to cross.265 UNHCR expressed its concerns towards new policy in the UK in managing applications from people arriving irregularly by the channel, noting that the proposal to first detain and then either return applicants or transfer them to a third country

would amount to a denial of accessing the UK asylum system for this group of applicants.266

Icon box: Non refoulment

Non-refoulement

The principle of *non-refoulement* is a core principle of international and EU laws to ensure that an applicant is not returned to a country where they will face persecution (recast QD, Recital 3). It constitutes an essential and crucial safeguard throughout the asylum procedure (including access to the procedure, assessment of the application on first instance, appeal and return). Accordingly, Member States must respect the principle of *non-refoulement* in accordance with their international obligations (recast QD, Article21).

The principle of *non-refoulement* secures the right of an applicant to remain in the host country when applying for international protection, including during a Dublin procedure and while awaiting a decision by the determining authority, in accordance with the procedures at the administrative level.

It ensures that Member States must allow applicants to remain in the territory to exercise the remedy of a right to appeal and, when such a right has been exercised, pending the outcome of the appeal. It must be observed by courts and tribunals when ruling whether an applicant may remain in the territory of the Member State.

It also protects against a return or an extradition decision which may result in direct or indirect *refoulement*, in violation of international and EU obligations of that Member State. In accordance with the Geneva Convention, the respect for the non-refoulement principle must be assessed in the application of safe country concepts.
The respect of the *non-refoulement* principle during the international protection procedure is one of the most common elements that undergo judicial review. Civil society organisations and academia offered their views on the cases throughout 2022.

Case law database

Indicative list of recent case law beyond CJEU rulings

European Court of Human Rights [ECtHR], *S.H. v Malta*: The ECtHR found violations of Articles 3 and 13 of the European Convention due to the lack of an adequate assessment of the asylum application lodged by a Bangladeshi national in Malta, the lack of legal assistance and the lack of an effective remedy. The Maltese authorities made a referral to the Grand Chamber and stated that they strongly disagreed with the conclusions of the court. The referral request was rejected, and the judgment became final in May 2023.

European Court of Human Rights [ECtHR], *T.Z. and Others v Poland*: The ECtHR found a violation of Article 3 of the European Convention and Protocol No 4, Article 4 to the Convention for the collective expulsion of six Russian nationals who were turned away at the Polish border with Belarus without having their applications for asylum examined by the Polish authorities.

European Court of Human Rights [ECtHR], *O.M. and D.S. v Ukraine*: The ECtHR found a violation of Article 3 of the European Convention due to the expulsion of applicant from Ukraine to Kyrgyzstan without assessing the risk of ill treatment and *refoulement*.

European Court of Human Rights [ECtHR], *A.B. and Others v Poland*: The ECtHR found violations of the European Convention and Protocol No 4 due to the refusal of Polish border guards to receive asylum applications, summary removals to Belarus and non-compliance with interim measures.

European Court of Human Rights [ECtHR], *A.I. and Others v Poland*: The ECtHR ruled on the refusal of border guards to receive asylum applications and summary removal to a third country, exposing the applicants to a risk of chain *refoulement* to their countries of origin and inhuman and degrading treatment and torture.

Poland, Voivodeship Administrative Court [Wojewodzki Sąd Administracyjny], *A.D. v Border Guard*: The Administrative Court of Białystok found a violation of the right to access the asylum procedure and the right to an effective remedy in the case of Iraqi applicants transferred to the border area with Belarus.

Germany, Regional Administrative Court [Verwaltungsgerichte], *Applicants v BAMF*: The Administrative Court annulled a Dublin transfer to Croatia due to systemic deficiencies of the asylum system and risk of indirect *refoulement*.

Germany, Higher Administrative Court [Oberverwaltungsgerichte], *Applicant*: The Higher Administrative Court of Lower Saxony underlined that the existence of chain *refoulement* must be substantiated specifically for Dublin returnees to rebut the presumption of the principle of mutual trust.

Netherlands, Council of State [Afdeling Bestuursrechtspraak van de Raad van State], *Applicants v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)*: The Council of State found “obvious and fundamental differences” in asylum policies between Denmark and the Netherlands related to Syrian applicants. The Council of State held that the applicants met the burden of proof by providing evidence that the policy of the determining authority in Denmark was to return Syrian applicants, and this was endorsed by the Danish Refugees Appeals Board. The Council of State noted that the State Secretary did not conduct a further investigation to eliminate any doubts about a possible real risk of *refoulement*.

Case law database

Read more in the EUAA Case Law Database.

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