Office of the Chancellor of Justice

Mr Felipe González Morales
Special Rapporteur on the human rights of migrants
Office of the United Nations High Commissioner for Human Rights
OHCHR-migrant@un.org

Your ref. No

Our ref. 28.02.2022 No 5-2/2200823

Re: Human rights violations at international borders: trends, prevention and accountability - Estonia

Dear Mr Felipe González Morales,

Since January 1, 2019, the Chancellor of Justice of Estonia performs the functions of protection and promotion of human rights on the basis of the UN General Assembly Resolution No 48/134 of 20 December 1993 "National institutions for the promotion and protection of human rights".

On behalf of the Chancellor of Justice of Estonia, I would like to provide the following comments concerning accountability at Estonian borders.

1. Questions concerning entry to the state are regulated by the State Borders Act.[1] Asylum and international protection is regulated by the Act on Granting International Protection to Aliens (AGIPA).[2] Expulsion is regulated by the Obligation to Leave and Prohibition on Entry Act (OLPEA).[3]

All these acts were amended last year and these amendments took effect on July 15, 2021. However, these amendments were not related to the topic of your inquiry but concerned the creation of a new database of personal identification data.[4]

The Law Enforcement Act regulates the grounds for applying coercive measures to protect public order (including at the borders).[5] This law has not been amended since May 2021.

[1] Original text in Estonian is available at: https://www.riigiteataja.ee/akt/108072021014; in English at: https://www.riigiteataja.ee/en/eli/507072021001/consolide.
[2] Original text available in Estonian at: https://www.riigiteataja.ee/akt/108072021016; in English at: https://www.riigiteataja.ee/en/eli/517082021001/consolide.
[3] Original text available in Estonian at: https://www.riigiteataja.ee/akt/108072021018; in English at: https://www.riigiteataja.ee/en/eli/517082021005/consolide.
[4] It is possible to follow the amendments to the laws also in the texts of the English translation, as it is possible to select the wordings of the text: „In force", „Previous" and „Future wordings" (if applicable) of the translation.
[5] Original text in Estonian is available at: https://www.riigiteataja.ee/akt/103032021005; in English at: https://www.riigiteataja.ee/en/eli/503032021004/consolide.

2. Article 17(1) of the State Borders Act regulates the grounds for temporary restriction on or suspension of crossing of the state border. In the interests of national security, in order to ensure public order, prevent and solve a situation, which may endanger public health, and also at the request of a foreign state, the Government of the Republic shall have the right to:
1) temporarily restrict the crossing of the state border or suspend the crossing of the state border;
2) establish quarantine for the crossing of the state border for persons and conveyance of domestic animals, poultry, and also livestock products, plant produce and other cargo across the state border.

Several legislative amendments are prepared to address the possible mass influx of migrants. These draft acts were initiated considering the events at the Belarus border with Latvia, Lithuania and Poland. The purpose of the initiatives is to further control, reduce and prevent arrivals of migrants to Estonia and to provide the legal ground for push-backs if certain conditions are met.

On November 17, 2021, the Members of the Parliament initiated a draft act to amend the State Borders Act.[6] The Government of the Republic issued an opinion that they support the purpose of this draft act but they do not support this draft act as such because its wording is not in compliance with the international and EU law (letter of the Ministry of the Interior of 22.12.2021, no 1-7/287-4). Nevertheless, the draft act passed the first reading on January 26, 2022, in the Parliament.

The purpose of the draft act is to amend the State Borders Act with the following provisions (unofficial translation): "Amendments to Article 9^1 of the State Borders Act.
(1^3) If a massive illegal border crossing takes place, for security considerations, the Police and Border Guard Board has the duty to refuse to receive the applications for international protection and to return the foreigners, who have crossed the border illegally, back to the foreign country from which or through which they arrived to Estonia.
(1^4) If a massive illegal border-crossing attempt takes place, the Police and Border Guard Board has a duty to inhibit it for the security purposes and to refuse from the receiving of the applications for international protection."

The Ministry of the Interior has prepared their draft act to amend the State Borders Act. The text of the draft act is not yet available to the public.

There is also a pending draft act, which regulates the conditions to restrict entry of the foreigners on the grounds of public health.[7]

On June 27, 2020, the amendments to the Obligation to Leave and Prohibition on Entry Act and Act on Granting International Protection to Aliens took effect, which concerned inhibition of a mass influx of migrants. For example, in the case of a mass influx the migrants can be detained outside the detention centre for migrants (e.g. in prisons or elsewhere) and the material reception conditions can be reduced. As a rule, it is mandatory to apply for the court permission to detain the migrant for longer than 48 hours. In the case of a mass influx of migrants the Police and Border Guard Board (PBGB) can make the request on simplified terms. The application has to at least describe the essential circumstances of the mass immigration, list the applicants for international protection and the related procedural acts, which have been prevented, and indicate the time needed to carry out the procedural acts. The court can give an initial permission for detention for 7 days (Article 36^6 of the AGIPA, Article 15^4 of the OLPEA). Some changes concerned also requirements of the administrative proceedings (e.g. the decision does not have to

[6] A draft Act to amend the State Borders Act, no 489 SE (available only in Estonian).
[7] A draft act no 536 SE (available only in Estonian).

be delivered to the person, if the place of residence is unknown) (Article 31(4) and (5) of the AGIPA; Article 6^2(2) and (3) of the OLPEA).

Further, if an exceptionally large number of applications for detention of an alien have been submitted to the courts and the courts are unable, due to an objective obstacle, to review the applications for detention on the basis of and pursuant to the procedure enacted in Chapter 27 of the Code of Administrative Court Procedure[8] or the review is significantly complicated, the court may make the ruling on the detention of the alien without the descriptive and reasoning part. If an alien wishes to contest the detention, which the court formalized by a ruling without a descriptive or reasoning part, the court shall submit the descriptive and reasoning part to the alien at the first opportunity (Article 36^5(2) and (3) of the AGIPA; Article 15^3(2) and (3) of the OLPEA).

It is also possible to transfer judges from the general courts to the administrative courts to assist the review of applications for detention in the case of a mass influx of migrants. Article 45^2(1) of the Courts Act[9] provides that on the basis of information received pursuant to Article 15^4(4) of the OLPEA or Article 36^6(4) of the AGIPA, the chief judges of Circuit Courts of Appeal may, by their joint decision, temporarily send a judge of a District Court or Circuit Court of Appeal without their consent to an Administrative Court for review of the applications for detention of aliens where this is required for administration of justice pursuant to the requirements.

The Emergency Act[10] regulates the grounds for crisis management, including the declaration, resolution and termination of an emergency situation, the involvement of the defence forces and the Defence League in resolving an emergency that has led to the declaration of an emergency situation, and state supervision and liability. The PBGB has enacted an implementation plan for resolving the emergency caused by a mass influx of migrants, but these documents are not available to the public.

3. The concept of a "safe third country" is applied in accordance with the Estonian legislation. This is regulated by the Act on Granting International Protection to Aliens. The determining authority is the PBGB.

According to Article 8(2) of the AGIPA a country where the following principles are guaranteed is considered a safe third country:
1) the life and freedom of an alien who is seeking asylum is not at risk on the grounds of his or her race, religion, nationality, membership of a particular social group or political opinions;
2) the principle of prohibition of expulsion or return is observed in the country pursuant to the Geneva Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967 (the State Gazette II 1997, 6, 26);
3) the country observes the principle of non-refoulement established in international legislation if he or she is threatened by torture or other cruel, inhuman or degrading treatment;
4) an alien has the possibility to apply for refugee status and upon recognition as a refugee, to receive protection pursuant to the Geneva Convention;
5) an alien is not faced with a serious threat (death penalty, torture, inhuman or degrading treatment or punishment, individual threat to life or the lives of civilians or violence by reason of international or internal armed conflict).

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[8] Original text in Estonian is available at: https://www.riigiteataja.ee/akt/108122021020; in English at: https://www.riigiteataja.ee/en/eli/527122021008/consolide.
[9] Original text in Estonian is available at: https://www.riigiteataja.ee/akt/128012021003; in English at: https://www.riigiteataja.ee/en/eli/513122021001/consolide.
[10] Original text in Estonian is available at: https://www.riigiteataja.ee/akt/117112021009; in English at: https://www.riigiteataja.ee/en/eli/501122021001/consolide.

Article 9 of the AGIPA regulates the determination process of the safe third country and safe country of origin. Upon determining a safe third country, it shall be considered and assessed whether an applicant for international protection has connections with that country on the basis of which it can be expected that the applicant applies for protection from the specified third country and there is a good reason to believe that the applicant shall be allowed to enter that country or he or she shall be readmitted there. The PBGB has to give the applicant for international protection a possibility to submit justifications as to why that country cannot be considered a safe third country (Article 9(1) of the AGIPA).

If a safe third country does not allow an applicant for international protection to enter its territory, the PBGB must ensure access to the proceedings for international protection (Article 9(2) of the AGIPA).

Article 20^1(1) of the AGIPA stipulates that an application is considered clearly unfounded by the PBGB if the application is clearly submitted with the purpose of abusing the international protection system and one of the enlisted grounds exists (*inter alia* there is reason to consider the applicant's country of origin as a safe country of origin).

In that case there is no automatic suspensive effect against expulsion but the person has to request for an interim relief from the court and the court decides whether the person can stay in the country during the court proceedings (Article 25^1(3)(1) of the AGIPA). However, the person cannot be expelled before the court has decided about the right to remain in Estonia during the court proceedings.

Further, the substance of an application for international protection is not reviewed, if the applicant has arrived to Estonia through a country, which can be considered a safe third country (Article 21(1)(3) of the AGIPA).

The PBGB has enacted a list of safe third countries. This list is not available to the public.

Estonia has concluded several bilateral treaties concerning re-admission of migrants.

4. Estonian state has not established a separate independent border monitoring mechanism.

The Chancellor of Justice has, *inter alia*, the competences of a national ombudsman and national preventive mechanism. This means that the Chancellor of Justice can investigate complaints concerning the activities of public bodies, including the Police and Border Guard Board, and carry out inspection visits to the border facilities.

Please find the text of the respective provisions in the annex. We hope you find this information useful.

Sincerely Yours,

Kertti Pilvik
Head of International Relations and Organisational Development
On behalf of the Chancellor of Justice

ANNEX – Excerpts of the law:

Act on Granting International Protection to Aliens:

Article 8. Country of origin, safe third country and safe country of origin

[…]

(2) A country where the following principles are guaranteed is considered a safe third country:

1) the life and freedom of an alien who is seeking asylum is not at risk on the grounds of his or her race, religion, nationality, membership of a particular social group or political opinions;

2) the principle of prohibition of expulsion or return is observed in the country pursuant to the Geneva Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967 (RT II 1997, 6, 26) (hereinafter Geneva Convention);

3) the country observes the principle of non-refoulement established in international legislation if he or she is threatened by torture or other cruel, inhuman or degrading treatment;

4) an alien has the possibility to apply for refugee status and upon recognition as a refugee, to receive protection pursuant to the Geneva Convention;

5) an alien is not faced with a serious threat specified in subsection 4 (3) of this Act.

[RT I, 06.04.2016, 1 – entry into force 01.05.2016]

(3) A safe country of origin is a country where an alien is not faced with a serious risk specified in subsection 4 (3) of this Act.

Article 9. Determining of safe third country and safe country of origin

(1) Upon determining a safe third country, it shall be taken into account and assessed whether an applicant for international protection has connections with that country on the basis of which it can be expected that the applicant applies for protection from the specified third country and there is a good reason to believe that the applicant shall be allowed to enter that country or he or she shall be readmitted there. Upon assessment of the safety of a third country the applicant for international protection shall be given a possibility to submit justifications as to why that country cannot be considered a safe third country.

[RT I, 06.04.2016, 1 – entry into force 01.05.2016]

(2) If a safe third country does not allow an applicant for international protection to enter its territory, the Police and Border Guard Board must ensure access to the proceedings for international protection for the applicant for international protection.

[RT I 2009, 62, 405 – entry into force 01.01.2010]

(3) A country shall be considered a safe country of origin if it can be proved on the basis of legal situation, the application of legislation in a democratic system and the general political climate that there is no general and persistent persecution specified in § 19 of this Act.

(4) The following circumstances shall be taken into account and assessed in determining a safe country of origin:

1) to what extent the legislation of the country and the application thereof guarantees the protection of persons from persecution and abuse, the principle of prohibition of expulsion or return provided for in the Geneva Convention and a system of efficient legal protection instruments against the violation of the said rights and freedoms;

2) whether or not the country has acceded to the main treaties concerning human rights and if, as a general rule, it adheres to the provisions thereof.

(5) A country can be considered a safe country of origin for a specific applicant for international protection if the applicant for international protection has not presented substantial reasons as to why the country cannot be considered a safe country of origin for him or her and the applicant for international protection has the citizenship of that country or he or she last resided in that country as a stateless person.

(6) The Police and Border Guard Board shall determine a safe third country and a safe country of origin.
(6^1) The Police and Border Guard Board shall have the right to establish a list of safe countries of origin.
[RT I, 06.04.2016, 1 – entry into force 01.05.2016]
(7) The Police and Border Guard Board may specify as safe a part of the country of origin or third country.
[RT I, 21.12.2013, 1 – entry into force 22.12.2013]
(7^1) The Police and Border Guard Board shall review and, where necessary, update the list of safe countries of origin at least once a year.
[RT I, 17.06.2020, 1 – entry into force 27.06.2020]
(7^2) Upon designating a safe third country and a safe country of origin on the basis of subsections (6) and (6^1) of this section, relevant and up-to-date information on the general situation of the country of origin of the applicant and, where necessary, of transit countries shall be used. Such information shall be obtained in particular from other Member States of the European Union, the European Asylum Support Office, the Office of the United Nations High Commissioner for Refugees, the Council of Europe and other relevant international human rights organizations.
[RT I, 17.06.2020, 1 – entry into force 27.06.2020]
(8) If a person may safely and legally travel to one part of the state, he or she is permitted to stay there and it is reasonable to expect that he or she settles there, the part of such country of origin may be determined as safe in compliance with the provisions of subsections (3)-(5) of this section.
[RT I, 06.04.2016, 1 – entry into force 01.05.2016]
(9) The Ministry of the Interior shall notify the European Commission of the designation of countries as safe third countries and safe countries of origin at least once a year.
[RT I, 17.06.2020, 1 – entry into force 27.06.2020]

Article 18. Review of application for international protection
[…]
(2) The Police and Border Guard Board shall review each application for international protection individually and impartially and shall verify the correctness of the evidence and information provided, the credibility of the statements made by the applicant and other circumstances, and shall perform the procedural acts necessary for such purpose.
[RT I, 06.04.2016, 1 – entry into force 01.05.2016]
(3) The Police and Border Guard Board shall determine a safe country of origin and a safe third country and verify if the applicant for international protection can be sent to the specified countries.
[…]

Article 20^1. Clearly unfounded application
An application is considered clearly unfounded if the claims and reasons presented therein are not related to the circumstances specified in subsection 20 (1) of this Act or the application is clearly submitted with the purpose of abusing the international protection system and one of the following bases exists:
1) there is reason to consider the applicant's country of origin as a safe country of origin;
2) upon the processing of the application for international protection the applicant has knowingly provided incorrect information, given incorrect explanations, has knowingly failed to provide information or give explanations which are of essential importance to the processing of his or her application for international protection, or has knowingly submitted falsified documents;
3) there is reason to believe that the applicant has destroyed or disposed of a document or any other evidence that would have helped to establish his or her identity or citizenship;

4) the applicant has made clearly false or clearly improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies to the criteria of a beneficiary of international protection;
5) the application is subsequent and subsection 24 (1) of this Act shall be applied thereto;
6) the applicant has submitted an application for international protection only to avoid the compliance with the obligation to leave;
7) the applicant has arrived in Estonia or has stayed in the territory of Estonia illegally or has failed to submit an application for international protection at the earliest opportunity;
8) the applicant has refused or refuses to be fingerprinted;
9) the applicant poses a threat to national security or public order or he or she has been expelled from Estonia for the specified reasons.
[RT I, 06.04.2016, 1 – entry into force 01.05.2016]

Article 20^2. Review of application under expedited procedure

(1) A clearly unfounded application for international protection may be reviewed under the expedited procedure, including at the border, taking account of the provisions of this section.
(2) A clearly unfounded application shall not be reviewed under the expedited procedure or the application of the expedited procedure shall be terminated if upon the application thereof it is impossible to take account of the special needs of the applicant, primarily in the case when the applicant has become a victim of torture of rape or he or she has been subjected to other serious forms of psychological, physical or sexual violence.
(3) The application of an unaccompanied minor, if it is in the interests of the minor, may be reviewed under the expedited procedure only in the following cases:
1) in the cases specified in clauses 201 1) and 9) of this Act;
2) in the cases specified in clauses 201 2) and 3 of this Act on condition that the special needs of the unaccompanied minor have been taken account of and he or she has been given an opportunity to justify his or her action, including to consult his or her representative;
3) in the cases specified in clause 201 6) of this Act on condition that the review of the content of the application is not refused on the basis of subsection 24 (3) and clause 21 (1) 4) of this Act;
4) in the case specified in clause 21 (1) 3) of this Act.
(4) Upon application of the expedited procedure the application shall be reviewed within 30 days. The specified time-limit may be extended where necessary in order to ensure an adequate and complete review of the application, taking account of the provisions of subsections 181 (1)–(5) of this Act.
[RT I, 06.04.2016, 1 – entry into force 01.05.2016]

Article 21. Refusal to review application

[RT I, 06.04.2016, 1 – entry into force 01.05.2016]
(1) The content of an application shall not be reviewed if one of the following bases exists:
[…]
the applicant has arrived in Estonia through a country which can be considered a safe third country;
[…]
(2) In the cases specified in subsection (1) of this section the proceedings for international protection shall be terminated by a decision to reject an application stating, inter alia, that the content of the application has not been reviewed and thereby the Police and Border Guard Board are not required to estimate whether the applicant complies with the requirements for the grant of international protection provided for in Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification as beneficiary of international protection.

(3) If an application is dismissed on the basis provided for in clause (1) 3) of this section, the Police and Border Guard Board shall issue to the person a document in which the authorities of a third county shall be notified in the official language of that state of the circumstance that the content of the application has not been reviewed.
(4) The provisions of subsection (1) of this section shall be applied to an unaccompanied minor only in the case specified in clause (1) 3) of this section on condition that it is used in the interests of the minor.
[RT I, 06.04.2016, 1 – entry into force 01.05.2016]

Article 25[1]. Contestation of decision
(1) The decision on rejection of an application or revocation of international protection may be contested in the administrative court within ten days as of the announcement of the decision. The specified decision may not be contested pursuant to the proceedings concerning a challenge.
(2) Upon contestation of the decision made with regard to an application for international protection an applicant shall have the rights and obligations specified in this Act, including the right to stay in the territory of Estonia, within the time limit for an appeal and until the final decision is made.
[RT I, 17.06.2020, 1 – entry into force 27.06.2020]
(3) If an applicant files an appeal against a decision which is made:
1) on the basis specified in § 20[1] , except for clause 7), of this Act;
2) on the basis specified in clauses 21 (1) 1), 2) or 4) of this Act;
3) on the basis specified in subsection 23 (3) or (6) of this Act or
4) on the basis of Regulation (EU) No 604/2013 of the European Parliament and of the Council, the court conducting the proceeding of the matter shall decide on the right of the applicant to stay in Estonia until the final decision is made. Until the making of the decision specified in this subsection the applicant shall have the right to stay in the territory of Estonia.
[RT I, 17.06.2020, 1 – entry into force 27.06.2020]
(4) If the court has decided to restrict the right of stay in the state of a person until the final decision is made in the cases specified in subsection (3) of this section, the applicant shall retain the right to an effective remedy.
[RT I, 17.06.2020, 1 – entry into force 27.06.2020]
(5) Application for international protection and contestation of the decision made with regard to an application for international protection shall not give an applicant the right to apply for temporary residence permit on the basis of the Aliens Act.
(6) In the cases specified in subsection (3) of this section the court shall make a ruling to decide on the right to stay in Estonia until the final decision is made.
[RT I, 17.06.2020, 1 – entry into force 27.06.2020]
(7) If the derogation provided for in clauses (3) 1)–3) of this section is applied to the decision made at the border, it is ensured that the applicant is enabled the rights specified in clauses 10 (2) 1), 7), 8) and 9) of this Act during the period of ten days for contestation provided for in subsection (1) of this section for preparation of the appeal and presenting the arguments to the court.
(8) An applicant has the right to waive the right of appeal pursuant to the procedure provided for in the Code of Administrative Court Procedure.
[RT I, 06.04.2016, 1 – entry into force 01.05.2016]