

**Response of the Commissioner for Human Rights of the Republic of Poland to the call for inputs of the UN Special Rapporteur on the human rights of migrants for the report on how to expand and diversify regularization mechanisms and programs to enhance the protection of the human rights of migrants**

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**Information on reporting institution**

The Commissioner for Human Rights (Commissioner) is a constitutional body appointed to protect and supervise the observance of human and civil rights. The Commissioner’s role is performed independently of other public authorities and his powers are set out in the Constitution of the Republic of Poland as well as in the Act of 15 July 1987 on the Commissioner for Human Rights. The Commissioner is appointed by Sejm (lower chamber of the Parliament) with the approval of Senate (higher chamber of the Parliament) for a 5-year term of office. The Commissioner plays the roles of National Human Rights Institution (NHRI) as well as Ombudsman, the National Mechanism for the Prevention of Torture (NMPT – visiting body for the prevention of torture and other cruel, inhuman or degrading treatment or punishment), independent equality body (as referred to in the EU anti-discrimination directives) and independent body monitoring the implementation of the Convention on the rights of persons with disabilities (CRPD).

As NHRI, the Commissioner may only comment on some success stories and challenges remaining in Poland related to the regularisation of stays of migrants, from the human rights perspective, as well as on the cooperation of the government with civil society in this regard. The present input is thus divided into two sections, reflecting success stories and outstanding challenges.

1. **A success story: response of Poland to the mass forced displacement of Ukrainian war refugees**

Following the full-scale Russian invasion of Ukraine, Poland, after 24 February 2022, admitted, virtually unconditionally, millions of war refugees. At the peak of the influx, the Border Guard would admit as many as 140 thousand people a day through regular border posts.[[1]](#footnote-2) Most of the Ukrainians were permitted entry on the mere basis of their biometric passports as Poland and Ukraine operated a visa-free movement for nationals of both countries already prior to the invasion. For third-country nationals (TCNs) who did not hold a valid visa, or Ukrainians who could not present a valid passport, commandants of Border Guard posts would exercise their competence under Article 32 of the law on foreigners that allows them to admit anyone on humanitarian grounds for the period of 15 days.

The initial confusion whether admitted Ukrainians should apply for international protection in order to be able to stay in Poland was resolved with triggering of the temporary protection (TP) mechanism by the EU,[[2]](#footnote-3) and, secondly, with the adoption by the Polish parliament of the *Act on assistance to Ukrainian citizens* (the Act).[[3]](#footnote-4) The idea behind the EU’s TP is to provide immediate and collective protection (without the need of conducting individual status assessments as per regular asylum procedures) to the displaced persons. TP provides for lawful stay of the war refugees within the EU for an initial period of one year and grants them, *inter alia*, the right to work and access to healthcare, housing and education. The Polish *Act on assistance to Ukrainian citizens*, whichin many respects constitutes *lex specialis* with respect to the TP, grants the Ukrainians on the Polish territory even more favourable rights, e.g. lawful stay for the period of 18 months and broad entitlements in virtually all areas of public policy. The Act also provides for the extension of lawful stays for Ukrainians who were lawfully present in Poland on 24 February 2022 on an unrelated legal basis. However, because the broad entitlements the Act provides for are applicable to those Ukrainians who entered Poland on 24 February or later, those who were present in Poland on the day of the invasion may only claim the right to remain in the country on the basis of the Act.

Being of generally favourable opinion towards the Act, the Commissioner pointed out the shortcomings of the initial draft and subsequent amendments.[[4]](#footnote-5) The most profound of the shortcomings was, in the opinion of the Commissioner, the narrow subjective scope of the Act which applies, in principle, only to Ukrainian citizens and their spouses who entered Poland on, or after, 24 February 2022. Being substantially narrower than the subjective scope of the TP, it may lead to situations whereby members of the same family that fled Ukraine are protected on different bases (e.g. parents protected on the basis of the Act, and their child protected on the basis of the TP). Poland did not exercise its right to provide more favourable conditions of stay of all those protected by the EU’s TP and hence those benefitting from the Act have been provided with substantially more generous entitlements than those protected only by the TP. Additionally, some TCNs who inhabited Ukraine before the invasion (e.g. those living in Ukraine on the basis of student visas or temporary stay permits) were left outside of the scope of both instruments. They were generally permitted to enter Poland and to remain in the country for the period of 15 days on the basis of the said Article of 32 of the law on foreigners, but they were left without any legally mandated assistance. The Commissioner did not, however, receive any information of any cases of *refoulement* with regard to this category of persons.

Moreover, from the first days of the mass influx of war refugees from Ukraine, the Commissioner received worrying information regarding the situation of some groups of war refugees from Ukraine, particularly those of Roma ethnicity. There were signs of them facing discrimination and hinderances in access to services, for instance in reception centres.[[5]](#footnote-6)

There was also some degree of confusion regarding the regularisation of stays of those war refugees of Ukrainian nationality (or TCNs married to Ukrainian nationals) who were admitted on the basis of Article 32 of the law on foreigners. According to that article, the period of lawful stay is set at 15 days. On 12 March 2022, the Act took effect retroactively as from 24 February. A high level of uncertainty prevailed regarding the status of this category of Ukrainian war refugees before the adoption of the Act which eventually prolonged their lawful stays to 18 months.

More detailed information on the Commissioner’s activities with regard to the Ukrainian crisis is available on the Commissioner’s website.[[6]](#footnote-7) Despite some challenges and shortcomings in the response (briefly outlined above), the Commissioner is of the opinion that efforts made by the authorities and the generosity towards the Ukrainian war refugees displayed by the Polish society are commendable.

**An outstanding challenge: handling of the irregular influx of migrants through Poland-Belarus border**

Since August 2021, Poland has been experiencing a humanitarian crisis along its border with Belarus. This crisis was, by all accounts, orchestrated by the Belarusian regime who would instrumentalise migrants from different parts of the world (predominantly the MENA region and Sub-Saharan Africa) to cross the border irregularly, often through a very difficult terrain. Notwithstanding the Belarusian responsibility for the crisis, the Commissioner is of the opinion that Polish handling thereof has been largely unlawful. The Commissioner has already expressed such an opinion in the submission of 28 February 2022 to the *Report on human rights violations at international borders: trends, prevention and accountability*.[[7]](#footnote-8)

The correct procedure for the regularisation of irregular migrants’ status would be the following. A foreigner who crosses the border irregularly in principle commits a minor offense (Article 49a of the Polish *Code of minor offenses*). However, according to Article 31 section 1 of the 1951 Convention Relating to the Status of Refugees, upon ascertaining that the person is a refugee, penalisation becomes impermissible. The person encountered upon crossing irregularly ought to be apprehended, and the procedure for obliging a foreigner to return should be initiated, unless an asylum application has been lodged (Article 303 section 4 of the law on foreigners). Moreover, lodging an asylum application after the initiation of the return procedure always entails a suspension thereof (Article 305 section 1 of the law on foreigners). Before the execution of the return decision, the Border Guard must also determine whether permits for humanitarian stay or for tolerated stay are warranted (Articles 348 and 351 of the law on foreigners, respectively).[[8]](#footnote-9) The rationale of these safeguards embedded in the Polish law is to rule out the possibility of *refoulement* whenever the premises for a refugee status or subsidiary protection are, for whatever reason, not met. These safeguards were, however, utterly circumvented in the period following August 2021.

The first reaction by the authorities to the ensuing crisis was to prevent anyone from crossing the border in an irregular manner and immediately expel anyone who was apprehended on the Polish side. These initial pushbacks were executed without any basis in the applicable law. Later on, such a conduct was regularised by two legislations that, according to the Commissioner, are grossly incompatible with the Polish constitution and Poland’s international obligations.[[9]](#footnote-10) These legislations - the executive ordinance of the Minister of Interior and Administration of 20 August 2021[[10]](#footnote-11) and the amendment to the Act on Foreigners of 14 October 2021 - generally permit the Border Guard to immediately expel an individual upon apprehending them and ascertaining that they had recently crossed the border in an irregular manner.[[11]](#footnote-12)

The summary effect of the above is that the Border Guard, once they encounter a migrant in the border area, by default immediately expel them, without commencing a proper formal procedure as laid down above. Stays of migrants who have irregularly crossed Poland-Belarus border not only are not regularised but they largely remain outside the protective mechanisms of Polish and international law. Those whose asylum applications were accepted (due to interim measure issued by the ECtHR, intervention of the Commissioner, radically ill health or any other reason) would usually be placed in prolonged detention, with insufficient regard to clauses that prohibit detaining foreigners who experienced violence or might experience dangers to their health or life in case of detention. The Commissioner opposes such a conduct as well.[[12]](#footnote-13)

These actions were complemented by the imposition of the state of emergency in the border zone, which effectively barred the access of journalists and activists to the established exclusion zone. The Commissioner assessed the derogations from human rights obligations, that entered into force along with the state of emergency, as disproportionate.[[13]](#footnote-14) The state of emergency was later *de facto* extended beyond the constitutionally mandated period in a manner that was assessed by the Commissioner as unlawful.[[14]](#footnote-15) Additionally, a 5-meter-high wall was constructed along the border which, however, did not result in complete barring of this irregular migration route.

The summary result of the above is that migrants who managed to cross the border predominantly choose to hide in forests and swamps of eastern Poland, as any contact with the authorities, even the emergency medical services, usually results in a pushback.[[15]](#footnote-16) According to activists operating in the area, since the beginning of the crisis, 34 dead bodies were recovered near the border and 212 persons remain missing (as of 24 January 2023).[[16]](#footnote-17) Given the extremely difficult terrain in the border area (vast forests and swamps, very low population density) and lack of official statistics, the total number of deaths is impossible to ascertain. There is also no available information on the number of deaths on the Belarusian side of the border.

No large humanitarian organizations operate in the border area. Grassroots organizations and individual activists that provide aid to people hiding in the wilderness experience intimidation and, on several occasions, attempts to criminalise their conduct. As the Commissioner pointed out in his input to the recent report of the Special Rapporteur on the situation of human rights defenders “[the Government of Poland] has done little to support and protect human rights defenders involved in response to this crisis. In fact, legislative and material actions taken by the Government suggest that the aim was to discourage them from involvement in assistance to irregular migrants”.[[17]](#footnote-18)

1. [https://www.strazgraniczna.pl/pl/aktualnosci/11135,Rok-2022-w-Strazy-Granicznej.html](https://www.strazgraniczna.pl/pl/aktualnosci/11135%2CRok-2022-w-Strazy-Granicznej.html) (accessed 24/01/2023). [↑](#footnote-ref-2)
2. <https://www.consilium.europa.eu/en/press/press-releases/2022/03/04/ukraine-council-introduces-temporary-protection-for-persons-fleeing-the-war/> (accessed 24/01/2023). [↑](#footnote-ref-3)
3. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20220000583> (accessed 24/01/2023). [↑](#footnote-ref-4)
4. <https://bip.brpo.gov.pl/pl/content/rpo-uwagi-doustawy-o-pomocy-obywatelom-ukrainy-marcin-wiacek-senat> (accessed 24/01/2023); <https://bip.brpo.gov.pl/pl/content/rpo-ukraina-uchodzcy-ustawa-zmiana-opinia-mswia-odpowiedz> (accessed 24/01/2023). [↑](#footnote-ref-5)
5. <https://bip.brpo.gov.pl/pl/content/rpo-przemysl-dworzec-uchodzcy-ukraina-romowie-wojewoda-odpowiedz> (accessed 24/01/2023); <https://bip.brpo.gov.pl/pl/content/rpo-ukraina-uchodzcy-systemowa-ochrona-grup-wrazliwych-mswia-odpowiedz> (accessed 24/01/2023). [↑](#footnote-ref-6)
6. <https://bip.brpo.gov.pl/pl> (accessed 24/01/2023). [↑](#footnote-ref-7)
7. <https://www.ohchr.org/sites/default/files/2022-04/PolandNHRISubmission.pdf> (accessed 24/01/2023). [↑](#footnote-ref-8)
8. <https://academic.oup.com/rsq/advance-article/doi/10.1093/rsq/hdac025/6662333> (accessed 24/01/2023). [↑](#footnote-ref-9)
9. <https://bip.brpo.gov.pl/pl/content/RPO-wstrzymac-stosowanie-push-backow-granica-bialorus> (accessed 24/01/2023). [↑](#footnote-ref-10)
10. The ordinance has already been deemed unconstitutional by the court: as a result of the Commissioner’s application, the Białystok Administrative Court has found the pushback procedure under the ordinance unlawful: <https://bip.brpo.gov.pl/pl/content/wsa-rpo-pushbacki-sprzecznosc-prawo-polskie-miedzynarodowe-uzasadnienie> (accessed 24/01/2023). [↑](#footnote-ref-11)
11. A more detailed analysis of both laws in question is contained in the Commissioner’s submission of 28 February 2022 *Report on human rights violations at international borders: trends, prevention and accountability*. [↑](#footnote-ref-12)
12. <https://bip.brpo.gov.pl/pl/content/rpo-sady-migranci-strzezone-osrodki-rodziny-dzieci> (accessed 24/01/2023). [↑](#footnote-ref-13)
13. <https://bip.brpo.gov.pl/pl/content/stan-wyjatkowy-rpo-ma-watpliwosci-ws-ograniczen-pracy-dziennikarzy-oraz-dostepu-do> (accessed 24/01/2023). [↑](#footnote-ref-14)
14. <https://bip.brpo.gov.pl/pl/content/rpo-senat-ustawa-granica-panstwowa-uwagi> (accessed 24/01/2023). [↑](#footnote-ref-15)
15. <https://academic.oup.com/rsq/advance-article/doi/10.1093/rsq/hdac025/6662333> (accessed 24/01/2023). [↑](#footnote-ref-16)
16. <https://oko.press/smiertelne-zniwo-push-backow-na-granicy-z-bialorusia-znaleziono-ciala-az-4-migrantow> (accessed 24/01/2023). [↑](#footnote-ref-17)
17. Situation of human rights defenders, UNGA doc. A/77/178, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/428/94/PDF/N2242894.pdf?OpenElement> (accessed 24/01/2023). [↑](#footnote-ref-18)