



Latvijas Republikas Ārlietu ministrija
Ministry of Foreign Affairs of the Republic of Latvia

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The Ministry of Foreign Affairs of the Republic of Latvia presents its compliments to the Office of the United Nations High Commissioner for Human Rights and with the reference to the joint communication of 2 March 2023 of Ms Mary Lawlor, Special Rapporteur on the situation of human rights defenders, Mr Obiora C. Okafor, Independent Expert on human rights and international solidarity, and Mr Felipe González Morales, Special Rapporteur on the human rights of migrants, expressing concerns about the criminal proceedings initiated against the representatives of the association “*Gribu palīdzēt bēgļiem*” and the effects of the emergency situation on the exercise of one’s human rights, has the honour to provide the following information.

The present response consists of three parts: the first part contains information about the Cabinet of Ministers Order no. 518 “Regarding the Declaration of Emergency Situation”, the second part contains information about the criminal proceedings initiated against the representatives of the association “*Gribu palīdzēt bēgļiem*”, and the third part contains information about the interim measures previously indicated by the European Court of Human Rights in respect of the application *M.A. and Others v. Latvia* (application no.1134/23). Where appropriate, the present response clarifies the summary of the facts and circumstances as set out in the joint communication, as well as provides examples of the relevant case law of the European Court of Human Rights (hereinafter – the ECtHR) and the Court of Justice of the European Union (hereinafter – CJEU).

I. Order no. 518 “Regarding the Declaration of Emergency Situation”

In the summer of 2021, Latvia encountered the instrumentalization of migration, which was orchestrated and launched by the Belarusian regime on the Latvian-Belarusian border. The instrumentalization of migration has been strongly condemned by the members of the United Nations Security Council¹ and the highest levels of the European Union as a new form of ongoing hybrid attack² against the external borders of the EU³ presenting a real threat and danger to the regional security.

As a result, Latvia faced rapid increase of cases of illegal border crossings from the territory of Belarus. Similar situation was experienced by Lithuania and Poland. Thereof, on 10 August 2021, the Cabinet of Ministers of the Republic of Latvia adopted Order no. 518 “Regarding the Declaration of Emergency Situation” (hereinafter – the Order) to prevent illegal crossing of the State border.

The Order has been adopted taking into account the principles of non-refoulement and proportionality as stipulated in the international human rights norms binding upon Latvia, including the 1951 Refugee Convention and 1967 Protocol (hereinafter – the RC and its Protocol), the United Nations (hereinafter – the UN) Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter – the CAT), the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter – the ECHR), as interpreted by the ECtHR in its case law; the UN International Covenant on Civil and Political Rights of 16 December 1966 (hereinafter – the ICCPR), the Charter of Fundamental Rights of the European Union (hereinafter – the CFR) as interpreted by the CJEU, and other relevant international and regional documents.

The establishment of border guarding systems, including border controls is key to ensure the internal and regional security of States. Border guarding systems serve not only the national interests of States at the borders of which they are carried out, but also the interests of all States applying the provisions of the Schengen *acquis* relating to the abolition of border

¹ *Joint Statement on the Belarusian Authorities' Activities with Regard to the Instrumentalization of Migrants* of 11 November 2021 by the current European Union members of the United Nations Security Council, Estonia, France and Ireland, joined by the Security Council members, Norway, the United Kingdom and the United States.

² President of the European Commission, State of the Union Address, 15 September 2021.

³ *The Conclusions of the European Council on COVID-19, digital, energy prices, migration, trade and external relations*. Brussels, 22 October 2021 (OR. en) EUCO 17/21, paragraphs 19 and 21.

controls at the internal borders of the European Union.

It should be emphasised that in exercising their sovereign powers and maintaining the public order, States have the right to control the entry and residence of aliens, as well as to define their immigration policy, as a matter of well-established international law and subject to their treaty obligations, inter alia, towards the European Union. This approach has been endorsed by Articles 67(2), 77 to 79 (in particular Article 79(1) concerning the prevention of illegal immigration), and Article 80 of the Treaty on the Functioning of the European Union, as well as followed by the ECtHR in its case law (see, for example, *Boujlifa v. France*, the judgment of the ECtHR of 21 October 1997, paragraph 42).

Furthermore, the ECtHR has also recognised that only lawful entry of a person into the State is permissible. A person's entry shall be considered lawful if the person crosses the State border at the point designated for it and if the person is able to justify the circumstances allowing entry and does not pose a threat to the national security, public order and security, and public health of the State (see, for example, *N.D. and N.T. v. Spain*, judgment of the ECtHR of 13 February 2020, paragraph 208; *A. A. and Others v. North Macedonia*, the judgment of the ECtHR of 5 April 2022, paragraphs 114-116). Where a person chooses to cross the State border outside the venues and procedures specified for a lawful entry, the person may be allowed to cross the border if immediate entry is necessary and justified by objective circumstances. Here objective circumstances refer to the state of health of a person and other circumstances that would require the State to permit a person's entry into its territory that are based on the principle of prohibition of torture and other cruel, inhuman or degrading treatment or punishment as established by international law (Article 3 of the ECHR, Article 3 of the CAT; Article 7 of the ICCPR, Article 4 of the CFR).

In the absence of relevant and objectively justified circumstances relating to the need to ensure immediate entry into the State outside the regular entry regime, States are entitled, where appropriate, to refuse such entry. This does not constitute an infringement of the principle of non-refoulement, but instead falls within the proportionate exercise of the right of the State to control entry, stay and departure of non-nationals (see, for example, *N.D. and N.T. v. Spain*, the judgment of the ECtHR of 13 February 2020, paragraphs 178, 180, 184-185, 188, 200, 201, 210). The mere fact that a third-country national is in the immediate vicinity of the State border outside the border crossing points designated for lawful entry, without any indication of objective circumstances justifying the need to ensure immediate

entry into the territory of the State outside the procedures specified for lawful entry, does not provide clarity as to the reasons why a person has not chosen to cross the State border in a regular manner. Consequently, in such circumstances, the State does not have an obligation to permit a person's entry into its territory, and it may refuse such entry.

In certain cases, a *de facto* action aimed at preventing a person from entering the State can be regarded as expulsion "in the generic meaning in current use ("to drive away from a place")" (see *N.D. and N.T. v. Spain*, the judgment of the ECtHR, paragraph 185). However, the said *de facto* action by refusing the irregular entry does not automatically constitute an infringement of the principle of non-refoulement. Instead, as explained above, it is retraced back to the State's right to control the entry, stay, and departure of non-nationals (see *N.D. and N.T. v. Spain*, the judgment of the ECtHR, paragraphs 222, 231-232).

In discharging their obligations to protect their borders, States have the right to refuse the entry of a person who attempts to cross the State border or has already crossed the border outside the official border crossing points and procedures laid down for lawful entry. At the same time, it should be emphasised that the Latvian authorities ensure a case-by-case assessment, and if there are circumstances indicating that there is an immediate need for entry, the authorities allow the person to enter the territory of Latvia outside the official border crossing points and procedures specified for lawful entry.

It should be pointed out that Latvia's legal framework does not prevent individuals from applying for a refugee or an alternative status in the territory of Latvia. The Order only temporarily altered the venues for submitting the application on granting of a refugee or an alternative status. The aforesaid regulation was introduced given the margin of appreciation awarded for the Member States as set by Article 4, paragraph 1, and Article 6 (especially in its paragraph 3) of the Directive of the European Parliament and the Council of 26 June 2013 2013/32/EU on common procedures for granting and withdrawing international protection status (see, *mutatis mutandis*, *Valstybės sienos apsaugos tarnyba (C-72/22 PPU)*, the judgment of the CJEU of 30 June 2022, paragraph 65; *Ministerio Fiscal (C-36/20 PPU)* the judgment of the CJEU of 25 June 2020, paragraphs 57, 65, and sub-paragraph 114.1).

On 6 April 2022, Article 6 of the Order was amended with the aim to clarify it. Pursuant to these amendments, the applications for granting of a refugee or an alternative status are accepted at the official border crossing points located in the territories specified in paragraph

1 of the Order, namely, Ludza municipality, Krāslava municipality, Augšdaugava municipality, city of Daugavpils, as well as at the "*Daugavpils*" accommodation centre for detained foreigners of the State Border Guard.

Given the foregoing considerations, the following scenarios are possible:

- if a person enters the territory of Latvia legally or by using the venues and procedures provided for lawful border crossing, it is possible for him or her to submit an asylum application immediately at the respective official border crossing point in accordance with Article 6 of the Asylum Law;

- if a person is staying in Latvia illegally (for example, has reached the competent authority at his or her location outside the border control posts), he or she has the right to apply for an asylum in accordance with Article 6 of the Asylum Law (see, *mutatis mutandis*, *Ministerio fiscal* (C-36/20 PPU) the judgment of the CJEU of 25 June 2020, sub-paragraph 114.1);

- if a person attempts to cross the State border or has already physically crossed the State border outside the official border crossing points and procedures specified for lawful entry and there are objective indications justifying the person's immediate entry, the entry shall be allowed on humanitarian grounds. The person may submit an asylum application in accordance with the procedures laid down in Article 6 of the Asylum Law. In case there are grounds for detention specified by the Immigration Law, the person is transferred to the "*Daugavpils*" accommodation centre for detained foreigners of the State Border Guard, where the person may submit an asylum application (see, *mutatis mutandis*, *Ministerio fiscal* (C-36/20 PPU) the judgment of the CJEU of 25 June 2020, paragraph 89);

- if a person attempts to cross the State border or has already crossed the State border outside the official border crossing points and procedures specified for lawful entry and there are no objectively indications justifying immediate entry, the competent authorities have the right to refuse the entry into the State (see, *N.D. and N.T. v. Spain*, the judgment of the ECtHR, paragraphs 167, 209; *A. A. and Others v. North Macedonia*, the judgment of the ECtHR of 5 April 2022, paragraphs 114-116, 121-122).

Furthermore, if a person, present in the territory of Latvia, invokes circumstances

establishing the need to apply for asylum and submits such an application, Article 3 of the Asylum Law and Articles 32 and 33 of the RC and Article 1 of its Protocol prohibit their expulsion, except in the cases provided for by law (Article 3, Paragraph 4, of the Asylum Law), including if the person poses a threat to the national security and public order. In addition, Article 42, part 3, of the Immigration Law provides that a person shall not be requested to leave the territory of Latvia if the Head of the Office of Citizenship and Migration Affairs or an official authorised by the Head of the Office has adopted a decision to allow a foreigner to reside in Latvia for a specified period of time due to humanitarian reasons.

II. Criminal proceedings initiated against the representatives of the association “*Gribu palīdzēt bēgļiem*”

As concerns the question about the access of journalists, non-governmental organisations, and international monitoring mechanisms to the territories specified in Paragraph 1 of the Order, Latvia notes that in ensuring the protection the State border, the State Border Guard must comply with human rights requirements. Accordingly, neither the Order, nor the State Border Guard prevent journalists, non-governmental organisations, and international monitoring mechanisms from carrying out lawful professional activities within the scope of their objectives.

Any person has a duty to comply with the legal framework of Latvia, and the State Border Guard has a duty to react to violations of the law. Article 6 of the Criminal Procedure Law (hereinafter – the CPR) provides that the official authorised to conduct criminal proceedings has an obligation to initiate criminal proceedings and to lead such proceedings to the fair regulation of criminal legal relations provided for in the Criminal Law in each case where the reason and grounds for initiating criminal proceedings have become known. Article 19 of the CPR enshrines the principle of the presumption of innocence, which reads as follows: “no person shall be considered guilty until the guilt of such person in the committing of a criminal offence has been determined in accordance with the procedures laid down in this Law”.

The criminal proceedings against two members of the association “*Gribu palīdzēt bēgļiem*” were initiated by the State Border Guard on the account of the activities carried out by these persons in the border zone. Latvia underlines that some of the facts referred to in the joint

communication of 2 March 2023 contradict the facts established during the pre-trial investigation. Unfortunately, it is not possible to provide further information and specify the established contradictions, because in accordance with Article 375, part 1, of the CPR, during criminal proceedings, the criminal case materials shall be a secret of the investigation. Only the officials who conduct the criminal proceedings and the persons to whom the respective officials present the criminal case materials are permitted to acquaint themselves with such materials. Thus, at the present stage of the criminal proceedings, the modalities of the criminal case materials cannot be disclosed.

III. Interim measures indicated by the ECtHR

Finally, turning to the decision of the ECtHR of 11 January 2023 indicating interim measures in respect of the application of *M.A. and Others v. Latvia*, Latvia informs of the following. In its decision to indicate interim measures, the ECtHR requested that the persons referred to in the decision were not to be returned to Belarus until 8 February 2023 and that these persons, should they be on the territory of Latvia, were to be provided with food, drinking water, clothing, medical care and temporary accommodation. In accordance with this decision, Latvia took into account and immediately implemented the measures indicated by the ECtHR. In particular, on 12 January 2023, five Syrian nationals that were mentioned in the decision of 11 January 2023, were allowed the entry and subsequently made the applications for asylum in Latvia. Moreover, Latvia informed the ECtHR about the conduct of two members of the association “*Gribu palīdzēt bēgļiem*” and the criminal proceedings that were instituted against them by the State Border Guard.

In this regard, the Ministry of Foreign Affairs of the Republic of Latvia draws your attention to an important factual inconsistency, which is included in the joint communication. Namely, the statement that on the same date when the ECtHR indicated the above interim measures “the applicants were forcibly returned to Belarus” is incorrect as on that date the applicants were in the Republic of Belarus.

On 2 February 2023, the ECtHR informed Latvia that in the light of the information provided by the applicants and the authorities of Latvia, the interim measures that had previously been indicated had been lifted.

In this connection, the Ministry of Foreign Affairs of the Republic of Latvia draws attention to the fact that on 6 March 2023 four of the five individuals that requested the interim

measures in the application *M.A. and Others v. Latvia* had left the Accommodation Centre for Asylum seekers “*Mucenieki*” of the Office of Citizenship and Migration Affairs without prior warning. For the time being, their whereabouts are unknown. Thus, on 8 March 2023, the Office of Citizenship and Migration Affairs adopted decision to suspend the examination of asylum applications of the above-mentioned applicants.

The Ministry of Foreign Affairs of the Republic of Latvia avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.

Riga, 28 April 2023

