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Speaker of the Seimas of the Republic of Lithuania
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REGARDING THE DRAFT LAW AMENDING AND SUPPLEMENTING THE LAW OF THE REPUBLIC OF LITHUANIA ON THE LEGAL STATUS OF ALIENS

The Seimas Ombudsmen's Office, acting in accordance with Articles 3, 19[1] and 19[2] of the Law of the Republic of Lithuania on the Seimas Ombudsmen within its competence, for the purpose of preventing the legal framework from facilitating unjustifiable restrictions of human rights and freedoms, has assessed draft law Nr. XIVP-719 amending Articles 5, 71, 76, 77, 79, 113, 131, 136, 138, 139, and 140, and supplementing with Chapter IX[1] the Law of the Republic of Lithuania on the Legal Status of Aliens No. IX-2206 (hereinafter – the Draft Law) and is hereby submitting its assessment on the regulatory framework proposed by the Draft Law from the point of view of protection of human rights and freedoms.

[1] Decision of 12 February 2012 in case No. 9152/09 *I.M. v. France.*
[2] Resolutions by the Constitutional Court of 23 October 2002, 24 March 2003, 26 January 2004, 13 May 2005, 31 May 2006, 5 May 2007, 15 March 2008, 11 December 2009, 26 February 2010, 21 June 2011, 7 July 2011.

1. In the explanatory memorandum to the Draft Law it is indicated that the purpose of the Draft Law is to amend legal provisions contained in the Law of the Republic of Lithuania on the Legal Status of Aliens (hereinafter – the Law) related to the assessment of applications for asylum, with the view to expediting the process of examination and decision making, as well as to restricting the rights of asylum applicants if the state is unable to ensure these rights due to the state of war, the state of contingency, an emergency situation or an emergency event due to a mass influx of aliens.

First, a note shall be taken of the opinion already delivered by the European Court of Human Rights, namely that a fast-track examination of asylum applications should not compromise the efficiency of examination procedures of such applications and the right to an effective legal remedy[1].

2. Article 1 of the Draft Law proposes that in Article 5(8) of the Law the following shall be provided for: *„If the state of war, the state of contingency, an emergency situation or an emergency event has been declared due to a mass influx of aliens, the deadline of 28 days prescribed in this paragraph shall be extended for the duration of the state of war, the state of contingency, an emergency situation or an emergency event declared due to a mass influx of aliens and additional 28 days thereafter".*

We would like to remind that an emergency situation declared on account of, e.g., spread of a contagious disease or a mass influx of aliens, may last for several years in a row, the fact which often makes it impossible to objectively define or anticipate the likely duration thereof. Therefore, with regard to the proposed amendments to Article 5(8) of the Law, there may be situations where asylum applicants, whilst being *de facto* present in the territory of the Republic of Lithuania, *de jure* could not be allowed entry until after the end of the declared the state of war, the state of contingency, an emergency situation or an emergency event and for an additional 28 days thereafter, i.e., practically for an unlimited period of time that cannot be defined by any objective criteria.

The Constitutional Court of the Republic of Lithuania has ruled in several of its resolutions that in accordance with the Constitution of the Republic of Lithuania human rights and freedoms may be restricted provided that, *inter alia*, such restrictions do not deny the very essence and nature of the rights and freedoms, and the principle of constitutional proportionality is respected[2].

The Constitutional Court has also held that amendments to the regulatory framework may not deny the legitimate interests and expectations of persons[3]. The principle of legal security is one of the fundamental elements of the rule of law enshrined in the Constitution and means the duty of the state to ensure clarity and stability of the regulatory framework, protect the rights of subjects of legal relations, as well as acquired rights, respect the legitimate interests and expectations[4].

Presumably, if the Draft Law were adopted, this would pave the way for restrictions of human rights

[3] Resolution of 12 July 2001 by the Constitutional Court.
[4] Resolution of 13 December 2004 by the Constitutional Court.

for an indefinite time, which is not commensurate with the appropriate implementation of the principles of legitimate expectations and proportionality. Therefore, it is suggested to reject this provision of the Draft Law.

3. It is noteworthy that from a linguistic point of view it is not clear as to whether the wording of *"the state of war, the state of contingency, an emergency situation and an emergency event due to a mass influx of aliens"* used in the Draft Law would cover only such contingency situations or emergency situations which were declared due to a mass influx, or would they also include all contingency situations and emergency situations, because the wordings used in the Draft Law single out only *"an emergency event due to a mass influx of aliens"* (ant not, for instance, an emergency situation due to a mass influx of aliens or an emergency event due to a mass influx of aliens).

It is noteworthy that Article 6 of the Draft Law presents a slightly different wording: *"the state of war, the state of contingency, an emergency situation and an emergency event declared due to a mass influx of aliens",* which leads to believe that the author of the proposed Article 113 (4) (1) [1] of the Draft Law seeks to single out only such emergency situation that has been declared due to a mass influx of aliens. However, it is still unclear why this wording in different articles of the Draft Law is used inconsistently.

In accordance with the legislative principles, the provisions of legal acts shall be specific, consistent, logical and unambiguous, particularly, if these relate to potential restrictions of human rights and freedoms introduced for the sake of protecting the public interest. The Constitutional Court has ruled that the regulatory framework stipulated in the laws and other legal acts shall be clear, comprehensible, and the legal norms shall be worded precisely to avoid any ambiguity[5].

In view of the above and in order to avoid disproportionate restriction of freedoms of persons, we propose specifying clearly defined and reasonable time periods in Article 5(8) of the Draft Law. Moreover, we suggest finetuning the wordings used in the Draft Law to make it clear which states of contingency or emergency situations are to be singled out in the Law (all or only those that have been declared due to a mass influx of aliens).

4. Article 1 of the Draft Law proposes the following to be provided for in Article 5 (9) of the Law "[...] *if, in accordance with pars. 4 or 8 of this Article, a decision is made to grant entry for an asylum applicant to the territory of the Republic of Lithuania and his (her) application for asylum is examined on its merits under a fast track procedure, by the decision of the State Border Guard Service such an asylum applicant shall be provided temporary accommodation specified in par. 6 of this Article, without granting him (her) freedom of movement within the territory of the Republic of Lithuania until the entry into force of the decision by the Department of Migration adopted after examining the application for asylum on its merits under a fast track procedure".*

It shall be noted that from this wording of the Law it is no clear what type of restrictions to freedom

[5] Resolution of 16 December 2013 by the Constitutional Court.

of movement are to be imposed upon such people, i.e., whether people could leave their temporary accommodation subject to some restrictions, or whether their freedom of movement throughout the entire period is to be restricted to the territory of temporary accommodation or some part thereof without the right to go beyond the limits of this territory. In accordance with the currently valid version of the Law, temporary accommodation of an alien by the State Border Guard Service subject to restriction of the freedom of movement on the grounds and for the time period as specified in this Law is comparable to detention of a person. It is noteworthy that Article 114 of the Law provides for that a detention exceeding 48 hours may be imposed *only by a court* and an alien may not be detained for more than 6 months, subject to supplementary extension of additional 12 months in certain situations.

It shall be noted that in order to better ensuring the physical and psychological integrity of the applicants for international protection, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants[6].

In accordance with Article 3 of the Law of the Republic of Lithuanian on Legislative Framework, legislation shall be guided by, *inter alia*, principles of expedience, proportionality, respect for the rights and freedoms of an individual, therefore, a draft law should be drawn and a legal act shall be adopted only provided that the objectives being pursued cannot be achieved by other means; the selected measures of legal regulation shall not restrict entities of legal relationships more than is necessary to achieve the objectives of legal regulation, the provisions of legal acts shall ensure and shall not deny human rights and freedoms, and legitimate interests established by the law, all available alternative measures of legal regulation shall be examined and only the best ones shall be selected.

It may not be excluded that these unprecedented measures adopted by the state for the purpose of managing emergency situations may not only have an impact on the capacity of the state to ensure the right, freedom and security, but may also disturb the usual functioning of the legal system. The Council of Europe brought it to the attention of the member states[7] that under emergency circumstances it shall be prohibited to restrict the fundamental right in the absence of the legal basis, and the principle of a timely judicial review shall be respected.

Therefore, the new wording included in Article 9 of the Law *"without granting the freedom of movement within the territory of the Republic of Lithuania"* in its essence shall be interpreted as amounting to personal detention (within the meaning of Article 114 of the Law) applied disproportionately without a court's decision. This is not in compliance with the principle of the rule of law, and the key commitments assumed by

[6] Directive 2013/33/EU of the the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), recital 20.

[7] Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit. Information Documents by Council of Europe [SG/Inf(2020)l 1], prieinama per: https://rm.coe.int/sg-inf-2020-l 1- respecting-democracy-rule-of-law-and-human-rights-in-th/16809elf40

the state in the field of protection of human rights and freedoms and is disproportionately restricting one of the rights enshrined in the European Convention for the protection of human rights and fundamental freedoms (hereinafter – ECHR), i.e., the freedom of movement and the right to security.

5. Article 2 of the Draft Law proposes supplementing Article 71 of the Law with par. l[1] specifying that in the state of war, the state of contingency, an emergency situation or an emergency event declared due to a mass influx of aliens the rights of asylum applicants prescribed under Article 71 (1) of the Law may be subject to temporary restriction if these cannot be ensured due to objective reasons, except for the right to material reception conditions and provision of the first medical aid. This means that, if the said provision is approved, the right of asylum applicants may be restricted, inter alia, the right to receive, free of charge, information about their rights and duties and consequences of violations of such rights and duties in the language they understand during the process of examination of their application for asylum, as well as information related to the examination of the application for asylum, to avail of interpreter's services free of charge to the extent that such services are related to the examination of application for asylum, the right to receive psychological and any other assistance defined in the said provision, the right to apply to the Office of the United Nations High Commissioner for Refugees and any other organisation providing specialised legal assistance or consultations to asylum applicants.

In particular, it shall be emphasised that if reception and accommodation centres of aliens do not provide a regular access to communication in the language they understand, due to the language barrier the aliens placed in such centres will fail to notify the local staff of their basic daily needs in a timely manner, which may lead to the situation where aliens are not guaranteed an appropriate and timely legal, medical, psychological and any other assistance they may need.

Moreover, as noted by the Constitutional Court in its opinion about the right to limit access to information, protection of common interests in a democracy shall not deny the right of a person to receive information in general. In accordance with the doctrine of human rights and freedoms, and the international and domestic law based on this doctrine, the solution to this problem is linked with a rational relationship among legal values guaranteeing that restrictions shall not violate the very essence of a human right in question[8].

In its caselaw the Constitutional Court has been maintaining the position that the justification for restriction of a human right or freedom within a democracy may be assessed from the point of view of common sense and obvious necessity, such restriction shall be commensurate with the concept of justice and requirements, as well as comply with the terms and conditions of restriction of the right or freedom in question specified in the Constitution. Provision of certain exemptions from the general legal regulation may be compliant with the Constitution provided that the objective sought is to ensure a public interest enshrined in

[8] Resolution of 19 December 1996 by the Constitutional Court.

the Constitution and only to the extent which is necessary for the attainment of that objective; the said exemptions shall be proportionate with the objective sought that shall be justifiable under the Constitution and shall not restrict the rights of individuals more than is necessary for the purpose of ensuring a universal public interest justifiable by the Constitution[9].

In order to identify potential restrictions of human rights and freedoms and the scope thereof, a note shall be taken of the fact that within the ECHR there are some rights and freedoms which may be subject to restrictions by the states in exceptional circumstances and under special conditions enshrined in the relevant Articles of ECHR[10]. It is the obligation of public authorities to ensure that the restrictions permitted by ECHR even in emergency situations shall be based on the law and be commensurate with the constitutional guarantees, shall be applied out of objective necessity and be appropriate to the objective for the sake of which such restrictions have been imposed.

6. Under Article 3 of the Draft Law it is proposed to repeal Article 76 (5) of the Law. However, we would like to stress that if such amendment were to be adopted, it would become unclear whether the Department of Migration would inform an asylum applicant about examination of his (her) application for asylum on its merits and if so, in which form and within how many days from the day of submission of such application.

7. Under Article 3 of the Draft Law it is proposed to specify in Article 76(6) of the Law that „*Par. 4 of this Article shall not apply to unaccompanied minor asylum applicants and applicants who have been subject to torture, rape or suffered other serious psychological, physical or sexual violence. This provision shall not apply in the state of war, the state of contingency, emergency situation or an emergency event declared due to a mass influx of aliens".* Article 4 of the Draft Law proposes amending Article 77 (3) of the Law to read as follows: *"Paragraph 1 of this Article shall not apply to vulnerable persons, except in the state of war, the state of contingency, an emergency situation or an emergency event declared due to a mass influx of aliens".*

It shall be emphasised that if the said amendment to Article 76 (6) of the Law were to be adopted in the presence of relevant grounds (specified in Par. 4 of the Article), the Department of Migration could examine applications for asylum filed by unaccompanied minor asylum applicants and asylum applicants who have been subject to torture, rape or suffered other serious psychological, physical or sexual violence on the merits under the fast-track procedure, while upon adoption of Article 77 (3) of the Law applications for asylum filed

[9] Resolutions of 12 December 2005, 2 March 2009, and 24 May 2013 by the Constitutional Court.

[10] For instance, the rights and freedoms enshrined in the provisions of Article 5. Right to liberty and security, Article 8. Right to respect for private and family life, Article 9. Freedom of thought, conscience and religion, Article 10 Freedom of expression, Article 11 Freedom of assembly and association of ECHR, Article 2 of Protocol 4 to ECHR Freedom of movement, Article 1 of Protocol No. 1 to ECHR Protection of property may be subject to such restricttion as are prescribed by the law and are necessary in a democratic society, in the interests of national security, public health, or integrity, and for the protection or the rights and freedoms of others.

by vulnerable persons may be left unexamined.

Within the meaning of the Law, a vulnerable person means a person with special needs (for instance, a minor, a disabled person, or a person who is over 75 years of age, a pregnant woman, a single father or mother raising minor children, a person with a mental and behavioural disorder, a victim in human trafficking, or a person who has been subjected to torture, rape or other serious forms of psychological, physical or sexual abuse).

It is noteworthy that the European Court of Human Rights has held that some asylum applicants may require special protection due to their special needs and/or belonging to vulnerable groups. In such situations the status of an asylum applicant is very important[11]. The fact of belonging to at least one of the vulnerable groups by an asylum applicant may affect the commitment of the state regarding such asylum applicants in terms of the conditions of reception and during deliberation of whether such person may be expelled from the state in which he (she) filed an application for asylum[12].

In accordance with the European Union law, member states shall consider the special situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence[13].

We would like to note that the requirement to respect the constitutional principle of proportionality as one of the elements of constitutional principles of the rule of law which also means that any measures prescribed by the law shall be commensurate with the legitimate objectives important for the public, that such measures shall be necessary for the attainment of the said objectives and shall not restrict the rights and freedoms of individuals obviously more than is necessary for the attainment of these objectives, *inter alia,* entails the requirement for the legislator to establish such regulatory framework which could facilitate to a sufficient extent an individual approach to restrictions of rights and freedoms of individuals. The regulatory framework restrictions of personal rights and freedoms shall be such as to facilitate a case-by-case assessment of individual situation of every person and, in view of all the important circumstances, to enable application of restrictive measures in respect of the rights of that person on a case-by-case basis[14].

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[11] Decision of 21 January 2011 in case No. 30696/09 *M.S.S. versus Belgium and Greece.*

[12] A publication by the European Court of Human Rights, available online via: https://www.echr.coe.int/Documents/COURTalks_Asyl_Talk_ENG.pdf.

[13] Article 20 (3) of Directive of 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Article 21 of Directive 2013/33/EU of the the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

[14] Resolutions of 7 July 2011, 14 April 2014, 26 February 2015, and 17 February 2016 by the Constitutional Court.

8. Article 5 of the Draft Law proposes amending Article 79 (4) of the Law to read it as follows *"In the state of war, the state of contingency, an emergency situation or an emergency event declared due to a mass influx of aliens, an unaccompanied minor asylum applicant may be placed also in other places of accommodation."*

From the proposed amendment under the Draft Law it is unclear as to what other places of accommodation can lodge unaccompanied minor asylum applicants and whether the conditions for accommodating unaccompanied minors assumed by the state under international commitments will be ensured.

It is noteworthy that, in accordance with Article 31 (3) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, Member States shall ensure that unaccompanied minors are placed either: with adult relatives; or with a foster family; or in centres specialised in accommodation for minors; or in other accommodation suitable for minors. Thus, unaccompanied minors shall be placed not in any accommodation, but rather in accommodation suitable for minors. In accordance with Article 11 (3) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, unaccompanied minors shall never be detained in prison accommodation. Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults. It is noteworthy that the European Court of Human Rights has repeatedly noted on the exceptional legal status of unaccompanied minors and their extremely vulnerable situation, emphasising the duty of the states to ensure appropriate living conditions for such asylum applicants[15].

9. Under Article 8 of the Draft Law it is being proposed to supplement the Law with the new Chapter IX[1], by specifying therein a new procedure of pre-trial appeals against decisions on granting asylum.

The wording of Article 135[1] given in the Draft Law implies that appeals against decisions adopted by the Department of Migration indicated in this Article *"will be mandatorily examined under pre-trial procedure within the Department of Migration".*

We believe that such proposed legal regulation introducing mandatory pre-trial procedure of appeal whereunder decisions adopted by the Department of Migration may only be appealed with the very same administrative authority, i.e., the Department of Migration, is faulty.

Under Article 14 of the Law of the Republic of Lithuania on Public Administration, a person may file a complaint against an administrative decision or act (omission to act) by a public administration authority, or delays by a public administration authority to perform the actions within its remit with a higher public administration authority or with another authority authorised by the laws regulating disputes arising out of administrative legal relationships to perform preliminary deliberations of disputes out of court, or to an administrative court.

It shall be noted that in Articles 135[1] and 135[2] of the Law it is being proposed to provide for a

[15] Judgement of 5 April 2011 in case No. 8687/08 *Rahimi versus Greece.*

possibility of filing a complaint with the Department of Migration within 7 days from the date of familiarising the alien with the decision, while the Department of Migration shall examine the said complaint and decide upon it within 7 days from the receipt of complaint. It is noteworthy that in accordance with the Law of the Republic of Lithuania on Public Administration, the time limits for adopting administrative decisions and performing other administrative procedures are indicated in working days.

Having regard to the above, we would not support the amendment proposed in Article 8 of the Draft Law related to the mandatory pre-trial complaint procedure with the Department of Migration in respect of decisions adopted by the same Department of Migration.

Having analysed the entirety of the proposed legislative amendments to the Law, it shall be emphasised in addition that the principle of necessity enshrined in ECHR implies that the measures undertaken with the objective of managing the state of contingency or an emergency situation shall be sought with minimal amendments to the already existing legal norms and procedures, thus, in the face of a crisis no major legal reforms shall be undertaken. Although a rapidly developing and highly unpredictable crisis may indeed give rise to a substantially high level of legislation, and the executive must act in a fast and efficient manner, all efforts undertaken shall seek to avoid possible violations of human rights and freedoms. This situation may lead to simplified procedures of decision and, to the extent that is compatible with the Constitution, to some flexibility in the standard distribution of competences among the local, regional and national branches of government to the extent that these relate to specific and restricted areas aiming at a coordinated crisis management for as long as may be necessary[16]. Moreover, from the point of view of human rights, the regulatory framework shall be clear and unambiguous to avoid various interpretations of its contents and the risk of violation of human rights and freedoms.

Sincerely

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[16] Council of Europe. Compilation of European Commission for Democracy Through Law (Venice Commission) opinions and reports on states of emergency [CDL-PI(2020)003].