Joint EUAA / FRA Expert Panel

Fundamental rights and access to asylum procedures at the external borders

27 April 2022, 14:00 – 16:00 CET

online via WebEx Meetings

Background Note

1. Background information

In accordance with its mandate to support judicial training in the field of international protection[1] and decisions adopted by the EUAA Courts and Tribunals Network[2], the EUAA is increasing the roll-out effect of their judicial activities through the EUAA expert panels. This activity was introduced in 2021 with the additional objective to address specialised topics in the field of international protection. It involves a panel of 3 judicial professionals and experts that engage in a discussion on a specific area of the CEAS, allowing attendees to deepen their expert knowledge on the respective field.

2. The joint EUAA / FRA Expert Panel

Building on suggestions by participants in previous expert panels and following consultation with the EUAA Courts and Tribunals Network, it was decided that the next EUAA expert panel addresses the issue of access to asylum procedures at the external borders and touches upon related fundamental rights considerations. To benefit from the expertise of the EU Agency for Fundamentals Rights (FRA) in this respect, this panel is jointly organised by the EUAA and FRA under the title '***Fundamental rights and access to asylum procedures at the external borders***'.

The Joint EUAA FRA Expert Panel will meet in the ***premises of FRA in Vienna***, for a lively exchange on this topic which participants will follow remotely through the WebEx meetings platform.

[1] See Article 8 of the EUAA Regulation: "The Agency shall establish, develop and review training for members of its own staff and members of the staff of relevant national administrations, **courts and tribunals**, and of national authorities responsible for asylum and reception" and Article 13: "The Agency shall organise and coordinate activities promoting a correct and effective implementation of Union law on asylum, including through the development of operational standards, indicators, guidelines or best practices on asylum-related matters, and the exchange of best practices in asylum-related matters among Member States."

[2] See EASO Courts and Tribunals Network, Report of the Annual Coordination and Planning Meeting, 21-22 January 2021, p. 25; and Report of the Annual Coordination and Planning Meeting, 23-24 January 2020, p. 17.

3. *Framing the topic*

The right to asylum is enshrined in Article 18 of the EU Charter of Fundamental Rights ('Charter') whereas the overarching principle of non-refoulement is further confirmed in Article 19 (2) of the Charter and Article 78 (1) of the TFEU. Recital 25 of the Asylum Procedures Directive (2013/32/EU) reiterates that in the interest of a correct identification of persons in need of international protection, ***'every applicant should have an effective access to asylum procedures'.*** Specific requirements for an effective access to procedure are laid down in Article 6 of the directive, whilst Article 3 (1) ascertains that the directive applies also to applications ***made at the border of Member States.***

EU Member States have made extensive use of border asylum procedures[3]. In late 2021 and in light of the rapid rise in irregular border crossings at the eastern borders of the EU, proposals by the Commission called for new EU law instruments of emergency nature – and beyond – to broaden the scope of border procedures in this area[4]. The Russian invasion of Ukraine added to the challenges faced in the area, as it gave rise to an unprecedented influx of Ukrainian nationals – and third-country nationals residing there – into EU territory mostly through the eastern borders.

It is within this context that a discussion on the issues arising in the exercise of the right to asylum in border procedures presents itself even more relevant. Such issues that often entail implications with fundamental rights can be broadly distinguished into the following categories:

- The first one includes alleged pushbacks of applicants for international protection at external borders, without prior access to an asylum procedure and individual assessment of the international protection claim or otherwise ineffective access to asylum procedures.
- The second one includes claims for prolonged stays in transit zones under conditions that amount to detention whilst the application for international protection is still ongoing, without legal guarantees regarding the grounds, length and judicial review of the detention.
- A third category would include all issues arising in the interplay between the application of the Temporary Protection Directive (2001/55/EC) that by way of a Council implementing decision[5] has been activated for Ukrainian nationals and some categories of third-country nationals residing there, and the regular asylum procedure at the border, especially for profiles of Ukrainian nationals that could potentially qualify for international protection.

[3] For an overview see EUAA (2020), Border Procedures for Asylum Applications in EU+ Countries.

[4] COM(2021)752 final, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, 1.12.2021. See also, as legislative proposals of general application, COM(2021)890 final, Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, 14.12.2021 and COM(2021)891 final, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders.

[5] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

The following lines give an overview of the mainly applicable primary and secondary European legal framework and the related case law by the two European Courts.

4. *Legal Framework*

EU Charter of Fundamental Rights	
Article 1	Human dignity
Article 2	Right to life
Article 4	Prohibition of torture and inhuman or degrading treatment or punishment
Article 6	Right to liberty and security
Article 18	Right to asylum
Article 19	Protection in the event of removal, expulsion or extradition; prohibition of collective expulsion
Article 24	Rights of the child
Article 47	Right to an effective remedy and to a fair trial

European Convention on Human Rights	
Article 2	Right to life
Article 3	Prohibition of torture
Article 5	Right to liberty and security
Article 13	Right to an effective remedy
Protocol No. 4, Article 4	Prohibition of collective expulsion of aliens

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)	
Article 2 (b)	Definition of an application for international protection
Article 3 (1)	Scope
Article 6 (1)-(2)	Access to the procedure
Article 26	Detention
Article 43	Border procedures

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast):	
Article 2 (b)	Definition of an applicant for international protection
Article 8	Detention
Article 9	Guarantees for detained applicants
Article 10	Conditions of detention
Article 11	Detention of vulnerable persons and of applicants with special reception needs

Schengen Borders Code (Regulation (EU) No. 2016/399)	
Article 3b	Scope [without prejudice to rights of refugees and the prohibition of *non-refoulement*]
Article 4	Fundamental rights safeguard clause

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof	
Article 3	General Provisions / Interplay with 1951 Geneva Convention and fundamental rights
Article 8 (3)	Obligations of Member States with regards to issuing visas
Article 17	Interplay with the asylum procedure in the context of temporary protection
Article 19	Interplay with asylum status in the context of temporary protection

5. *Relevant Case Law*

Access to asylum procedures at the border

- CJEU: European Commission v Hungary [GC] – 17/12/2020: Hungary has failed to fulfil its obligation to ensure effective access to the procedure for granting international protection, in so far as third-country nationals wishing to access, from the Serbian-Hungarian border, that procedure were in practice confronted with the virtual impossibility of making their application. That failure stems from a combination of the national legislation, according to which applications for international protection may, as a general rule, be made only in one of the two transit zones, and a consistent and generalised administrative practice, established by the Hungarian authorities, consisting in drastically limiting the number of applicants authorised to enter those zones each day.

- CJEU: V.L. – 25/06/2020: National courts examining the legality of the detention of a claimant at the border can be among the 'other authorities' under Article 6 (1) of the Asylum Procedures Directive, likely to receive applications for international protection and have the obligations outlined under the 2nd paragraph of this article. Lack of accommodation in humanitarian reception centres cannot justify holding an applicant for international protection in detention.

- ECtHR: D. v Bulgaria – 20/07/2021: Upon apprehension by Bulgarian border police, a Turkish applicant has been removed to Turkey, his country of origin from which he had fled, without a prior examination of the risks he faced from the standpoint of Article 3 of the Convention and hence of his application for international protection.

- ECtHR: M.K. and Others v Poland – 23/7/2020: repeated refusal of Polish border guards on the border with Belarus to admit the applicants, who had come from Chechnya and had asked for international protection. The Court found in particular that the applicants had repeatedly

arrived at the Terespol border crossing between Poland and Belarus and had made it clear, despite the Polish authorities' statements to the contrary, that they wished to seek international protection. Instead, the border guards had returned them consistently to Belarus, without a proper review of their applications. Furthermore, the Government had ignored interim measures issued by the European Court to prevent the removal of the applicants, who had argued that they were at a real risk of chain-refoulement and treatment contrary to the Convention.

- ECtHR: Kebe and Others (Eritrea and Ethiopia) v Ukraine – 12/01/2017: The applicant had arrived in the port of Mykolayiv in Ukraine in February 2012 after he had stowed himself away on a commercial vessel flying the Maltese flag. Border guards prevented him from entering Ukraine, stopped him from lodging claims for asylum, and exposed him to the risk of ill-treatment in his country of origin (Ethiopia) by ensuring that he remained on the vessel (which was headed to Saudi Arabia). After the ECtHR had indicated an interim measure in March 2012, the applicant had been allowed to leave the ship and make an asylum application in Ukraine. There had been a violation of the applicant's right to an effective remedy under Article 13 taken in conjunction with Article 3 of the Convention. Prior to the Court's interim measure, the border guards had prevented the applicant from disembarking in Ukraine, which made him liable to be removed from Ukraine at any time without having his claim of potential ill-treatment being examined by the authorities.

- ECtHR: Gebremedhin (Eritrea) v France – 26/04/2007: The ECtHR observed that, under French law, a decision to refuse entry to the country acted as a bar to lodging an application for asylum; moreover, such a decision was enforceable, with the result that the individual concerned could be immediately returned to the country he or she claimed to have fled. In the instant case, following the application of Rule 39 of the Rules of Court, the applicant had been granted leave to enter France and had hence been able to lodge an application for asylum with OFPRA, which granted him refugee status in November 2005.

Pushbacks and collective expulsion

- ECtHR: Interim Measures for applicants stranded in the borders between Belarus, Poland and Lithuania
    - Sadeed and Others (Afghanistan) v Lithuania, 08/09/2021
    - Amiri and Others (Afghanistan) v Poland and Ahmed and Others (Iraq) v Latvia, 25/08/2021

- ECtHR: Shahzad v Hungary – 8/7/2021: The ECtHR found a violation of Article 4 of Protocol No. 4 to the ECHR. The Court noted that the applicant had entered Hungary as part of a group. However, the Government had not argued that that had created a disruptive situation or a public-safety risk. There had been sufficient Government agents to control the situation; in any case the applicant and his companions had not used force or resisted. The Court reiterated

that with regard to Contracting States like Hungary, which had an external Schengen Area border, the effectiveness of the Convention rights required that those States made available genuine and effective means of legal entry, in particular border procedures for arrivals at the border. In the applicant's case, the access points available had been located 40 and 84 km away from where he had been returned to Serbia. The applicant argued that those zones had been inaccessible for him owing to the daily limit on entrants and the need to register beforehand. The Court considered that due to the daily admission limits, which had been quite low, and lack of any formal procedure accompanied by appropriate safeguards governing the admission of migrants Hungary had failed to provide an effective means of entry. As a result, the Court found that the applicant's expulsion had been "collective" leading to a violation of his rights.

- ECtHR: D.A. v Poland – 8/07/2021: The ECtHR found a violation of Article 4 of Protocol No. 4 to the ECHR due to refusing entry D.A., M.A. and S.K., Syrian nationals, former residents of Belarus, at the Polish-Belarusian border and the return of applicants to Belarus. The decisions on refusal of entry given to each applicant were not sufficiently individualised. The Court also found a violation of Article 13 in conjunction with Article 3 of the Convention and Article 4 Protocol 4 to the ECHR noting that an appeal against a refusal of entry and a further appeal to the administrative courts were not effective remedies within the meaning of the Convention because they did not have automatic suspensive effect.

- ECtHR: Asady a.o. v Slovakia – 24/03/2020: The case concerned the expulsion of 19 applicants to Ukraine by the Slovakian police. The applicants were found hidden in a truck by the Slovak Border. The ECtHR examined the complaints of only seven of the applicants, striking the case out of its list in respect of the others. It found in particular that despite short interviews at the police station, they had been given a genuine possibility to draw the authorities' attention to any issue which could have affected their status and entitled them to remain in Slovakia. Their removal had not been carried out without any examination of their individual circumstances (no violation of Article 4 of Protocol No. 4 to the ECHR).

- ECtHR: N.D. and N.T. v Spain [GC] – 13/02/2020: The ECtHR found no violation of Protocol No. 4 to the ECHR on the prohibition of collective expulsion. The lack of individual removal decisions could be attributed to the fact that the applicants – assuming that they had wished to assert rights under the Convention – had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct. In so far as it had found that the lack of an individualised procedure for their removal had been the consequence of the applicants' own conduct, the Court could not hold the respondent State responsible for the lack of a legal remedy in Melilla enabling them to challenge that removal.

- ECtHR: Sharifi and Others v Italy and Greece – 21/10/2014: 32 Afghan nationals, two Sudanese nationals and one Eritrean national had entered Italy illegally from Greece and been returned to that country immediately. The ECtHR held that there had been a violation by Italy of Article 4 of Protocol No. 4 considering that the measures to which the applicants had been subjected

in the port of Ancona had amounted to collective and indiscriminate expulsions. It also held, concerning the four same applicants, that there had been a violation by Italy of Article 13 (right to an effective remedy) combined with Article 3 (prohibition of inhuman or degrading treatment) of the Convention and Article 4 of Protocol No. 4 on account of the lack of access to the asylum procedure or to any other remedy in the port of Ancona. It further held that there had been a violation by Greece of Article 13 combined with Article 3 of the ECHR on account of the lack of access to the asylum procedure for them and the risk of deportation to Afghanistan, where they were likely to be subjected to ill-treatment, and a violation by Italy of Article 3, as the Italian authorities, by returning these applicants to Greece, had exposed them to the risks arising from the shortcomings in that country's asylum procedure.

- ECtHR: Hirsi Jamaa and others (Somalia and Eritrea) v Italy, 23/02/2012: Somali and Eritrean migrants were intercepted at sea by the Italian authorities and sent back to Libya in implementation of a relevant bilateral agreement between Italy and Libya. The ECtHR found that by returning the applicants to Libya without prior individual examination of their case, Italian authorities violated Article 4 of Protocol No. 4 of the Convention and exposed applicants to a risk of ill-treatment in Libya.

Detention and Border Procedures

- CJEU: FMS and Others v Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendeszeti Főigazgatóság [GC] – 14/05/2020: the conditions prevailing in the Röszke transit zone, at the Hungarian-Serbian border, amount to a deprivation of liberty, inter alia because the persons concerned cannot lawfully leave that zone of their own free will in any direction whatsoever. In particular, they may not leave that zone for Serbia since such an attempt (i) would be considered unlawful by the Serbian authorities and would therefore expose them to penalties; and (ii) might result in their losing any chance of obtaining refugee status in Hungary.

- ECtHR: M.B.K and Others v Hungary – 24/02/2022: The case concerned the confinement of an Afghan family in the Röszke transit zone at the border of Hungary and Serbia between 30 March 2017 and 24 October 2017. The applicants complained of detention conditions, but the Court found that the threshold of the Article 3 of the ECHR was not attained in respect of the adult applicants and referred to the case R.R. and others (Iran and Afghanistan) v Hungary of 2 March 2021 (*see below*) to conclude that there was a violation of the Articles 5 (1) and (4) of the ECHR.

- ECtHR: M.H. and Others v. Croatia – 18/11/2021: The case concerned the death of the Afghan applicants' six-year-old child, MAD.H., who was hit by a train after allegedly having been denied the opportunity to seek asylum by the Croatian authorities and ordered to return to Serbia via the tracks. It also concerned the applicants' detention in the Tovarnik centre while seeking international protection and their removal to Serbia after summary proceedings that did not take into consideration their individual situation. Among others, the Court found a

violation of the procedural limb of Article 2 on account of insufficient investigation into the child's death by the Croatian authorities, a violation of Article 3 with regards to detention conditions of child applicants in the Tovarnik centre, a violation of Article 5 due to a lack of sufficient assessment of alternative measures and sufficient efforts to limit family detention as much as possible and collective expulsion by Croatian police outside official border crossing in violation of Article 4 of Protocol No. 4 to the Convention.

- ECtHR: R.R. and others (Iran and Afghanistan) v Hungary – 2/3/2021: a violation of Article 3 of the ECHR, due to the issues posed by the confinement of children, who are vulnerable individuals, the lack of attention of the State to assess the needs of the applicants, and the living conditions examined in the Röszke transit zone by the Grand Chamber of the Court in the case of *Ilias and Ahmed v Hungary* (No. 47287/15). The ECtHR also found that the extended duration of the stay of the applicants in the transit zone, the considerable delays in the examination of the asylum claims, the conditions of the stay and the lack of judicial review of the applicants' detention in the transit zone amounted to a violation of Article 5 (1) and (4) of the Convention.

- ECtHR, Ilias and Ahmed v Hungary [GC] – 21/11/2019: Two asylum-seekers from Bangladesh spent 23 days in a Hungarian border transit zone before being removed to Serbia after their asylum applications were rejected. The Court held that there had been a violation of Article 3 of the ECHR owing to the applicants' removal to Serbia, and, no violation of Article 3 as regards the conditions in the transit zone, and, by a majority, that the applicants' complaints under Article 5 (1) and (4) (right to liberty and security; judicial review of detention) had to be rejected as inadmissible. The Court found in particular that the Hungarian authorities had failed in their duty under Article 3 to assess the risks of the applicants not having proper access to asylum proceedings in Serbia or being subjected to chain-refoulement, which could have seen them being sent to Greece, where conditions in refugee camps had already been found to be in violation of Article 3. Article 5 was not applicable to the applicants' case as there had been no de facto deprivation of liberty in the transit zone. The applicants had entered the transit zone of their own initiative and it had been possible in practice for them to return to Serbia, where they had not faced any danger to their life or health. Their fears of a lack of access to Serbia's asylum system or of refoulement to Greece, as expressed under Article 3, had not been enough to make their stay in the transit zone involuntary.