

# Déclaration du CCBE sur la situation à la frontière entre l'UE et le Bélarus

15/12/2021

Le Conseil des barreaux européens (CCBE) représente les barreaux de 45 pays, soit plus d'un million d'avocats européens.

Le CCBE tient à exprimer sa vive préoccupation face à la crise humanitaire qui se déroule actuellement à la frontière entre l'UE et le Bélarus.

Dans ce contexte, même s'il est conscient de la situation fortement politisée à la frontière avec le Bélarus, le CCBE rappelle qu'il est important d'appliquer certains principes dans le domaine de la migration et de l'asile, quelles que soient les difficultés auxquelles les États membres doivent indéniablement faire face. Parmi ces principes figurent la défense de l'état de droit, la protection des libertés et des droits fondamentaux, notamment le droit d'accès à la justice. Il convient également d'ajouter que ces principes doivent toujours prévaloir sur d'éventuelles considérations politiques ou économiques.

En outre, le CCBE réaffirme son engagement en faveur du droit d'asile reconnu au titre de la Convention de Genève de 1951 relative au statut des réfugiés, de la Charte des droits fondamentaux de l'UE et du traité sur le fonctionnement de l'Union européenne ainsi que des dispositions pertinentes du régime d'asile européen commun, lequel droit ne peut être garanti efficacement qu'en offrant un accès suffisant à l'assistance juridique à toutes les personnes ayant potentiellement besoin d'une protection internationale.

De plus, le CCBE rappelle la jurisprudence de la Cour européenne des droits de l'homme qui dispose que « l'effectivité des droits de la Convention exige [que ces États] mettent à disposition un accès réel et effectif aux voies d'entrée régulières, et en particulier aux procédures à la frontière, pour les personnes qui parviennent à la frontière. Ces voies doivent permettre à toute personne persécutée d'introduire une demande de protection, fondée notamment sur l'article 3 de la Convention, dans des conditions qui en assurent un traitement conforme aux normes internationales, en ce compris la Convention »<sup>1</sup>. La Cour européenne des droits de l'homme a également souligné que « pour que l'obligation de l'État en vertu de l'article 3 de la Convention soit effectivement remplie, une personne sollicitant une protection internationale doit bénéficier de garanties afin de ne pas avoir à retourner dans son pays d'origine avant que ses allégations ne fassent l'objet d'un examen approfondi. Par conséquent, la Cour estime que [...] un État ne peut pas refuser l'accès à son territoire à une personne qui se présente à un poste-frontière en soutenant qu'elle risque d'être soumise à de mauvais traitements si elle reste sur le territoire de l'État voisin, à moins que des mesures appropriées ne soient prises pour éliminer ce risque »<sup>2</sup>.

<sup>1</sup> Voir [N.D. et N.T. c. Espagne \[GC\] \(requêtes n<sup>os</sup> 8675/15 et 8697/15\)](#)

<sup>2</sup> Voir [M.K. et autres c. Pologne \(requêtes n<sup>os</sup> 40503/17, 42902/17 et 43643/17\)](#)

Dans ces circonstances, bien que le CCBE prenne note de la proposition<sup>3</sup> de la Commission européenne de proposer un ensemble de mesures temporaires d'asile et de retour pour aider la Lettonie, la Lituanie et la Pologne à faire face à la situation d'urgence à la frontière extérieure de l'UE avec le Bélarus, le CCBE souhaite rappeler que le droit d'asile et le principe de non-refoulement sont des droits fondamentaux auxquels il est impossible de déroger, même dans de telles circonstances. Nous recommandons vivement de sauvegarder et de protéger ces principes aux frontières de l'UE, en adoptant une approche centrée sur les droits humains afin de résoudre la situation et permettre aux personnes ayant besoin de protection d'accéder au territoire et aux procédures conformément au droit européen, au régime d'asile européen commun et aux lois internationales sur les droits humains. A cet égard, le CCBE est préoccupé par le fait que la proposition de la Commission permet un recours accru à la détention avec des conditions d'accueil de base réduites. En outre, le CCBE exprime ses préoccupations quant au manque d'accès adéquat au droit d'asile, aux garanties procédurales et à l'application effective dans la pratique des droits fondamentaux auxquels toutes les personnes arrivant aux frontières ont droit, ainsi qu'au manque de garanties renforcées pour les enfants et les autres personnes en situation de vulnérabilité.

**Le CCBE demande donc instamment l'UE et ses États membres :**

- 1. d'assurer la mise à disposition adéquate de ressources matérielles et humaines efficaces afin de garantir dûment l'application effective des garanties procédurales et des droits fondamentaux, dans la pratique, auxquels toute personne arrivant aux frontières a droit, y compris un accès véritable, digne et effectif à la demande de protection internationale, sans exception ;;**
- 2. de garantir le respect des droits fondamentaux, en permettant aux personnes qui se présentent à la frontière d'accéder efficacement à une assistance juridique<sup>4</sup> fournie par des avocats.**

Des informations complémentaires sur la situation dans les pays frontaliers fournies par des barreaux membres du CCBE (Pologne et Lituanie) figurent à l'annexe de la présente déclaration.

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<sup>3</sup> [Proposal for a COUNCIL DECISION on provisional emergency measures for the benefit of Latvia, Lithuania and Poland COM/2021/752 final](#)

<sup>4</sup> En ce qui concerne les garanties procédurales contre le refoulement, voir [Hirsi Jamaa et autres c. Italie](#) (point 185)

**I. Situation at the EU border (Polish – Belarusian) and Polish regulations**

Since the end of August there has been a humanitarian crisis at the Polish-Belarusian border. There have been numerous attempts to cross the EU border (Polish – Belarusian) illegally. According to the information provided by the Polish Ministry of Defence in November 2021, there have been over 5000 attempts to cross the border.

Although some of the people crossed the border with a clear intent to ask for asylum, these requests were not taken into consideration and people were sent back directly to the border, in contradiction with the Geneva Convention on the Status of Refugees, 1951, the EU Charter of Fundamental Rights and the Treaty on the Functioning of the European Union as well as the relevant provisions of the common European Asylum System.

Many Polish citizens (including Polish artists, known actors), NGOs, lawyers, bars have tried their best to provide help for the asylum seekers (offering clothes, food, legal assistance when possible, etc.).

This situation started at the border crossing close to the Polish city of Usnierz Gorny where around 30 foreigners have been locked away at the border between Poland and Belarus. On this site, migrants were refused access to the territory of Poland and were prevented as well by Belarusian officers to come back to the territory of Belarus, and were therefore stuck at the border. People were pushed back to the Belarusian Border by Polish officers even though they had asked for international protection in Poland.

Under the amendments made by the Ministry of Internal Affairs and Administration to the Foreigners Act on the temporary suspension or restriction of border traffic at certain border crossings from 26 August 2021, all persons who did not belong to the category of persons specified in the Foreigners Act as having access to the Polish territory were obliged to immediately leave the territory of the Republic of Poland.

On 3 September 2021, the Polish President enacted the Act of the state of emergency, which was introduced in 183 municipalities within around 3 kilometres of the border in the beginning of September, initially for 30 days. As a result – volunteers, journalists NGOs and lawyers lost access to the border zone.

On 26 October 2021, the amendments to the Foreigners Act were published. According to these amendments, neither the return procedure nor any asylum procedure is initiated and all persons arriving at the border are detained immediately after crossing the border in contradiction to the law constituting the external border in the sense of Art. 2.2 of the Schengen Borders Code (Art. 303 point 1 section 9a of the Foreigners Act). In those cases, the Commanding Officer of the Border Guard Post would issue an order to leave the territory of Poland. The order may be appealed to the Commander-in-Chief of the Border Guard. However such a procedure does not suspend the execution of the order. The order contains the order for the foreigner to leave the territory of Poland and includes a ban for re-entry into Poland and other countries of the Schengen area along with the period of this prohibition from 6 months to 3 years (Article 303b points 1-5 of the Foreigners Act).

The state of emergency will expire in the beginning of December and under the Polish Constitution the President cannot extend it. However, on 17 November 2021, the Polish Parliament adopted a new bill setting out new rules which would apply after the expiry of the state of emergency, and which would allow the government to maintain the quasi-state of emergency and therefore allow it to grant access

to the border zone to only a few number of selected people (although no “selection” criteria have been published yet).

## II. Actions undertaken by representative bars and councils of attorney-in-law in Poland

*(NB: in Poland, we have attorneys (FR: Avocat - EN: Attorney/Barrister) and attorney-in-law (FR: Conseiller juridique – EN: Solicitor/Legal advisor). The information below covers the actions undertaken by both the attorneys and by the legal advisors as each profession is represented by their respective organs/councils).*

### A. Actions undertaken by respective Polish bars of attorneys:

**The Polish Supreme Bar of Attorneys (“PSBA”)** took a resolution in respect of the current situation at the border. The resolution no 26/2021 was unanimously adopted on the session of PSBA on 23 October 2021.

The resolution calls the Polish authorities to respect human dignity, rights and freedom of each person (including asylum seekers) and to respect the non-refoulement rule as stipulated in the Geneva Convention of 28 July 1951.

Furthermore, in the same resolution, the PSBA called for amending the ordinance of the Council of Ministers of September 2021 (in respect of limiting freedoms and rights in relation to introducing the state of emergency). The amendment would make possible for attorneys and trainees (that do not have their offices in the territory where the state of emergency was introduced) to provide legal services to asylum seekers. At present, the possibility of providing legal aid by the said attorneys is strongly limited. Likewise, the President of the PSBA - Mr. Przemysław Rosati submitted letters to the Polish authorities on providing legal aid by the Polish attorneys at the EU border. Mr. Rosati emphasized that the access to legal aid for the refugees should not be limited or excluded (in particular the legal aid rendered by attorneys whose registered offices are located outside the area under the state of emergency).

On 18 November 2021 the PSBA adopted a resolution addressed to the Polish authorities. The resolution tackled the issue of amending the Act on protection of a state border and other acts. In the PSBA’s opinion the said amendments are not compliant with the Polish Constitution. One should not use feelings like fear, apprehension and danger or similar feelings to amend the law in a way that can be considered as breaching the binding provisions of law.

PSBA is working at present to organise a conference devoted to the help to the asylum seekers as well as to organise workshops for the attorneys willing to provide legal assistance to asylum seekers.

On 29 November 2021 the PSBA organised a training devoted to the legal aid provided by the attorneys for the refugees.

The PSBA is constantly monitoring the legal situation at the EU border (that is a Polish – Belarusian one) and is taking respective actions.

**Warsaw Bar of Attorneys:** Mr. Mikołaj Pietrzak, the Dean of Warsaw Bar of Attorneys, has submitted a letter addressed to the Head Police Commandant and the Head Commandant of the Polish Border

Guards regarding the limitation of the possibility for attorneys to provide legal assistance at the border (September 2021). In this regard, the Dean also visited the border.

Furthermore, the Warsaw Bar of Attorneys organised a training session on the right to international protection and the refugee status (August 2021).

Moreover, the Attorneys from Warsaw Bar of Attorneys organised a charity collection for the refugees' children (it was the grassroots initiative).

**Białystok Bar of Attorneys** has set up a group that will provide legal assistance to the asylum seekers. There are around 30 attorneys in this group.

The attorneys (this is the grassroots initiative) also organised legal assistance for the Polish guards working at the border.

#### B. Actions undertaken by representative councils of attorneys-in-law

Since the beginning of the crisis at the Polish borders, attorneys-in-law have been providing pro bono legal assistance to asylum seekers. The National Council of Attorneys at law and regional Councils of Attorneys at law also organized training sessions about asylum and immigration law for the lawyers who would like to provide legal assistance for asylum seekers. The attorneys-in-law also cooperated with NGOs providing humanitarian help for asylum seekers.

On 24 August 2021, the National Council of Attorneys at law endorsed the resolution of the Human Rights Commission of the National Council of Legal Advisers on the deepening humanitarian crisis on the border strip near the town of Usnierz Górny at the Polish-Belarusian border. The Commission expressed its deep concern and outrage at the deepening humanitarian crisis that has lasted for two weeks. This resolution also notes that there is no doubt that the increased number of asylum seekers at the Polish-Belarusian border is the result of a hybrid war waged by Alexandr Lukashenka, in which asylum seekers have been objectified and that it is undeniable that the government of the Republic of Poland is obliged to guard the border and ensure the safety of its citizens. The resolution further reads that: "(...), it should be clearly stated that border protection cannot take place at the expense of violating the norms and rules contained in the Constitution of the Republic of Poland, international agreements, EU legislation, judgments of the Supreme Administrative Court, the Court of Justice of the European Union, or the European Court of Human Rights. It should also take place with respect to the rights of individuals guaranteed by the Geneva Convention relating to the Status of Refugees to which Poland is a party. Statements by representatives of the Polish authorities regarding the impossibility of submitting applications for international protection by persons staying on the Polish-Belarusian border to the competent Polish authorities are either a deliberate violation of fundamental human rights, or they prove a complete ignorance of international law and standards. (...) The claim of the Polish authorities that the Republic of Belarus is a safe third country does not stand up to the data published by the Head of the Office for Foreigners for 2020. According to the data published by the Head of the Office for Foreigners, in 2020, 81 people from the Republic of Belarus were granted international protection, which proves that this country is not treated by Polish public administration authorities as a safe third country. The Commission expresses solidarity and respect towards people seeking international protection in Poland and calls on the Polish authorities to treat them humanely, accept their applications, provide immediate medical care, legal aid, and psychological and social support."

On 15 November 2021, the representatives of the National Council of Legal Advisers: Mr. Włodzimierz Chróścik - President, Ms. Joanna Kamieńska, Dean of the Council of the District Chamber of Legal

Advisers in Białystok - District Chamber of Legal Advisers in Białystok, and members of the Human Rights Commission of the National Council of Legal Advisers r.pr. Magdalena Bartosiewicz and r.pr. Janusz Trochimiak, as well Mr Jacek Białas from the Helsinki Foundation for Human Rights) met with the representative of the Border Guard and NGOs to discuss the situation at the Polish Border.

### **III. Actions undertaken by the Lithuanian Bar**

The Lithuanian Bar assisted the Migration Department in dealing with the migrant crisis, which has risen from massive illegal crossing of the Lithuanian border.

Learning materials and examples of good practice were prepared and supplied as a precondition that legal processes do not violate international obligations. These materials were prepared for lawyers to better understand the specifics of refugee complaints providing legal aid. It was necessary because previously there was no high demand for lawyers specialising in migration law.

It was publicly announced that there are nuances that lawyers should pay attention to when providing legal aid. The purpose of the training was also to update lawyers on examples of good practice. Online training was prepared for lawyers (advocates) at no cost for the participants. These learning materials and online training were also made accessible for the Migration Department employees free of charge.

The main purpose of these initiatives was to contribute to the efforts that Lithuania does not violate the requirements of the United Nations, the Council of Europe and the European Union, ensuring the rights of migrants to an effective judicial remedy and a fair trial.

The Lithuanian Bar Association also publicly drew attention, that current system providing legal aid to migrants has significant flaws. First, such legal aid is outside general State legal aid system. As a direct consequence, the lawyers are selected by the Migration Department itself according to the procedures of public procurement. Such a situation might give the impression of a conflict of interest. Because Migration Department hires a lawyer who complains about the decisions of the Migration Department itself. Second, such system might create distortions in the State legal aid system itself, as the State legal aid system should be comprehensive and inclusive, covering all sectors and ensuring a uniform standard of access to justice. Third, State legal aid system at any time can ensure a proper number of lawyers providing legal aid, which could hardly be attainable by Migration Department.

These proposed initiatives and expressed concerns were addressed and discussed in the meeting of the President of the Bar with the Director of Migration Department in August 2021. This meeting also received a public attention by media.