

# EXTRAORDINARY RESPONSES: LEGISLATIVE CHANGES IN LITHUANIA, 2021

ECRE'S assessment of recent changes to asylum legislation in Lithuania and their impact, with reference to compliance with EU and international law.

# I. INTRODUCTION

In 2021, an unprecedented situation in the field of asylum and migration in Lithuania arose. The number of people crossing the Lithuania-Belarus border, the external border of the European Union (EU), increased more than thirty-fold compared to previous years. As of mid-August, 4,110 people had been detained at this border (2,882 persons were detained in July alone), compared to the 81 apprehended during the entire year of 2020. Among those detained are – primarily – citizens of Iraq (2,797 people), then of Congo (200), Cameroon (131), Syria (130), Afghanistan (83), and other countries.<sup>1</sup>

The seriousness of the situation was reflected not so much in the growth of numbers as in the nature of the movement of people itself, which was publicly encouraged by the Belarusian authorities in an attempt to use migrants, including asylum applicants, as a political tool against Lithuania in response to its support for the democratic opposition in Belarus.<sup>2</sup> On 13 July, the Parliament of the Republic of Lithuania adopted Resolution No. XIV-505 entitled “On countering hybrid aggression”, which stated that “the states hostile towards Lithuania are waging hybrid aggression against the Republic of Lithuania, during which flows of third-country nationals illegally crossing the state border of the Republic of Lithuania are organised in violation of international law and international commitments with the purpose to destabilise the situation in Lithuania and cause damage to the State of Lithuania [...]” This resolution called upon the Government to undertake all possible measures. On 2 July, an “extraordinary situation”<sup>3</sup> was declared in the country due to a “mass influx” of foreign nationals.<sup>4</sup>

In this context, amendments to the Law on the Legal Status of Aliens (the “Aliens Law”) were also adopted, introducing important changes to the asylum system which are likely to have a significant impact on its overall functioning. During summer 2021, the Parliament of the Republic of Lithuania amended the Aliens Law twice. The first package of amendments was approved on 13 July 2021 with the adoption of Law No. XIV-506 “On the Law of the Republic of Lithuania Amending Articles 5, 71, 76, 77, 79, 113, 131, 136, 138, 139, 140 of the Law on the Legal Status of Aliens No IX-2206 and Supplement of the Law with Chapter IX” (“Amendments to the Aliens Law of 13 July 2021”).<sup>5</sup> The law was amended for the second time on 10 August 2021 with the adoption of the Law No. XIV-515 “On the Law of the Republic of Lithuania on the Legal Status of Aliens No. IX-2206 Amendment to Article 67”<sup>6</sup> (“Amendments to the Aliens Law of 10 August 2021”). Following the amendment of the law, secondary legislation to implement it was approved and/or amended accordingly.

These amendments to the legal act governing the asylum procedure and the rights and obligations of asylum seekers raise questions concerning compliance with Lithuania’s international obligations and with EU law. The amendments to the Aliens Law, followed by the subsequent practice of pushbacks, have created an extremely hostile environment for asylum seekers and irregular migrants in general in Lithuania. The situation is conducive to the violation of the right to asylum and the principle of *non-refoulement* and to undermining the fairness and efficiency of the asylum procedure, contrary to Lithuania’s international and EU obligations on the protection of refugees and human rights.

It should further be noted that some of the amendments are linked to the state of war, state of emergency or extraordinary situations which has been declared (such as the restrictions on reception conditions), and are therefore applicable on a temporary basis, whereas others are not linked to these exceptional situations and apply generally (such as changes to the appeals system).

ECRE is alarmed by these recent developments in law and practice, which undermine the institution of asylum in Lithuania. This note provides an analysis of the most problematic aspects of the recent legislative amendments to the Aliens Law, illustrated, where possible, by the practice that has followed these amendments. The analysis is based on publicly available information and the publicly expressed positions of international, national and non-governmental organisations.

1. <https://www.lrytas.lt/lietuvsdiena/aktualijos/2021/08/05/news/situacija-keiciasi-praejusia-para-sulaikyta-19-migrantu-apgrezta-daugiau-nei-300-20328378/>
2. <https://lrv.lt/lt/naujienos/aptarta-skubi-ek-pagalba-stabdant-nelegalia-migracija-is-baltarusijos>
3. A state of emergency (“nepaprastoji padėtis”) as regulated by the Constitution and in line with Article 15 ECHR was not declared, rather, an “extraordinary situation” (“ekstremalioji padėtis”) was introduced.
4. Resolution No 517 of the Government of the Republic of Lithuania of 2 July 2021 On the Declaration of the Extraordinary situation and the Appointment of the State Commander of National Emergency Operations, TAR, 30/07/2021, No15235, available at: <https://bit.ly/3taBHCL>
5. TAR, 2021-07-22, Nr. 16266, available : <https://bit.ly/2Ylikvr>
6. TAR, 2021-08-11, Nr. 17359, available : <https://bit.ly/3ylvIWS>

The document focuses on the following issues:

- (1). Access to the asylum procedure at the Lithuania-Belarus land border, push-back practices and accelerated processing of asylum applications;
- (2). Detention of asylum applicants, including of vulnerable persons;
- (3). Changes and restrictions to the procedure for appealing against asylum decisions; and
- (4). Restrictions on reception conditions, including for vulnerable persons.

Concerns about the adopted amendments to the Aliens Law have been expressed by the Office of the United Nations High Commissioner for Refugees,<sup>7</sup> the Parliamentary Ombudsmen's Office,<sup>8</sup> Lithuanian NGOs, and the Council of Europe Commissioner for Human Rights, who stated that the amendments remove "important safeguards in the asylum procedure" in the event of an emergency, with regard to the detailed examination of the facts of an asylum application, the provision of legal aid, and the possibility of appeal.<sup>9</sup>

## II. ANALYSIS

### 1. EFFECTIVENESS OF ACCESS TO THE ASYLUM PROCEDURE AND ACCELERATED EXAMINATION OF ASYLUM APPLICATIONS

The legislative changes of July/August 2021 and the practices that have followed limit access to the asylum procedure in two ways: (a) the possibility introduced in the law allowing refusal to accept an asylum application in exceptional circumstances, and (b) the push-back practices without an individual assessment of a person's situation. In addition, the new practice of accelerated examination of the applications of all asylum applicants who have entered from territory of Belarus and the application of fewer procedural guarantees, disregarding the situation of vulnerable persons, will have a negative effect on the individual's access to fair and efficient asylum procedures.

#### Specific locations for lodging and refusal at other points

Amendments to the Aliens Law of 10 August 2021 added paragraph 1 to Article 67 of the Law by providing for specific places where an application for asylum may be lodged following the declaration of a state of war, state of emergency or an extraordinary situation, or an extraordinary event due to a mass influx of foreigners. These places are:

- (a). at border crossing points or transit zones – submitted to the State Border Guard Service;
- (b). in the territory of the Republic of Lithuania, when the foreigner entered the Republic of Lithuania legally – submitted to the Migration Department; and
- (c). in a foreign state – submitted to the diplomatic missions or consulates of the Republic of Lithuania specified by the Minister of Foreign Affairs.

The Law has also been supplemented with provisions (Article 67(1)) stipulating that a foreign national's application for asylum shall not be accepted after apprehension at the border, except at official border crossing points, and, in the event of non-acceptance, the procedure for applying for asylum at these crossings must be explained. At the same time, it is indicated that the State Border Guard Service may still accept the application of a foreign national who has crossed the state border of the Republic of Lithuania

7. UNHCR, *UNHCR legal observations on the amendments to the Law of the Republic of Lithuania on Legal Status of Aliens* (No XIV-506), 28 July 2021, available at: <https://bit.ly/38CwIBb> [accessed 23 August 2021]

8. <https://www.lrski.lt/wp-content/uploads/2021/07/assessment-of-the-proposed-legal-regulation.pdf>

9. <https://www.lrt.lt/naujienos/lietuvoje/2/1474704/euopos-tarybos-komisare-kreipiesi-i-simonyte-ir-paragino-lietuva-migrantu-krizes-metu-paisyti-zmogaus-teisiu>

“illegally” when taking into account the vulnerability of the person or other individual circumstances.

The implementation of these provisions has been confirmed by the subsequent practice at the Lithuania-Belarus border applied as of 2 August (based on an order of the Minister of the Interior), whereby foreigners are rejected at the border and not allowed to enter the territory of the state. In exceptional cases, a few people were admitted on humanitarian grounds. For example, during August 2021, 1,340 migrants were refused admission during the course of 11 days, while only 44 were granted admittance.<sup>10</sup>

### Pushbacks in practice

These legislative changes and practices create preconditions for the collective expulsion of asylum seekers (also known as “pushbacks”), i.e., return at the border without an assessment of the individual circumstances of the person. Such push-backs result in no possibility to apply for asylum (except for the theoretical possibility to apply at border crossing points); no individual decision being taken; and no possibility of appeal against the decision. As such, these policies and practices may give rise to violations of the principle of *non-refoulement* laid down in Article 33 of the 1951 Refugee Convention, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), Articles 1, 4 and 19(2) of the EU Charter of Fundamental Rights (CFREU). It should be noted that Lithuania has already lost a case before the European Court of Human Rights (ECtHR) concerning the refusal of entry and expulsion of asylum applicants to Belarus (ECtHR ruling of 11 December 2018 in the case of *M.A. and Others v. Lithuania* (Petition No 59793/17)). In this ruling, the Court concluded that the refusal to allow the applicants to lodge their applications for asylum and their expulsion to Belarus without examination of their applications constituted a violation of Article 3 of the ECHR (§ 115). Although Article 33(2) of the 1951 Convention provides for the possibility of exceptions to the application of the principle of *non-refoulement* on grounds of national security, neither Article 3 of the ECHR nor Article 4 of Protocol 4 to the ECHR provides justifiable grounds for not applying the principle of *non-refoulement* in emergency situations or other special cases.<sup>11</sup>

From the perspective of EU law, although the Asylum Procedures Directive (APD)<sup>12</sup> allows Member States to require the application for international protection in a specific designated place (Article 6(3)), such a requirement cannot prejudice the obligation to ensure effective access to asylum. In the absence of objective possibilities to apply at a border control post (such as when border crossing points are tens of kilometres away), such a theoretical possibility may be ineffective.

This practice may give rise to the risk of breaches of the prohibition of collective expulsion stipulated in Article 4 of Protocol 4 to the ECHR and Article 19 of the CFREU.<sup>13</sup> As the ECtHR ruled on 8 July 2021 in the case *Shahzad v. Hungary*, the situation of foreigners crossing the border irregularly and pushed back to the external side of the border fence falls within the scope of the prohibition of collective expulsion under Article 4 of Protocol 4. The Court took into account the limited access to transit areas and the fact that there was no formal procedure accompanied by relevant safeguards guaranteeing the individual admission of people in such circumstances, and found that effective means of legal entry were not ensured.<sup>14</sup> Accordingly, the expulsion of foreigners without examining their personal circumstances, and without enabling them to put forward arguments against expulsion was recognised as collective and, therefore, in violation of the Protocol.<sup>15</sup> The Court reiterated that decisions refusing entry taken as part of a wider policy of not receiving applications for international protection from persons presenting themselves at the border and pushing them back, are in violation of international law.<sup>16</sup>

### Accelerated examination of cases after entry from Belarus

Although the legislative changes of July/August 2021 have not changed the length of examination of asylum

10. <https://www.lrt.lt/naujienos/lietuvoje/2/1468387/bilotaite-nuo-rugpjucio-2-osios-l-lietuva-nebuvo-ileista-1-3-tukst-neteisetu-migrantu>
11. For more on the use of restrictions in relation to asylum during a state of emergency and other similar situations, see ECRE, Legal Note No. 6: Derogating from EU Asylum Law in the Name of “Emergencies”: the Legal Limits under EU Law, June 2020, link: <https://ecre.org/elena-legal-note-on-derogations-from-asylum-procedures-as-a-result-of-emergency-measures/>
12. 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).
13. For more on the ECtHR standards on the principle of *non-refoulement* and collective expulsion, see ECRE, Legal Note No 10: Across Borders: the Impact of *N.D. and N.T. v. Spain* in Europe, June 2021, link: <https://ecre.org/wp-content/uploads/2021/07/Legal-Note-10.pdf>
14. *Shahzad v. Hungary*, ECHR, 8 July 2021, Application No. 12625/17, para. 65: <https://bit.ly/2WCi6zh>
15. *D.A. and Others v. Poland*, ECHR, 8 July 2021, Application No. 51246/17, paras. 78-80: <https://bit.ly/3kFip4v>
16. *Ibid.*, para. 83; *M.K. and Others v. Poland*, ECHR, 23 July 2020, Applications No 40503/17, 42902/17 and 43643/17, paras. 208 – 210: <https://bit.ly/3DxtDKH>

applications, as of July, there is a new practice of accelerated examination of applications of all asylum seekers who have entered the territory from Belarus, i.e. within 10 days. The accelerated examination was previously allowed by Article 81 (2) and Article 76 (4) of the Aliens' Law even before the amendments, but it was reserved for an exhaustive set of situations;<sup>17</sup> now it is being applied to those who arrive from Belarus.

Amendments to the Aliens Law of 13 July 2021 (Article 76(6), Article 77(3)), will have an effect on the situation of vulnerable persons, in particular unaccompanied minors. The amendments remove the possibility of applying special procedural guarantees to vulnerable persons in the event of a state of war, state of emergency or extraordinary situation, or an extraordinary event due to a mass influx of foreigners. Previously, vulnerable persons were not subject to the accelerated examination of applications or to border procedures which are allowed in these exceptional situations, but the exceptions have been removed in the new procedure, i.e. vulnerable persons may be processed under accelerated procedures within 10 days.

Failure to take into account the needs of vulnerable persons in asylum procedures and in provision of reception conditions does not meet the requirements of Article 24 of the CFREU, the APD (Article 24(3)), and the requirements of the EU Reception Conditions Directive (RCD) to provide appropriate assistance to vulnerable persons and act in the best interests of the child (Articles 21-25).

The restrictions on reception conditions and on procedural guarantees (right to information, contacts with refugee counselling organisations, etc. please see below under sub-section on restrictions to the reception conditions) significantly reduce an individual's chances of participating effectively in the asylum procedure. This is possibly confirmed by the results of the examination of applications under these provisions: decisions have been taken on 200 of 1,500 applications registered as of August, and all these applications were rejected.<sup>18</sup> Excessively truncated deadlines for processing applications, coupled with restrictions of procedural guarantees and failure to take into account the situation of vulnerable persons, may jeopardize realisation of the objectives of the asylum procedure.

## **2. AUTOMATIC DETENTION OF ASYLUM APPLICANTS, EXCLUSION OF PROCEDURAL GUARANTEES AND DETERIORATION IN THE SITUATION OF VULNERABLE PERSONS**

The legislative changes of July/August 2021 and subsequent practices generate the risk of breaches of international obligations and EU law in the following areas:

- (a). the statutory possibility to hold asylum seekers in a designated facility prior to official admission into the territory in practice amounts to detention, but is not subject to the relevant safeguards and procedural guarantees, and may therefore lead to automatic de facto detention of asylum seekers;
- (b). detention exceeds the allowed period;
- (c). detention is ordered by a non-judicial decision without procedural guarantees or urgent judicial review;
- (d). the situation of vulnerable persons (including unaccompanied minors) and the safeguards afforded to them in EU law are not taken into account when accommodating persons, which in effect amounts to detention; and
- (e). an asylum seeker may be detained solely on account of irregular entry.

17. These were as follows: when: a) a foreigner arrived from a safe country of origin; b) asylum application contains only information that is not essential for granting asylum; c) the foreigner submits false information about his/her identity/nationality in order to mislead the examination or does not submit/destroys information or documents about identity/nationality, which may have essential importance for taking the decision on asylum; d) a foreigner submits asylum application, which is based on statements that are inconsistent, contradictory, misleading and contrary to the information collected about the country of origin of the foreigner, thus manifestly incredible; e) a foreigner submits a subsequent application and there is no information or data submitted as to increase the possibility that the foreigner might comply with criteria for granting asylum; f) a foreigner submits an asylum application for a sole purpose of preventing adoption or implementation of a return decision; g) a foreigner refuses to allow taking of fingerprints; g) there are serious reasons to consider that a foreigner may pose a threat to national security or public order, or has been previously expelled due to this reason.

18. <https://vz.lt/verslo-aplinka/2021/08/13/migracijos-departamentas-gauta-1500-migrantu-prieglobscio-prasymu-kol-kas-visi-atmesti>

First, the amendments to the Aliens Law of 13 July 2021 provide that:

“asylum seekers who have submitted asylum applications at border control points, transit zones or shortly after irregular crossing of the state border of the Republic of Lithuania shall be temporarily accommodated at border control points, transit zones, and at State Borders Guard Service. In case of state of war, state of emergency or extraordinary situation, or extraordinary event due to mass influx of foreigners, asylum seekers who have applied for asylum at border control points, transit zones or shortly after irregular crossing of the state border of the Republic of Lithuania pending their admission to the Republic of Lithuania, shall be temporarily accommodated at border control points, transit zones, the State Border Guard Service or other places adapted for that purpose, without granting them the right to move freely in the territory of the Republic of Lithuania” (Article 5(6); emphasis added).

In addition, such “accommodation” without granting the right to freedom of movement is automatically provided for by analogy after the decision to admit a foreigner into the territory of the Republic of Lithuania is made, but his/her application is examined under accelerated procedure (Article 5(9)).

The nature of the measure means that, although the term “accommodation” is used, it in fact falls within the definition of detention (when a Member State holds an applicant in isolation in a place where the applicant is deprived of his freedom of movement, Article 2(h) of the RCD) and in practice provides for the automatic detention of asylum applicants in the event of an “extraordinary situation” such as that currently invoked. The indications of detention are that the provision in itself explicitly deprives the persons concerned of freedom of movement and that they are isolated from the rest of the population, by requiring them to remain permanently within a restricted and closed perimeter (see the CJEU ruling of 14 May 2020 in the case C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, § 223).

While the isolation of people amounts to detention in itself, there is also no individual assessment of detention and accordingly the requirements of necessity and proportionality are not applied, nor is there an assessment of alternatives to detention, as required by Articles 8 and 9 of the RCD. The regulation and subsequent practices are not in line with the case law of the CJEU in its interpretation of the RCD, which provides that: (a) detention is a measure of last resort that applies after alternative measures have been assessed and cannot be applied effectively; (b) detention may be imposed only where it is necessary, on the basis of an individual assessment of each case and only after it has been established that such detention is proportionate to the objectives pursued (CJEU rulings in cases 14 May 2020 C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, paragraphs 222, 258-259 and 266, 14 September 2017 C18/16 K. v. *Staatssecretaris van Veiligheid en Justitie*, § 48). Similar requirements are enshrined in international law.<sup>19</sup>

Second, the amendments to the Aliens Law of 13 July 2021 provide that asylum seekers accommodated in temporary places prior to admission into the territory of the state may be held for up to 28 days, but this period is automatically extended upon declaration a state of war, state of emergency or extraordinary situation or an event due to mass influx of foreigners. This is, however, for a maximum of 6 months (Article 5(8)). Accordingly, if such accommodation, as indicated above, is equivalent to actual detention, the establishment of a detention period of more than 4 weeks is not in line with the case law of the CJEU in implementing Article 43(3) of the APD (border procedures), as the applicant cannot be detained for more than 4 weeks under this procedure, even if the state is confronted with a large number of applicants, making it impossible to complete the proceedings within that period (CJEU ruling of 14 May 2020 in the case C-924/19 PPU ir C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, §§ 245-246).

19. Under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), the state must prove that the detention was reasonable, necessary and proportionate in the circumstances of the individual case in order for it to be considered lawful. The requirement of necessity and proportionality of detention includes the requirement to prove that less restrictive measures have been considered and are not sufficient. Both the ICCPR and the ECHR require that detention is as short as possible and that the longer the detention, the more likely it is to become arbitrary. In addition, long detention or indefinite detention can be tantamount to cruel, inhuman or degrading treatment. Prolonged detention of minors is particularly problematic and may violate Article 3 of the Convention on the Rights of the Child in conjunction with Article 37, and Article 24 of the ICCPR. See, *Bakhtiyari v. Australia*, Human Rights Committee Communication No. 1069/2002, Views of 6 November 2003, UN Doc. CCPR/C/79/D/1069/2002 (2003), paras. 9.2-9.3; *F.K.A.G. et al. v. Australia*, Human Rights Committee, Communication No. 2094/2011, Views of 28 October 2013, UN Doc. CCPR/C/108/D/2094/2011 (2013), para. 9.3.; *C. v. Australia*, Human Rights Committee Communication No. 900/1999, Views of 13 November 2002, UN Doc. CCPR/C/76/D/900/1999 (2002), para. 8.2.



Third, the amendments to the Aliens Law of 13 July 2021 also stipulate that the decision on accommodation pending admission to the territory is made by an authorised official of the State Border Guard Service (Article 79 (1)), so the actual detention is applied by a non-judicial decision. There is no possibility to challenge such a decision in court provided in the Aliens Act, nor does it provide for judicial review of such a decision. Automatic de facto detention based on the decision of an administrative authority without an effective opportunity to challenge the decision or for its judicial review is not in line with the requirements set out in Article 47 of the CFREU, the RCD (Article 9 (3)), the APD (Article 26(2)) and international law. See for example ECtHR case law under Article 5 (e.g. ruling of 21 November 2019 in the case *Z.A. and others v. Russia*, *Petition Nos.* 61411/15, 61420/15, 61427/15 and 3028/16) (DK), § 146).

It should be noted that the absence of a formal detention order does not alter the fact that the applicants are de facto detained, if the circumstances so indicate, and a procedure of this type does not meet the requirements of the case law of the ECtHR. In such circumstances, the Court did not consider that the vulnerable applicants could have lodged a complaint against the lawfulness of the detention, which had not been formalised in any form of decision, for prompt judicial review, and therefore, found a violation of Article 5(4) of the ECHR (ECtHR ruling of 2 March 2021 in the case *R.R. and Others v. Hungary*, *Petition No* 36037/17, §§91, 97-98).

Fourth, the amendments to the Aliens Law of 13 July 2021 provide that no exceptions for vulnerable persons (unaccompanied minors) in the case of temporary border accommodation (which may be considered equivalent to actual detention, as mentioned above) apply upon declaration of a state of war, state of emergency or extraordinary situation, or extraordinary event due to mass influx of foreigners (Article 79 (4)). This means that the needs of vulnerable persons (unaccompanied minors) are not taken into account, as provided for in the RCD. Such amendments are not in line with the requirements international and EU law including Article 3(1) and Article 37(b) of the United Nations Convention on the Rights of the Child, Article 24 of the CFREU, Article 25(6) of the APD, Article 11(2) and (3) and Article 23(1) of the RCD, which provide for the principle of the best interests of the child as a primary consideration in all decisions and the application of detention to minors only as a last resort after establishing that other less coercive alternative measures cannot be applied effectively, and only for the shortest possible period of time.

It should be noted that in recent years there has been a consensus in international law on the total prohibition of application to children of measures of immigration detention (see, for example, the consolidated and clear position of the UN Committee on the Rights of the Child).<sup>20</sup> In ECtHR case law, minors (both accompanied and unaccompanied) are recognised as particularly vulnerable in the context of detention and have special needs (*R.R. and Others v. Hungary*, *Petition No* 36037/17, § 49; ruling of 19 January 2012 in the case *Popov v. France*, *Petition No* 39472/07 and 39474/07, § 91). In recent years, the ECtHR has established violations of Article 3 of the ECHR related to the detention of minors, taking into account a combination of three factors: the young age of the children, the duration of the detention, and the inadequacy of the premises to accommodate the children. The particular vulnerability of children is a decisive factor which takes precedence over the status of a child as an irregular migrant (e.g., ruling of 12 July 2016 in the case *A.B. and Others v. France*, *Petition No* 11593/12, § 109). Article 3 of the ECHR imposes a positive obligation on the state to undertake appropriate measures to protect minors (*R.R. and Others v. Hungary*, *Petition No* 36037/17; ruling of 19 January 2010 in the case *Muskhadzhieva and Others v. Belgium*, *Petition No* 41442/07, § 58).

Fifth, the amendments to the Aliens Law of 13 July 2021 also provide that an asylum seeker may be detained when he/she has entered the territory of the Republic of Lithuania by illegally crossing the state border of the Republic of Lithuania in a state of war, state of emergency or extraordinary situation or an event due to mass influx of foreigners (Article 113(4) (11)). This regulation implies the detention of an asylum seeker solely for the purpose of illegal entry, which is incompatible with Article 8 of the RCD, which establishes an exhaustive list of grounds for detention, in which illegal entry alone is not an appropriate ground for detention. This provision is also not in line with Article 26(1) of the APD, which provides that a person may not be detained for the sole reason that he/she is an applicant, while according to the amendment to the Aliens Act, detention applies precisely pending admission of a person, such as an asylum seeker, to the territory. It should be noted that the RCD does not provide for the possibility of applying different conditions in the event of the state of emergency or an extraordinary situation.

20. See, for example: Committee on the Rights of the Child and Committee on Migrant Workers, Joint General Comment no. 23/4, 16 November 2017, UN Doc. CMW/C/GC/4/CRC/C/GC/23.

### 3. RESTRICTED ACCESS TO EFFECTIVE LEGAL REMEDY

The legislative changes of July/August 2021 and subsequent practices have led to restrictions on the right of appeal, which may in turn result in asylum seekers being sent to countries where they face risks.

The amendments to the Aliens Law of 13 July 2021 restrict the right of asylum seekers to appeal to an independent authority, i.e., a court, against a decision to refuse asylum. They further limit the effect of the appeal, removing the suspension of implementation of the appealed decision and practical access to legal aid.

First, the amendments introduce a new pre-trial complaint procedure (amendment of Article 136 of the Aliens Law and new Articles 1351 and 1352), which provides that an appeal against a decision not to process an asylum application or to refuse asylum may be lodged with the Migration Department within 7 days of the date of notification of the decision to the foreigner. Second, such an appeal does not suspend the enforcement of the decision. This pre-trial appeal procedure is not tied to the state of emergency or extraordinary situation, and applies in all cases as mandatory, thus, should the person choose to appeal then the appeal must be lodged as described above.

This new regime may not ensure effective legal remedy as required by Article 13 of the ECHR, and Article 47 of the CFREU (right to effective judicial protection, which is an essential part of the rule of law),<sup>21</sup> and Article 46(5) and (6) of the APD. The ECtHR has repeatedly held that an effective remedy requires that the complaint be dealt with by a body other than the one which issued the decision, as a sufficiently independent standpoint must be ensured for the measure to comply with requirements of Article 13 of the ECHR; the court always reviews the independence of the extrajudicial body (*Silver and Others v. United Kingdom*, 1983, § 116; *Leander v. Sweden*, 1987, §§ 77 (b) and 81; *Khan v. United Kingdom*, 2000, § 47). According to the case law, the requirement of an effective remedy includes an independent review of the application in order to establish that there are serious grounds for believing that the applicant is at risk of conduct prohibited by Article 3 in view of the irreparable damage which might arise if such risk materialises. The examination must be carried out without regard to the person's conduct, the grounds for expulsion, or the perceived threat to the national security of the sending state (*Chahal v. United Kingdom*, 1996, § 151). Therefore, the Migration Department, which also makes a decision at first instance, cannot be considered an independent and impartial body for the examination of appeals against its own decisions. In addition, the lack of suspensive effect of an appeal against a negative decision may lead to a violation of the principle of *non-refoulement* contrary to Lithuania's obligations under Article 33 of the 1951 Convention, Article 3 of the ECHR in conjunction with Article 13, and Articles 4, 19 and 47 of the EUCFR.

The ECtHR has repeatedly stated that an effective measure must provide for the automatic suspensive effect against a decision in expulsion cases (e.g. the ruling of 5 July 2016 in the case *A.M. v. Netherlands*, Petition No 29094/09, § 66), and a measure which provides only for a "theoretical" suspension of the execution of the decision is not sufficient. It should be noted that in *M.A. and Others v. Lithuania*, the Court found that the absence of an effective legal remedy with automatic suspensive effect had violated Article 13 of the ECHR. This regulation is also not in line with the case law of the CJEU in interpreting the provisions of the APD, as it is required that an appeal against a refusal of asylum should always suspend the enforcement of the expulsion order. That Court held that the protection of the right to an effective remedy and the principle of *non-refoulement* required that an applicant for international protection be afforded an effective remedy with suspensive effect before at least one judicial authority (C-181/16 *Sadikou Gnandi v. Belgium*, § 58). As an appeal is lodged with the Migration Department and the lodging of such an appeal does not suspend the enforcement of the decision taken, applicants may in fact be expelled without the possibility of the decision being reviewed by at least one independent judicial authority.

Given that asylum seekers may be automatically detained (as mentioned above) and that the possibility of restricting procedural rights (contacts with refugee assistance organisations, including those offering legal aid, interpretation services, etc.) is envisaged, the possibilities for asylum seekers to appeal against a decision can become quite theoretical. This regulation is also not in line with the case law of the ECtHR, which requires individuals to be provided with sufficient information about their situation to be able to use appropriate means to substantiate their complaints and to use interpretation and legal aid services, i.e. the measure must be effective in practice and not theoretical and illusory (the ruling of 22 September 2009 in the case *Abdolkhani and Karimnia v. Turkey*, Petition No 30471/08, § 115; *M.S.S. v. Belgium and Greece*

21. The CJEU has held that, in accordance with the principle of the primacy of EU law and the right to an effective remedy guaranteed by Article 47 of the Charter, a national court hearing an appeal must reverse the decision of the administrative or quasi-judicial authority [...] which is inconsistent with its previous decision and give its decision on the application for international protection of the person concerned, without, if necessary, application of national rules prohibiting it from doing so (ruling of 29 July 2019 in the case C-556/17 *Torubarov*; see also, by analogy, ruling of 5 June 2014 of the case *Mahdi* C146/14 PPU, EU:C:2014:1320, § 62).



[DK], 2011, §§ 301-304 and 319).

In this context, the practice of rejecting asylum seekers (among other migrants) at the border without assessing their individual situation, without taking an individual decision, and, accordingly, without the possibility to appeal against the decision refusing entry based on amendments to the Law on Aliens may be considered incompatible with the right to effective judicial protection. It should be noted that the ruling of 23 July 2020 of the Grand Chamber of the ECtHR in the case *M.K. and Others v. Poland* (Petitions No 40503/17, No 42902/17 and No 43643/17) concerning the practice of push-backs by Polish officials, found that the applicants did not have access to effective remedies to challenge the refusal of entry in violation of Article 13 ECHR in conjunction with Article 3 and Article 4 Protocol No. 4.

#### **4. RESTRICTIONS ON THE RECEPTION CONDITIONS FOR ASYLUM APPLICANTS**

The amendments to the Aliens Law of 13 July 2021 provide for the possibility of:

“temporary and proportionate restrictions on the rights of asylum seekers in the event of the state of war, state of emergency or extraordinary situation or event due to a mass influx of foreigners, if they cannot be guaranteed for objective and reasonable reasons other than the right to material reception conditions, the provision of medical care and state-guaranteed legal aid, while for vulnerable persons – restrictions to the right to have access to reception conditions that meet their special needs” (Article 71(11)).

This provision allows for restrictions on the right to information, interpretation, social and psychological assistance, contacts with UNHCR and other refugee assistance organisations (including those offering legal aid), and the right to work. If access to legal aid organisations is restricted, the provision of legal aid is in fact restricted as a result. The restrictions on these fundamental procedural rights can significantly limit the ability of asylum seekers to properly prepare for asylum proceedings and to cooperate effectively with the authorities in determining their status. This might reduce the efficiency and fairness of asylum procedures.

Such restrictions are also incompatible with the requirements of international and EU law: Article 35 of the 1951 Convention (contacts with the UNHCR), Article 1 of the EUCFR (human dignity),<sup>22</sup> Article 12(1)(a) of the APD and Article 5 of RCD (right to information on the asylum procedure, rights, obligations and reception conditions), Article 12(1)(c) of the APD (contacts with UNHCR and other organisations providing legal aid and other advice), Article 12(1)(b) of the APD (right to an interpreter), and Article 15 of the RCD (right to work if the applicable conditions are met).

22. See, for example, CJEU rulings in cases: 12 June 2019 C233/18 *Zubair Haqbin v. Federaal agentschap voor de opvang van asielzoekers*, § 46, 24 February 2014 C79/13 *Saciri and Others v. Federaal agentschap voor de opvang van asielzoekers*, § 35; 27 September 2012 C-179/11, *CIMADE, GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, § 42.