



OPEN SUMMARY LV EMN AHQ on Interaction between criminal proceedings and asylum procedure

LV NCP launched an ad-hoc Query on “Interaction between criminal proceedings and asylum procedure” on 9th February 2016.

The question concerns application of criminal procedure initiated with regard to foreigner, who committed illegal crossing of the state external border and applied for international protection (asylum) as the result of that an asylum procedure is started. Latvia prepared questions to obtain information on national experiences of the (Member) States on interaction of both criminal and asylum procedures, taking into account provisions of Article 31 paragraph 1 of the Geneva Convention relating to the Status of Refugees, especially in cases when the foreigner arrives from the territory of the transit third country.

Responses were received from 21 country (AT, BE, HR, CZ, EE, FI, FR, DE, HU, IT, LV, LT, LU, NL, PL, PT, SK, SI, SE, UK, NO).

Please note that this is a summary of the answers provided by the (Member) States and that the actual compilation should be verified for nuances and detailed information.

Q1. Criminalization of illegal state border crossing and stay.

In accordance with replies received from the Member States illegal entry and illegal stay in some Member States constitute administrative offence (**AT, HR, SK**) while in the other – criminal offence (**BE, FI, FR, DE, HU, IT, LV, LT, LU, PL, SE**).

Some Member States (**CZ, NL, PT, SI**) informed that their national legislation neither defines criminal nor administrative liability for illegal border crossing.

In **EE** and **NO** illegal border crossing is criminal offence only in certain cases defined in the legal acts, but in all other cases, it is an administrative offence.

Some Member States declared that their national legal acts (**BE, HR, LT, UK**) mirror the provisions of Article 31 of the Geneva Convention.

BE, NO informed that criminal procedure for illegal entry is initiated only in combination with other criminal offence. **NO** indicated that usually illegal border crossing is handled as administrative case, especially in case when asylum application is rejected, person is not willing to return.

BE pointed out that in case of asylum seeker or refugee criminal procedure for illegal border crossing or stay is not initiated.

CZ and **SK** informed that persons are not prosecuted for illegal border crossing, but punishable is only act when the state border is crossed by use of force (**CZ**) or use of violence/threat of violence or illicit border crossing (violating international flight regulation) (**SK**).

Q2. Cases when criminal procedure is not applicable to foreigners.

In **FI, LU** and **NO** criminal proceedings are not applied with regard to foreigner seeking for asylum protection at the border and providing for information on protection against refoulement.

Q3. Criminal procedure and asylum procedure are applied in parallel (simultaneously) or criminal procedure is suspended.

In **EE, IT, UK** criminal procedure for illegal border crossing is suspended if a foreigner submits an application for international protection. In **PL** criminal procedure can be suspended depending on the circumstances.

BE informed that in case an asylum applicant is prosecuted for criminal acts, the refugee status determination procedure could in certain cases be accelerated.

FI terminates the criminal proceedings.

FR criminal sentences are only applied in cases of flagrante delicto, criminal and asylum procedures are not conducted simultaneously.

In **FR, CZ** asylum procedure at the border excludes the criminal procedure, because the person does not cross the border, so he/she is a subject of refusal of entry. At the end of the asylum procedure at the border, in case of refusal, the foreigner is returned to his/her country of origin or to another country where he/she can be readmitted.

HU, LU, LV, PL, SK, SE, NO apply criminal and asylum procedures simultaneously.

LT criminal procedure is not initiated if the foreigner presents himself/herself without delay to the competent authorities and provides an exhaustive explanations on the reasons of illegal entry and stay. Both criminal and asylum procedures are carried out if foreigner applies for asylum after the criminal proceedings are initiated with the aim to avoid liability for illegal border crossing or stay.

Q4. Suspension of criminal proceedings because of the existence of conditions mentioned in Article 31 paragraph 1 of the Geneva Convention.

IT is the only Member State which reported that there were cases in practice when the criminal proceedings were suspended based on the conditions mentioned in Article 31 paragraph 1 of the Geneva Convention.

Q5. The competent authority responsible for assessment if in each individual case the conditions mentioned in Article 31 paragraph 1 of the Geneva Convention exists.

In **EE, FI, FR, HU, LT, LU, UK** the competent authorities responsible for processing of international protection applications make assessment of conditions mentioned in Article 31 paragraph 1 of the Geneva Convention, while in **BE, PL** and **NO** judicial authorities make assessment.

Q6. Circumstances taken into account while making assessment of conditions referred to in Article 31 paragraph 1 of the Geneva Convention.

PL, LV, SK, UK, NO while making an assessment for not imposing penalties on account of illegal entry or stay of refugees the conditions referred to in Article 31 paragraph 1 of the Geneva Convention are examined. **NO** pointed out that situation and circumstances of apprehension are important. **LU** reported that assessment is made on the case-by-case basis and the fact that the asylum application was not submitted without delay does not exclude the assessment of the application. **LT** does not initiate criminal procedure if the foreigner submits his/her asylum application without delay and provides an exhaustive explanation of the reasons of illegal entry.

Q7. Continuation or termination of criminal proceedings in case when foreigner arrives from the transit country (not „coming directly”).

FI – criminal proceedings are terminated. **PL, SK**- criminal proceedings are continued. **SE** – the main criteria is safe transit country according to Article 38 of the Procedural Directive (2013/32/EU). The question of termination would be determined on a case-by-case basis depending on a weighing of the interest to enforce the law against the interest of a swift expulsion.

The **UK** informed that in accordance with Court decision in the case of *Asfaw* [2008] UKHL 31 the term “coming directly” is to be interpreted liberally, so that a refugee should be entitled to transit through other countries and then claim asylum in the country of his choice.

NO shared experiences on considerations related with “coming directly” definition within the meaning of time framework.

Q8. If criminal procedure is applicable after the end of asylum procedure.

FR if the foreigner is inside the country and with regard to him/her a refusal to grant international protection was issued at the result of which the return decision is issued, the criminal procedure for illegal border crossing is abandoned.

DE, LT criminal procedure is not applied after the asylum procedure is completed.

In **IT, NO** criminal proceedings are resumed after the international protection is refused.