

## **UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265)**

### **I. Introduction**

1. These observations are submitted by the Representation of the United Nations High Commissioner for Refugees (“UNHCR”) in Poland in relation to the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the Territory of the Republic of Poland (hereinafter – ‘Law Proposal’).
2. UNHCR has a direct interest in law proposals in the field of asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.<sup>1</sup> Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,<sup>2</sup> whereas the 1951 Convention relating to the Status of Refugees<sup>3</sup> and its 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as “1951 Convention”) oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol).<sup>4</sup>
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection (“UNHCR Handbook”).<sup>5</sup> UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

### **II. General remarks**

4. UNHCR acknowledges that the sudden increase in the number of asylum-seekers arriving recently at the Polish borders poses challenges to existing reception and asylum systems. In UNHCR’s view, these challenges can be overcome through the implementation of

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<sup>1</sup> UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <https://www.refworld.org/docid/3ae6b3628.html> (“the Statute”).

<sup>2</sup> Ibid, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR’s supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, UNHCR’s supervisory responsibility, October 2002, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

<sup>3</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

<sup>4</sup> UNHCR’s supervisory responsibility has also been reflected in EU law, including by way of general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the EU.

<sup>5</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, available at: <https://www.refworld.org/docid/5cb474b27.html>.

accelerated and/or simplified procedures<sup>6</sup> that maintain procedural safeguards and adhere to international and EU law, including the protection against refoulement.

5. UNHCR regrets that the amendments significantly restrict the possibility to seek asylum for persons intercepted in the border area, creating de facto two categories of asylum seekers and penalizing those who have crossed the border irregularly. UNHCR stresses that the right to seek and enjoy asylum does not depend on the regularity of arrival of an asylum-seeker to a country, as asylum-seekers are often forced to arrive at or enter a territory without prior authorisation.
6. The Law Proposal introduces the possibility that asylum applications can be arbitrarily rejected by the asylum authority without examination of the individual circumstances, the consequences of the removal, and/or the availability of effective protection elsewhere. UNHCR is deeply concerned that this provision undermines the right to seek asylum as foreseen in the 1951 Convention and the EU asylum acquis.
7. At the heart of this draft law is the long term deprivation of access to territory and asylum procedures for persons attempting to cross the border irregularly, including the introduction of expedited return orders and prohibitions of entry for up to 3 years. UNHCR wishes to reiterate that the principle of non-refoulement, a foundational principle of international refugee protection, is central to the right to asylum. While the principle of non-refoulement does not entail a right to be granted asylum in a preferred State, in order to meet their obligations under the 1951 Convention, States are required to grant individuals seeking asylum access to their territory and to fair and efficient procedures, before taking action to effect their removal.<sup>7</sup>

### III. Specific observations

#### The right to seek asylum does not discriminate based on mode of arrival

8. The proposed Article 33, para. 1a of the Act of 13 June 2003 on Granting Protection to Foreigners in the territory of the Republic of Poland (hereinafter - Act on Granting Protection) provides that the Head of the Office for Foreigners may disregard the application for asylum filed by a person intercepted crossing irregularly, unless the foreigner i) arrived directly from a territory in which their life or liberty was under threat of persecution, ii) presented credible causes for the illegal entry in the territory of the Republic of Poland and iii) filed an application for granting international protection immediately upon crossing the border.
9. UNHCR recalls that the right to seek and enjoy asylum is a basic human right under Article 14(1) of the Universal Declaration of Human Rights<sup>8</sup>, and is supported by the legal framework of the 1951 Convention to which Poland is a State Party. The right to asylum is also provided for in Article 18 of the Charter of Fundamental Rights of the European

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<sup>6</sup> UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, <https://www.refworld.org/docid/5b589eef4.htm>

<sup>7</sup> UNHCR, *UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom*, May 2021, [60950ed64.pdf \(unhcr.org\)](https://www.unhcr.org/60950ed64.pdf)

<sup>8</sup> UNGA, Universal Declaration of Human Rights, ('UDHR') 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

Union<sup>9</sup>. UNHCR recognizes that States have the legitimate right to control their borders, in a manner which is consistent with their obligations under international law, including the principle of non-refoulement and respect for the right to seek and enjoy asylum. This is further supported by international and European jurisprudence.<sup>10</sup>

10. Article 31 of the 1951 Convention recognizes that in exercising the right to seek asylum, refugees are often compelled to arrive, enter or stay in a territory without authorization or documents, or with documentation which is insufficient, false or obtained by fraudulent means.<sup>11</sup> Travelling without fulfilling relevant travel and immigration requirements, including for example, visa requirements or registration procedures for legally exiting one country and entering another, is often an unavoidable reality for refugees who seek to invoke the international protection afforded to them under the 1951 Convention.<sup>12</sup>

### The Draft Law relies on a misapplication of article 31 of the Geneva Convention

11. Article 31(1) of the 1951 Geneva Convention prohibits the imposition of penalties on refugees who have come directly from territories where their life or freedom is threatened, present themselves without delay to authorities and show good cause for their unauthorized entry or presence. These penalties are never to be interpreted in a manner that entails a deprivation of the right to seek and enjoy asylum or the protection against refoulement as foreseen in the 1951 Convention.
12. The requirements set forth for asylum seekers and refugees to benefit from the protection under article 31 (1) are to be interpreted cautiously. In UNHCR's view the term "directly" should be interpreted broadly and not necessarily in a literal – geographical or temporal – sense. Refugees are not required to have come to the current host country without crossing

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<sup>9</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Art. 18, which provides that '[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, available at: <http://www.refworld.org/docid/3ae6b3b70.html>.

<sup>10</sup> European Court of Human Rights, Grand Chamber judgment N.D. and N.T. v. Spain, 13 February 2020, available at: <http://hudoc.echr.coe.int/eng-press?i=003-6638738-8816756>, paras. 168-171. See also UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights, 15 November 2015, 8675/15 and 8697/15, available at: <https://www.refworld.org/docid/59d3a81f4.html>

<sup>11</sup> EXCOM Conclusion No. 58 (XL) 1989, para. (a). UN Ad Hoc Committee on Refugees and Stateless Persons, *Comité spécial pour les réfugiés et les apatrides, Deuxième session, Project de rapport du Comité spécial de l'apatridie et des problèmes connexes, Lake Success, New York, 16 janvier au février 1950*, 15 February 1950, E/AC.32/L.38, comment to paragraph 1 of then-draft Article 26, <http://www.refworld.org/docid/3ae68c264.html>: 'Le réfugié dont le départ du pays d'origine est généralement une évasion, est rarement en état de se conformer aux conditions requises pour pénétrer régulièrement (possession d'un passeport national et d'un visa national) dans le pays de refuge. Il serait conforme à la notion d'asile de ne pas imposer de sanctions pénales au réfugié qui, fuyant les persécutions, traverse clandestinement la frontière, mais se présente aussitôt que possible aux autorités du pays d'asile, et est reconnu comme réfugié de bonne foi'. *R v. Asfaw*, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008, para. 9, [http://www.refworld.org/cases,GBR\\_HL.4835401f2.html](http://www.refworld.org/cases,GBR_HL.4835401f2.html). *Mahamad Arwah Abdi and Another v Minister of Home Affairs and others*, Case No: 734/2010, South Africa: Supreme Court of Appeal, 15 February 2011, para. 22, <http://www.refworld.org/cases,SASCA.50239bb62.html>.

<sup>12</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, 3 January 1950, E/AC.32/2, comment to paragraph 2 of then-draft Article 24, <http://www.refworld.org/docid/3ae68c280.html>, stating: "[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum." UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, p. 213, <https://www.refworld.org/docid/519b1fb54.html>.

through, stopping or staying in other countries, after leaving the country where their life or freedom was threatened.<sup>13</sup>

13. The term “without delay” must not be read as a strict temporal requirement. Applying “without delay” is a matter of fact and degree, depending on the circumstances of the case, including the time and mode of arrival, the availability of information in a language the refugee understands, and an understanding of where and to which authority they are to report to. Refugees may first gain entry into the state, including without authorization, before approaching authorities to claim international protection.
14. Likewise, the term “good cause” may be satisfied when a person is circumventing border control requirements and physical barriers at frontiers for fear of being rejected or pushed back at the border; is unable to physically enter at an established port of entry; lacks information or knowledge on relevant procedures for claiming asylum on entry; is acting under instruction of a third party, such as a smuggler or trafficker; or is traumatized.<sup>14</sup>
15. In view of the above, UNHCR considers that the procedure introduced by the Draft Law is not consistent with the right to seek asylum in Poland, including at its borders, and exposes asylum-seekers to a risk of refoulement, contrary to international refugee, human rights and EU law. UNHCR recommends that Poland establishes a more streamlined asylum processing at the border areas. These include proposals for the (a) frontloading of the asylum system by improving registration and screening; (b) enhancing triaging with a view to referring applications to simplified and accelerated procedures, depending on profile and background; and (c) return of those finally determined not to have any international protection needs.

#### States are required to grant asylum seekers access to their territory and procedures

16. According to the proposed amendment introduced by Art. 303, persons apprehended crossing the border irregularly will be prevented from entry into Polish territory and issued a return order with a prohibition of entry from 6 months to 3 years. This order can be appealed but has immediate effect.
17. While the principle of non-refoulement does not entail a right to be granted asylum in a preferred State, in order to meet their obligations under the 1951 Convention, States are

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<sup>13</sup> *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, para. 18, [https://www.refworld.org/cases.GBR\\_HC\\_QB.3ae6b6b41c.html](https://www.refworld.org/cases.GBR_HC_QB.3ae6b6b41c.html). *R v. Asfaw*, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008, para. 15, [https://www.refworld.org/cases.GBR\\_HL.4835401f2.html](https://www.refworld.org/cases.GBR_HL.4835401f2.html). *Decision KKO:2013:21*, Finland: Supreme Court, 5 April 2013, [https://www.refworld.org/cases.FIN\\_SC.557ac4ce4.html](https://www.refworld.org/cases.FIN_SC.557ac4ce4.html). Summary Conclusions 2003, note 11 above, para. 10(b). See also, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 11, <http://www.refworld.org/docid/3fe9981e4.html>, and Goodwin-Gill Article 31, note 16 above, pp. 192 and 217–218, referring, inter alia, to the drafting history of the 1951 Convention, where it was mentioned that transits or stays in intermediary countries may be necessary, see remarks of the UN High Commissioner for Refugees, Van Heuven Goedhart, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Fourteenth Meeting*, 22 November 1951, A/CONF.2/SR.14, <https://www.refworld.org/docid/3ae68cdb0.html>.

<sup>14</sup> G S Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, p. 217, [www.refworld.org/docid/470a33b10.html](http://www.refworld.org/docid/470a33b10.html).

required to grant individuals seeking asylum access to their territory and to fair and efficient procedures, before taking action to effect their removal.<sup>15</sup>

18. UNHCR is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be at risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State<sup>16</sup>.
19. UNHCR's position is that a State which is presented with an asylum request at its borders is required to provide admission at least on a temporary basis to examine the claim, as the right to seek asylum and the non-refoulement principle would otherwise be rendered meaningless. Similarly, the European Court of Human Rights in the Grand Chamber judgment *N.D. and N.T. v Spain*<sup>17</sup> emphasized that "(...) the effectiveness of Convention rights requires that (...) States make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border.<sup>18</sup> Those means should allow all persons who face persecution to submit an application for protection (...). In the absence of appropriate arrangements, the resulting possibility for States to refuse entry to their territory is liable to render ineffective all the Convention provisions designed to protect individuals who face a genuine risk of persecution.
20. The Regulation (EU) 2016/399, mentioned in the proposed amendment, shall apply to any person crossing the internal or external borders of Member States, "*without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement*" In addition, the Regulation specifically obliges Member States to "act in full compliance with [...] the Geneva Convention, obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights."
21. The Court of Justice of the European Union established in its jurisprudence that the return decision must be taken following a fair and transparent procedure. More specifically, pursuant to Article 5 of the Directive 2008/115/EC, *when the competent national authority is contemplating the adoption of a return decision, it must, on the one hand, observe the principle of non-refoulement and take due account of the best interests of the child, family life and the state of health of the third-country national concerned and, on the other hand, hear the person concerned on that subject* (see, to that effect, judgment of 8 May 2018, *K.A. and Others (Family reunification in Belgium)*, C-82/16, EU:C:2018:308, paragraphs 101 to 103).<sup>19</sup>

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<sup>15</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020, <https://www.refworld.org/docid/5ef5c0614.html>

<sup>16</sup> UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <https://www.refworld.org/docid/45f17a1a4.html>

<sup>17</sup> European Court of Human Rights, Grand Chamber judgment *N.D. and N.T. v. Spain*, 13 February 2020, available at: <http://hudoc.echr.coe.int/eng-press?i=003-6638738-8816756>, paras. 209.

<sup>18</sup> See also European Court of Human Rights, *Shazard v. Hungary*, Appl. no. 12625/17, 8 July 2021, para 62.

<sup>19</sup> Discussed in detail in CJEU Case- C-808/18 - *Commission v Hungary*. para.250. available at: [CURIA - List of results \(europa.eu\)](https://eur-lex.europa.eu/curia/listofresults).

22. In view of the above, UNHCR recommends that Poland provides admission to its territory and asylum procedures to any persons who seeks asylum at their borders and that return decisions are taken in full compliance with the principle of non-refoulement.

#### The lack of suspensive effect renders the available remedy ineffective

23. The provision on the immediate execution of the decision renders the appeal non-suspensive. The lack of automatic suspensive effect of the appeal may undermine access to an effective remedy and lead to a violation of the principle of non-refoulement contrary to Article 33 of the 1951 Geneva Convention, Article 4, 19 and 47 of the EU Charter of Fundamental Rights and Article 3 and 13 of the ECHR.<sup>20</sup>
24. Moreover, the discussed amendments do not at any stage guarantee the foreigner's right to legal aid during the return procedure. Pursuant to Art. 13(3) and Art. 13(4) Directive 2008/115/EC, foreigners shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance when exercising the right to an effective remedy against a return decision. Member States shall ensure that the necessary legal assistance and / or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid. In this respect, UNHCR would like to underline that the right to legal aid is an essential component of the right to an effective remedy and fair trial under international law, and the right to effective judicial protection under EU Law.<sup>21</sup>
25. UNHCR recommends that automatic suspensive effect is granted during the judicial review as a general rule, with derogations only on exceptional basis for subsequent applications, or in the case of manifestly unfounded or abusive claims. In those cases, guarantees for the applicant to request suspensive effect before a Court should be foreseen.<sup>22</sup>

## Conclusion

UNHCR hopes that these observations will be given due consideration in the upcoming discussion in the Parliament. UNHCR is available to provide all the necessary technical support and expertise to ensure that the adopted adjustments to the national asylum framework would help the asylum authorities manage the current situation through fair and efficient asylum procedures.

UNHCR 13 September 2021

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<sup>20</sup> See, for example, Court of Justice of the EU, Case C-181/16, *Gnandi*, para 56. See also European Court of Human Rights, for example, *Gebremedhin [Gaberamadhien] c. France*, 25389/05, 26 April 2007, para. 66, *K.R.S. against the United Kingdom*, Application No. 32733/08, 2 December 2008; or *Čonka v. Belgium*, 51564/99, February 2002. For UNHCR's detailed position see UNHCR, *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, available at: <https://www.refworld.org/docid/5cb597a27.html>, p. 19ff.

<sup>21</sup> The Court of Justice of the EU confirmed the importance of the right to legal aid under Article 47 Charter of Fundamental Rights in Case C-279/09, *DEB*, para 36, noting that it corresponds to Art 6 ECHR and refers to the *Airey v Ireland* case which notes that legal aid should be provided where it would be otherwise impossible to ensure an effective remedy.

<sup>22</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 67, <https://www.refworld.org/docid/5cb597a27.html>