# From the EU-Belarus Border to Strasbourg

## The Cases on 'Migrant Instrumentalisation' Before the ECtHR

**Aleksandra Ancite-Jepifánova**

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12 February 2025 was a long and remarkable day at the European Court of Human Rights (ECtHR) in Strasbourg. For one, because for the first time in its history, the court was invited to consider the interpretation of the Convention in the context of so-called 'migrant instrumentalisation' or 'hybrid attacks', allegedly orchestrated by the Belarusian regime after the EU imposed sanctions on Minsk. Second, because the Grand Chamber heard three cases on the same day – against each of the three states allegedly affected by Belarus' actions: Latvia (*H.M.M. and Others v. Latvia*), Lithuania (*C.O.C.G. and Others v. Lithuania*) and Poland (*R.A. and Others v. Poland*).

In 2024, on behalf of the CEU Democracy Institute's Rule of Law Clinic, I submitted third party interventions in two of these cases: *H.M.M. and Others v. Latvia* and *C.O.C.G. and Others v. Lithuania*. Both submissions draw heavily on my interdisciplinary research into the situation at the EU-Belarus border which, in addition to legal analysis, includes in-depth interviews with local NGO representatives, legal practitioners and volunteers, as well as over 40 non-EU nationals affected (see, e.g., here and here).

In this contribution, I critically engage with key arguments of the respondent governments with respect to the main issue in the proceedings – namely, the interpretation of Art. 3 ECHR (prohibition of inhuman or degrading treatment) and Art. 4 Prot. 4 ECHR (prohibition of collective expulsion of aliens). I also consider the relationship between the two in the particular context, having regard to the complexity and peculiarities of the situation on the ground.

### The EU-Belarus border crisis

The origins of the EU-Belarus border crisis date back to summer 2021 when Belarus relaxed its visa regime for nationals of several refugee-producing countries and, in cooperation with local travel agents, started coordinating their travel to Minsk. Belarus also stopped preventing irregular border crossings into the EU.

In response to the perceived 'migrant instrumentalisation', three EU Member States bordering Belarus – Latvia, Lithuania and Poland – introduced radical changes to their domestic legislation. The respective amendments effectively deprived people crossing irregularly of their right to claim asylum and allowed the state authorities to exercise pushbacks – forceful returns to Belarus without formal return procedures and individual assessment of protection claims (for a comparative analysis see here).

The three cases before the Grand Chamber concern the legal and practical consequences of the respective measures for the individuals involved – Afghan, Iraqi and Cuban nationals respectively. Among other things, all applicants complain that under Art. 3 ECHR, they were pushed back to Belarus, which is not a safe third country, without being given an opportunity to request asylum in the relevant EU Member States. They also allege that under Art. 4 Prot. 4 ECHR, they were subjected to collective expulsion, without an examination of their individual circumstances and without having a genuine and effective access to means of legal entry.

### 'Migrant instrumentalisation' and N.D. and N.T. v. Spain

During the hearings, the representatives of all three governments maintained that their national legislation, adopted in response to perceived 'migrant instrumentalisation', was generally in line with the established ECtHR jurisprudence. In support of their argu-

ments, the governments relied on the (much criticised) ruling of *N.D. and N.T. v. Spain*. In this case and its subsequent jurisprudence, the ECtHR introduced a two-tier exception to Art. 4 Prot. 4 ECHR when individuals cross the border in an unauthorised manner. First, it needs to be considered whether the state provided genuine and effective access to means of legal entry, such as border procedures. Second, the court introduced an 'own culpable conduct' exception to this principle. If access to means of legal entry was provided, it should be taken into account whether there were cogent reasons for the relevant individual not to make use of it which were based on objective facts for which the respondent state was responsible.

The respondent governments suggested that these criteria would be equally applicable to the present cases. They argued that the latter should be considered in the broader geopolitical context of the security threats emanating from 'instrumentalised migration' and 'hybrid attacks', orchestrated by Belarus, in which the states shall enjoy a margin of appreciation in interpreting the Convention – not only in respect to Art.4 Prot.4 ECHR, but also the principle of *non-refoulement*, guaranteed under Art. 3 ECHR. In the meantime, the governments maintained that genuine and effective means of legal entry were still available, as the applicants could claim protection at official border crossing points.

## The 'genuine and effective means of legal entry' test

Against this background, the interpretation of the requirement to provide 'genuine and effective access to means of legal entry' deserves particular attention and would benefit from further clarification from the court. First, it should be underlined that, albeit similar, the legislative responses of the respondent states to perceived 'migrant instrumentalisation' have not been identical. The relevant Lithuanian and Polish legislation still formally allowed to submit asylum claims at official border crossings. By contrast, the Latvian emergency order explicitly suspended the right to seek asylum at the country's border with Belarus, including at official border crossing points. This version of the order remained in force from 11 August 2022 until April 2022, i.e., the period when the facts of *H.M.M. and Others v. Latvia* took place.

The Latvian government nevertheless maintained that genuine and effective access to means of legal entry was still provided, as the applicants could apply for a humanitarian visa at an official border crossing point and, once admitted in the Latvian territory on this basis, subsequently claim international protection. Such a procedure, however, does not allow for a thorough examination of the applicant's circumstances, necessary for assessment of the risk of *refoulement,* and should not be considered 'genuine and effective access' for purposes of the Convention. As rightly noted by the UNHCR, '[t]he right to seek asylum should not be conflated with the prerogative of a State to grant humanitarian entry'. Indeed, as early as March 2022 this contradiction was recognised by Latvia's own domestic court, following which the order was amended to allow foreign nationals to apply for asylum at official border crossing points.

## Access to official border crossings depends on a third state

Second, even if Poland and Lithuania formally allowed to claim asylum at official border crossing points, access to them was seriously obstructed. Applicant representatives underlined that, to physically reach the border crossings, the applicants would first need to pass through Belarusian controls. The Belarusian border guards, however, typically prevent foreign nationals without a valid visa, granted for entry in the EU, from passing through, rendering access to official border crossing points impossible in practice.

It should be recalled that, according to *N.D. and N.T. v. Spain*, the prohibition of collective expulsions would still apply in case if the individual had cogent reasons not to make use of the available means of legal entry, which were based on objective facts for which the *respondent state was responsible* (my emphasis – A.A-J.). In the particular situation, the actual access of foreigners to the asylum procedure at the border depends not on the respondent state but on a third state – in this case, Belarus. Further clarification from the ECtHR would be particularly welcome in this

regard. Arguably, a situation where an person cannot approach a border crossing point due to the Belarusian controls and decides to enter irregularly instead, should not be regarded as their own 'culpable conduct'. Moreover, applying the 'culpable conduct' exception in the present context would lead to an absurd outcome whereby a Belarusian dissident fleeing the regime would be deprived of any means to claim protection at the border, since every attempt to pass through Belarusian controls would mean coming into direct contact with the state officials the person is escaping from.

## The term 'migrant instrumentalisation' and the situation on the ground

At the hearings, the respondent governments alleged that applicants arrived at the border as part of a 'hybrid attack' and collaborated with the Belarusian authorities to exploit the situation and abuse the system of international protection. Such a perception, however, neither accurately reflects the facts of the cases, nor corresponds to the situation on the ground.

The findings of my research (see here and here) suggest that those attempting to cross from Belarus make up a highly heterogeneous group and frequently do not have any connection with the Belarusian or Russian authorities. For example, there are people who had previously resided in Russia before deciding to seek protection in the EU (by transiting through Belarus) due to the lack of safety and human rights violations in Russia, or the risk of being expelled or forced to fight in the war in Ukraine. The applicants in *C.O.C.G. and Others v. Lithuania* belong precisely to this category. Further, non-EU nationals are typically taken to the EU-Belarus border by intermediaries who bring them to places far from official border crossing points and instruct them to cross the border irregularly; people may also genuinely believe that it is possible to apply for international protection anywhere in the EU's territory.

## Applicants in H.M.M. and Others v. Latvia remained in the forest for months

This brings us to the final and, arguably, the most important point in this regard. After being pushed back to Belarus by Polish, Latvian or Lithuanian authorities, protection seekers are often apprehended by Belarusian forces who do not let them return to Minsk and, often violently, force them to cross the EU's border again with no opportunity to claim asylum in Belarus.

This situation is well known to the EU Member State governments. To avoid the risk of foreign nationals being subjected to ill-treatment in such circumstances, Polish, Latvian or Lithuanian border guards would thus need to directly transport people to an official border crossing point or a reception centre where they could submit a claim for international protection. Instead, the authorities return them to the Belarusian territory at random locations, effectively violating Art. 3 ECHR.

Protection seekers thereby risk becoming trapped in a long chain of push- and pullbacks, exercised by both Belarusian and EU Member State authorities, which is precisely what has happened in the cases before the Grand Chamber. Out of these, *H.M.M. and Others v. Latvia* represents a particularly grave example. The applicants are 26 Iraqi nationals of Kurdish origin, who irregularly crossed the Belarus border with Latvia in early August 2021 and thereafter became subjected to systematic push- and pullbacks by Latvian and Belarusian forces. It forced the applicants to remain in the forest in inhuman and life-threatening conditions for unprecedently long periods of time, typically for several weeks or months (in most extreme cases for up to seven months, see here and here). They further testified that in between pushbacks, Latvian special forces deployed at the border forcibly detained people in heavily-controlled tents in undisclosed locations, exposed them to intimidation, verbal abuse and physical violence, including beatings and electric shocks, and confiscated their phones, completely isolating them from the outside world.

## Concluding remarks

Given the current restrictive turn in European asylum policies, the significance of the upcoming Grand Chamber decisions cannot be overstated. Any derogations from Art. 4 Prot. 4 ECHR on the basis of

perceived 'migrant instrumentalisation' are not only highly problematic from a legal perspective, but are also likely to result in particularly severe consequences for the individuals involved. Irrespective of how foreign nationals arrive at the EU border in the first place, a subsequent pushback to Belarus would inevitably expose them to a real risk of ill-treatment at the hands of Belarusian forces and may trigger a chain of constant push- and pullbacks in violation of Article 3 ECHR. The ECtHR should take a firm stance against current attempts to rely on national security to justify hollowing out the non-derogable principle of *non-refoulement*, which undermine the very essence of the international refugee protection regime.

## ABOUT THE AUTHOR

**Aleksandra Ancite-Jepifánova**

Dr Aleksandra Ancite-Jepifánova is a researcher in European and comparative migration, asylum and nationality law. She holds a PhD in law from Queen Mary University of London and is currently a Senior Fellow at the Rule of Law Clinic at CEU Democracy Institute. She is also a Research Affiliate with the Refugee Law Initiative, University of London.Dr Aleksandra Ancite-Jepifánova is a researcher in European and comparative migration, asylum and nationality law. She holds a PhD in law from Queen Mary University of London and is currently a Senior Fellow at the Rule of Law Clinic at CEU Democracy Institute. She is also a Research Affiliate with the Refugee Law Initiative, University of London.

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