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The legality and permissibility of push-back policies (forcing people back over a border) and assessment of the attempts to legalise it in Poland

What are push-backs?

Push-backs are an illegal international practice of forcing migrants back to the country from which they crossed the border (usually irregularly) without giving them an opportunity to apply for refugee status and without launching other administrative procedures against them, including return procedures. Usually border guards who are engaged in pushback operations 'do not hear' the wish to apply for international protection, so they do not receive such applications.

International and EU law and the pushback practice

The obligation to examine applications for international protection arises from the 1951 Convention Relating to the Status of Refugees (the Geneva Convention), EU law and a number of human rights agreements to which Poland is a party (see text by "Grażyna Baranowska"). According to the principle of non-refoulement, refugees cannot be expelled or returned to territories where their life or freedom would be likely threatened¹. Under the push-back procedure, the personal circumstances of asylum seekers are not assessed, thus this procedure contravenes the principle of non-refoulement. There is no doubt that the practice of push-backs also violates Art. 4 of Protocol No. 4 to the European Convention on Human Rights, which prohibits collective expulsions of foreigners. In the last two years, the European Court of Human Rights has twice (the cases of M.K and others and D.A and other v. Poland) found a breach of the European Convention on Human Rights by Poland in complaints prior to the current crisis, in which it was not possible for persons arriving from Belarus to apply for international protection at the Terespol border crossing.

The practice of push-backs also violates EU law, in particular the so-called Asylum Procedures Directive (2013/32/EU). Under its provisions, persons who apply for international protection should be allowed to remain in an EU Member State for the entire procedure. The directive provides for a simplified procedure and an accelerated procedure, but does not allow, in any situation, for the application not to be processed. Also, if a foreigner does not submit an application for international protection, the push-back practice cannot be used against them. A return procedure must be initiated against each person who has entered the territory of an EU Member State, even if they crossed the border illegally and the EU Member State wishes to deport them. The details of the procedure are regulated by the so-called Return Directive (2008/115/EC). Following this procedure is important because it guarantees that the principle of non-refoulement will not be violated, as it provides for the obligation to determine whether returning the foreigner to the country of origin or another country where they have the right to stay will not entail danger to their life or physical integrity. If expulsion poses a threat to their safety, such a person may not be deported and should be provided with legal residence (under Polish law, this is either humanitarian protection or tolerated stay).

Furthermore, it should be stressed that each procedure of returning a foreigner means that it is carried out in full respect of the law, i.e. at a border crossing point. EU regulations, including the Schengen Bor-

¹ Art. 33 of the Geneva Convention, Art. 19 (2) of the EU Charter of Fundamental Rights, as well as in numerous agreements in the field of rights human, see e.g. Art. 3 of the UN Convention Against Torture.

[ders Code](#), do not provide for the possibility to send a foreigner back to the state border and force them to cross it in an unauthorised place. This is explicitly laid down in the second sentence of Art. 13 (1) ‘A person who has crossed the border illegally and who is not allowed to stay on the territory of the Member State concerned shall be apprehended and subjected to procedures that meet the requirements of Directive 2008/115/EC,’ i.e. the provisions of the Return Directive. Entry can only be refused at a border crossing point (Art. 14 of the Code), but in this case, the state border is not crossed at all. Once the border is crossed, a return procedure has to be initiated to return the foreigner.

Attempts to legalise the practice of push-backs in Poland

As a result of the situation on the Polish-Belarusian border, Polish authorities have made two attempts to legalise push-back practices. The first one is a temporary measure, i.e. an amendment to [the executive order of the Minister of Internal Affairs and Administration](#) on regulating or rather limiting border traffic on account of the COVID-19 pandemic. It authorises forcefully returning foreigners who crossed the border with Russia, Belarus or Ukraine after 20 August 2021 and do not belong to any of the categories listed in the Regulation. The second measure is stipulated in [the Pushback Act](#), which came into force on 25 October 2021. According to this law, persons apprehended immediately after they have illegally crossed the border are returned on the basis of a provision that includes a ban on re-entry into the territory of Poland. Currently, the executive order and the Act contain different regulations and are simultaneously in force.

Executive order of the Minister of Internal Affairs and Administration (August 2021)

In August 2021, the Minister of Internal Affairs and Administration amended the Executive order on temporary suspension or restriction of border traffic at specific border crossing points. Due to the COVID-19 pandemic, [the original regulation](#) of March 2020 limited border crossings at selected crossing points and against selected categories of persons. However, the rather extensive (and repeatedly supplemented) [list of circumstances](#) allowing border crossings never included persons seeking international protection. Foreigners who do not belong to any of the categories of persons listed in the annex to the executive regulation may be granted permission to enter Poland ‘in particularly justified cases’ (Art. 2 (7)). This permission is issued by the commanding officer of the Border Guard post who, after obtaining the consent of the Commander-in-Chief of the Border Guard, may allow the person concerned to enter the territory of Poland. As this is the only way for persons seeking international protection to enter Poland, the regulation is inconsistent with Polish and international law: asylum seekers should not have to obtain additional entry permits.

The August 2021 [amendment](#) to the executive order further provides for the right to send back to the state border persons who do not fall into any of the categories listed above, and therefore also those seeking international protection (Art. 1.2b). This forced return does not take place at a border crossing point, but is instead an illegal crossing from Poland. Importantly, migrants are forced back not only at the border crossing point where border traffic has been suspended or restricted, but also outside the territory of the border crossing point. This means that any person on the territory of Poland who entered the country from Russia, Belarus or Ukraine and does not belong to any of the categories listed in the Regulation, is returned to the Polish border.

The October 2021 Pushback Act

At the same time as the executive order was passed (20 August 2021), the government filed a bill legalising push-back practices (23 August 2021), but with slightly different provisions. This law became effective on 25 October 2021.

According to the [Act on amending the Act on foreigners](#) and some other acts, persons apprehended immediately after they have illegally crossed the border are ordered to leave the territory of Poland. The act does not specify the place where the order to leave the territory of Poland is to be carried out, but under the law this can only be done at a border crossing point. In practice, however, the Border Guard forces migrants to cross the Polish border in other places, which is in violation of law. The grounds for these actions is a decision issued by the commanding officer of the Border Guard post with jurisdiction over the place where the migrant crossed the border, ordering them to leave the territory of Poland and banning them from re-entering the Schengen territory, including a specification of this ban. The decision may be appealed against to the Commander-in-Chief of the Border Guard, but the appeal does not suspend the execution of the decision (added Art. 303¹ (9a) and 303b of the Aliens Act). The Act thus covers a smaller group of persons than the executive order, as it applies only to those detained immediately after they have crossed the border. At the same time, the Act, unlike the executive order, which is intended to respond to the challenges of the COVID-19 pandemic, is not a temporary measure. The Act also allows for applications for international protection to not be processed (see [text by “Magdalena Póltorak”](#)).