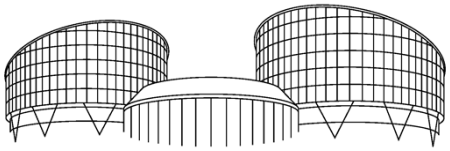

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER FOURTH SECTION

CASE OF BISTIEVA AND OTHERS v. POLAND

(Application no. 75157/14)

JUDGMENT

STRASBOURG

10 April 2018

FINAL

10/07/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Bistieva and Others v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Vincent A. De Gaetano, *President,*
András Sajó,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 16 May 2017 and 20 February 2018,

Delivers the following judgment, which was adopted on that last date:

PROCEDURE

1. The case originated in an application (no. 75157/14) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Zita Bistieva, and her three minor children ("the applicants"), on 26 November 2014.

2. The applicants were represented by Mr J. Białas, a lawyer practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska of the Ministry of Foreign Affairs.

3. The applicants alleged that their administrative detention for nearly six months pending their removal to Russia had been in breach of Articles 5 § 1, 5 § 4 and 8 of the Convention.

4. On 28 September 2015 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants are Ms Zita Bistieva, who was born in 1976, and her three minor children, who were born in 2006, 2008 and 2013, respectively. The applicants live in Herne, Germany.

6. In 2012 Ms Bistieva's husband, M.A., and their two elder children arrived in Poland. M.A. applied for asylum for himself and his family.

7. On 6 March 2013 the head of the Aliens Office (*Szef Urzędu do Spraw Cudzoziemców*) decided not to grant M.A. and his family refugee status and to expel them from Poland (decision no. PU-420-37001/SU/2012). That decision was upheld by the Refugee Council on 10 May 2013 (no. RdU-133-1/S/13). No appeal was lodged before the administrative court.

8. Soon afterwards the family fled to Germany, where Ms Bistieva's third child was born in July 2013.

9. On 28 May 2013 the Polish authorities took over the jurisdiction over the family's case under Council Regulation (EC) No. 343/2003 ("the Dublin II Regulation"). On 9 January 2014 Ms Bistieva and her three children were sent back to Poland.

10. On 9 January 2014 the Słubice District Court (*Sąd Rejonowy*) ordered the applicants' committal until 8 April 2014 to the family wing of a guarded centre for aliens (*Strzeżony Ośrodek dla Cudzoziemców*) in Kętrzyn. It was held that the applicants should be detained pending their expulsion, which had been ordered by the head of the Aliens Office (*Szef Urzędu do Spraw Cudzoziemców*) on 6 March 2013 and in view of the risk that they might again flee the country.

11. The information about the guarded centre for aliens in Kętrzyn which is presented in paragraphs 12-16 below, is derived from the reports of the Helsinki Foundation for Human Rights, which resulted from their monitoring visits in 2012 and in January and February of 2014.

12. The Kętrzyn centre was opened in 2008. At the material time, it only hosted families and unaccompanied children. In January and February 2014, 70 migrants were held there. That number included 13 men, 19 women and 38 minors. The majority of migrants in the centre were Russian nationals. The centre was surrounded with a high wall or fence with a single barbed wire on top. Kętrzyn was one of the two guarded centres in Poland which had done away with an additional barbed wire on the fence. Unlike in many other guarded centres, the one in Kętrzyn had outer but no inner bars on the windows and the windows in the day rooms (*świetlica*) were without any bars. Unlike in all other guarded centres, the bars allowed for windows to be opened sufficiently wide.

13. The overall living conditions in the centre were assessed as good. Each family occupied one room which was equipped with basic furniture. They had, in principle, unlimited access to common areas in the building, which included, a dining room, a number of kitchenettes, laundry rooms and day rooms (equipped with a TV-set, board games, video games and toys, a small gym and a library (containing a large number of publications in Russian and other languages). Migrants in Kętrzyn had also access to outdoor recreational grounds for adults and children. Outdoor time was limited to one hour per day unless, a migrant participated in sport or other type of activities.

14. Adequate medical care, including dental and psychological care, was provided in the Kętrzyn centre.

15. The staff of that establishment had received particularly positive evaluation from its occupants. Many staff members spoke Russian, they were closely supervised by the governor, who regularly talked to the migrants. The security measures were much more relaxed than in other centres for aliens. The premises were clean and adapted to children.

16. Education of migrant children and adults was provided on the centre's premises by the local authorities and pedagogy students from a nearby university. The classes of Polish, mathematics and geography were run by qualified teachers and the students either received school report cards or certificates of attendance. The classes were organised every day and, in early 2014, lasted from one hour to one hour and a half. In principle, children of all school ages and different language levels were mixed. Individual programmes had, occasionally been offered to those children who had previously studied in a Polish school. A wide range of outdoor and indoor activities, and events were available. They were run by staff members dressed in civilian clothing or visitors from the local school of music.

17. Ms Bistieva appealed, arguing that the administrative detention of herself and her children was unjustified and disregarded the fact that her husband had stayed behind in Germany, having been hospitalised when his family was sent back to Poland.

18. On 27 January 2014 the Warmińsko-Mazurski Governor (*Wojewoda*) refused to order the expulsion of Ms Bistieva's youngest child, which was sought by the head of the Świecko Border Guard (*Komendant Placówki Straży Granicznej*). It was held that the 2013 expulsion decision did not cover the child, who was born later in Germany and whose presence in Poland resulted from a decision of the German authorities. It followed that the child's presence in Poland, unlike that of the rest of his family, was not illegal.

19. On 28 January 2014 Ms Bistieva applied for refugee status for herself and her three children. She also applied for a stay of the enforcement of the 2013 expulsion decision.

20. On 4 February 2014 the Kętrzyn District Court decided to extend the detention of all the applicants at the guarded centre for aliens until 27 April 2014. The domestic court relied on the fact that the 2013 expulsion decision was enforceable despite Ms Bistieva's renewed asylum application and that the identification of the family members was being carried out by the Polish authorities. The applicant did not appeal against that decision.

21. On 5 February 2014 the Gorzów Wlkp. Regional Court (*Sąd Okręgowy*) upheld the decision of 9 January 2014. It was held that the decision to place Ms Bistieva in administrative detention was justified because she was an illegal alien in Poland and she had crossed the German

border illegally. The fact that she had minor children could not be considered as a sufficient reason for quashing the impugned decision. The guarded centre for aliens in Kętrzyn provided adequate living conditions and medical care to the family. Any inconvenience suffered by Ms Bistieva's family was the result not of their placement at the guarded centre but rather of Ms Bistieva's illegal immigration to Poland.

22. On 19 February 2014 the head of the Aliens Office decided not to grant the application to stay the enforcement of the 2013 expulsion decision. It was noted that the decision covered all the applicants. The authority considered that Ms Bistieva's new application for asylum was likely to fail as it was based on similar grounds as the one rejected in 2013. The applicant did not appeal. On 11 March 2014 the head of the Aliens Office issued a corrigendum to that decision and removed Ms Bistieva's youngest child from its scope.

23. It appears that on 20 February 2014 Ms Bistieva's husband was transferred to Poland and placed in the same guarded centre as the applicants.

24. In view of the 2013 decision, which was enforceable, on 18 April 2014 the head of the Aliens Office discontinued the applicants' asylum proceedings (decision no. DPU-420-214/SU/2014). That decision was served on Ms Bistieva on 23 April 2014. She did not appeal.

25. On 25 April 2014 the Kętrzyn District Court decided to extend the administrative detention of the applicants until 29 June 2014, given the discontinuation of the latest set of asylum proceedings.

26. Ms Bistieva appealed, arguing that her youngest child was not an illegal alien and, as such, he could not be the subject of administrative detention. She also argued that her own and her other children's placement in the guarded centre was unjustified.

27. On 22 May 2014 Ms Bistieva lodged a new application for asylum, also asking that the enforcement of the 2013 expulsion decision be put on hold. She argued that her application was justified because on 27 January 2014 the Warmińsko-Mazurski Governor had refused to order the expulsion of her youngest child and because, in a separate set of proceedings, on 25 April 2014 the Refugee Council (*Rada do Spraw Uchodźców*) had granted refugee status to her father, mother and siblings.

28. On 5 June 2014 the head of the Aliens Office decided to temporarily suspend the enforcement of the 2013 expulsion decision, until the delivery of a new decision, on the grounds that new circumstances had arisen in the case.

29. On 6 June 2014 the Olsztyn Regional Court upheld the decision of 25 April 2014 extending Ms Bistieva's administrative detention. It was observed that the decision to extend the measure of administrative detention was justified by the need to secure the course of the proceedings concerning the refusal of refugee status and expulsion. It was also noted that the last

relevant decision had been delivered by the head of the Aliens Office on 18 April 2014 and served on Ms Bistieva within the statutory time-limit. It followed that her detention was in accordance with the law. The domestic court held that section 107 of the 2003 Aliens Act had not been breached by the fact that the youngest child had been detained along with Ms Bistieva and the rest of the family even though his own expulsion had not been authorised by the Governor. It sufficed that the mother herself was covered by the 2013 expulsion decision and that the child was in her care. Separating Ms Bistieva from any of her children would be contrary to their best interests. Lastly, the court considered, without providing detailed reasons, that the possible alternative measure, namely placing the applicants at the aliens centre in Podkowa Leśna and providing them with social care, was not called for in the circumstances of the case.

30. On 12 June 2014 Ms Bistieva applied to be released from administrative detention.

31. On 29 June 2014 the applicants were released. They started living in Warsaw. Later, on an unspecified date in August 2014 the applicants left for Germany. As submitted by their lawyer, they currently live in Herne.

32. On 28 October 2014 the head of Aliens Office discontinued the applicants' asylum proceedings on the grounds that they had not appeared for questioning (decision no. DPU-420-1114/SU/2014).

33. The applicants did not bring an action for compensation for unjustified detention in a guarded centre under section 407 of the Aliens Act of 12 December 2013.

II. RELEVANT DOMESTIC LAW AND PRACTICE

34. The procedure for granting foreigners refugee status and tolerated stays and for their expulsion and detention is regulated by the Aliens Act of 13 June 2003, which grants protection to aliens within the territory of the Republic of Poland (*Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej* – "the 2003 Act"). The relevant provisions are sections 24(2), 33(4), 40(2)(2), 62(2), 67(1), 87, 88(a), 88(b), 89 and 89(b).

35. Matters related to the administrative detention of aliens, their placement in and release from guarded centres, the living conditions in such facilities, including admission of families with minor children and provision of healthcare and education, are regulated by the 2003 Act in so far as they have not been repealed by the Aliens Act of 12 December 2013 (*Ustawa o cudzoziemcach* – "the 2013 Act"), which entered into force on 1 May 2014. The applicable provisions of the 2013 Act are sections 398(1)(2) and (2)(1), 401, 403, 406, 407, 414(3), 416((1)(2) and (2), 417 and 426 of the 2013 Act.

36. Under the above-mentioned section 401(4) of the 2013 Act the court must also consider the child's best interests when examining a request that a

migrant who is accompanying a child be placed at the guarded centre for aliens.

37. At the relevant time the organisation and the living conditions in guarded centres for aliens were further regulated by the following Ordinances issued by the Minister of Internal Affairs: the Ordinance of 26 August 2004 on conditions in guarded centres and detention centres for aliens, and on internal rules concerning organisation and order during aliens' stay at a guarded centre or in detention pending expulsion (*Rozporządzenie w sprawie warunków, jakim powinny odpowiadać strzeżone ośrodki i areszty w celu wydalenia oraz regulaminu organizacyjno-porządkowego pobytu cudzoziemców w strzeżonym ośrodku i areszcie w celu wydalenia*), and the Ordinance of 6 December 2011 on the Internal Rules on the retention of asylum seekers at centres for aliens (*Regulamin pobytu w ośrodku dla cudzoziemców ubiegających się o nadanie status uchodźcy*). The Kętrzyn guarded centre was set up by the Minister of Internal Affairs Ordinance of 27 September 2007 *(Rozporządzenie Ministra Spraw Wewnętrznych w sprawie strzeżonego ośrodka dla cudzoziemców w Kętrzynie*).

38. A remedy entitling an alien to seek compensation for his or her manifestly unjustified placement in a guarded centre for aliens is provided for under Section 407 of the 2013 Act, which, in so far as relevant, reads a as follows:

> "1. An alien is entitled to obtain from the State Treasury compensation for pecuniary and non-pecuniary damage in the event of unjustified ... placement of the alien in a guarded centre or of the imposition of detention for aliens."

This procedure is further regulated under Articles 552 § 4 – 555 of the Code of Criminal Procedure, in so far as applicable. A claim for compensation is time-barred one year after release from detention (Article 555).

39. According to the case-law of Polish courts, detention is considered manifestly unjustified in the event the measure has been ordered in breach of law or if it turns out, in view of all the circumstance of the case - in particular the outcome of the proceedings - that it was redundant (see the Supreme Court's judgment of 17 March 2015, no. V KK 417/14 and the Szczecin Court of Appeal's judgment of 5 May 2016, no. II Aka 49/16). Any unlawful detention (such which is in breach of provisions of Chapter 28 of the Code of Criminal Procedure) is necessarily manifestly unjustified (see the Supreme Court's decision of 12 April 2010; V KK 308/09). The claim for compensation will not arise, however, in the event of only a minor procedural shortcoming in the course of the proceedings concerning a detention measure (see the Supreme Court's decision of 4 May 2016, no. V KK 375/15).

40. It appears that the first action brought under that provision by an Iranian woman awaiting a decision on her first asylum application is

currently pending (see decision on applicability issued on 4 June 2014 by the Lublin Court of Appeal; no. II AKz 277/14).

41. In addition, Article 246 of the Code of Criminal Procedure provides a remedy aimed at examination of the lawfulness and legitimacy of arrest. It is not limited to the detention of aliens. Article 552 of the Code of Criminal Procedure (action for compensation for manifestly unjustified remand in custody) enables a detainee to seek, retrospectively, a ruling as to whether in criminal proceedings that have already been terminated, a decision to detain him or her was justified, and to obtain compensation if it was not.

III. RELEVANT INTERNATIONAL LAW

42. The relevant sources of international law are set out in the Court's judgment in the case of *A.B. and Others v. France*, no. 11593/12, §§ 60-91, 12 July 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 4 OF THE CONVENTION

43. The applicants complained that their administrative detention had been in breach of Article 5 § 1 of the Convention. This provision, in so far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition ..."

44. Ms Bistieva also complained under Article 5 § 4 of the Convention that under Polish law a stay of enforcement of an expulsion decision did not result in automatic release of the alien concerned from administrative detention. She also complained that her youngest child had been deprived of judicial review of his detention because his situation had been linked with his mother's immigration status. This provision reads:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' submissions

1. The Government

45. The Government claimed that the applicants had not exhausted the domestic remedies available to them. In particular, they had not pursued the appeal against the 2013 expulsion decision which was at the origin of their subsequent administrative detention; had not challenged the detention measure under Article 246 of the Code of Criminal Procedure; had not appealed against the decision of the Kętrzyn District Court of 4 February 2014; had not appealed against the respective decisions of the head of the Aliens Office of 19 February and 18 April 2014; and had not brought an action for compensation for unjustified detention in a guarded centre under section 407 of the Aliens Act of 12 December 2013.

2. The applicants

46. The applicants argued that the remedies referred to by the Government were either ineffective, not available to them or had no prospects of success for the purpose of challenging their administrative detention.

47. Firstly, the decisions issued by the Refugees Council (on 10 May 2013) and by the head of Aliens Office (on 19 February and 18 April 2014) concerned the asylum proceedings and had no direct effect on the detention measure, which had been ordered by domestic courts.

48. Secondly, referring to the Court's well-established case-law, for example, *Kacprzyk v. Poland* (no. 50020/06, § 29, 21 July 2009) the applicants argued that they were not required to appeal against each and every decision extending their detention in order to comply with the requirement of exhaustion of domestic remedies. Consequently, Ms Bistieva's failure to appeal against the Kętrzyn District Court's decision of 4 February 2014 had no bearing on that issue because she had appealed against the Słubice District Court's decision of 9 January 2014 to order the applicants' detention, and against the Kętrzyn District Court's decision of 25 April 2014 to extend the measure.

49. Thirdly, the remedy provided by the Aliens Act was only of a compensatory nature and did not entail the release of the foreigner or any change in his or her detention conditions. The applicants compared that remedy to the one provided for under Article 552 of the Code of Criminal Procedure. Referring to the Court's case-law, for example, *Sławomir Musiał v. Poland* (no. 28300/06, §§ 77 and 82, 20 January 2009) the applicants argued that the use of that remedy was not required in cases where lawfulness or conditions of detention were at issue.

50. The applicants also argued that in the absence of any examples of national case-law concerning the detention of adult foreigners or their

children, especially those whose first asylum application had been rejected, the remedy in question could not be considered effective.

51. In any event, Ms Bistieva could not have participated in proceedings for compensation, as she had been under an obligation to leave Polish territory.

B. The Court's assessment

1. General principles relating to exhaustion of domestic remedies

52. The rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 et al., ECHR 2010, and *Włoch v. Poland*, no. 27785/95, § 89 with further references, ECHR 2000-XI).

53. Moreover, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Kennedy v. the United Kingdom*, no. 26839/05, § 109, 18 May 2010).

54. It is for the Government to submit to the Court any pertinent examples of domestic case-law with a view to demonstrating the scope of a newly established remedy and its application in practice (see *Melnītis v. Latvia*, no. 30779/05, § 50, 28 February 2012).

55. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case (see *Betteridge v. the United Kingdom*, no. 1497/10, § 48, 29 January 2013).

56. Where the applicant's complaint of a violation of Article 5 § 1 of the Convention is mainly based on the alleged unlawfulness of his or her detention under domestic law, and where that detention has come to an end, an action capable of leading to a declaration that it was unlawful and to a consequent award of compensation is an effective remedy which needs to be exhausted, if its practicability has been convincingly established. To hold otherwise would mean to duplicate the domestic process with proceedings before the Court, which would hardly be compatible with its subsidiary character (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 42, 6 November 2008, with a further reference, and *Ławniczak v. Poland* (dec.), no. 22857/07, §§ 41-44, 23 October 2012).

57. The issue whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged with the Court (see *Baumann v. France*, no. 33592/96 § 47, ECHR 2001-V (extracts)).

2. Application of these principles to the present case

58. The present application was brought before the Court on 26 November 2014, that is, when the applicants were already at liberty - nearly five months after their release from administrative detention (see paragraph 31 above).

59. Consequently, in view of the Convention principles as described above, an action capable of leading to a declaration that the impugned measure was unlawful and to a consequent award of compensation must be considered an effective remedy (see paragraph 56 above).

60. Section 407 of the 2013 Act, which entered into force on 1 May 2014, provides for a remedy whereby an alien is entitled to seek compensation for his or her manifestly unjustified placement in a guarded centre for aliens. Such an action is available for one year after the foreigner's release from detention (see paragraph 38 above).

61. Under Polish law, the remedy in question is not dependent on the discretion of the executive. The resulting judgment of the domestic court is necessarily binding on the parties to the proceedings (see, by contrast, *Burden*, §§ 40 and 43, cited above, and *B. and L. v. the United Kingdom* (dec.), no. 36536/02, 29 June 2004).

62. The applicants submitted that the remedy in question could not be considered effective in the absence of any examples of domestic court practice other than the decision on applicability issued on 4 June 2014 by the Lublin Court of Appeal (see paragraph 40 above).

The Court observes that adhering to the applicants' reasoning would mean that all remedies which have not been in place long enough to be tested before the domestic courts by interested individuals would have automatically to be declared ineffective and that applicants would be discouraged from pursuing the means at their disposal within the State to obtain available redress. Such an approach, in turn, would defeat the object and purpose underlying the Convention that rights and freedoms should be secured by the Contracting State within its jurisdiction and undermine the subsidiary nature of the Court's own role and capacity to function (see *B. and L. v. the United Kingdom* (dec.), no. 36536/02, 29 June 2004, and *Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008).

63. As to the applicants' argument that the remedy in question was unavailable to them in practice as their stay in Poland was illegal, the Court notes that an action for compensation under the 2013 Act is not conditional on a foreigner's presence in the jurisdiction. In any event, when the applicants were released from detention, the enforcement of the

2013 decision to deport them had already been suspended (see paragraph 28 above) and the examination of Ms Bistieva's renewed asylum application was under way in view of the new circumstances of the case, namely that her relatives had obtained refugee status in Poland (see paragraph 27 above). No objective obstacle therefore existed to the applicants lodging the impugned action and being fully engaged in the proceedings.

64. In keeping with the principle of subsidiarity, the Court therefore observes that, before having their Convention claim examined by this Court, the applicants should have sought redress at domestic level and brought an action for compensation under section 407 of the 2013 Act.

65. In view of the above consideration, the Court does not have to examine the remainder of the Government's objection.

66. Accordingly, the complaints under Article 5 §§ 1 and 4 of the Convention must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

67. Lastly, the applicants complained under Article 8 of the Convention that their placement in administrative detention had not been a necessary measure in relation to the aim pursued, and that it had constituted a disproportionate interference with her right to respect for her private and family life. The relevant part of Article 8 reads:

> "1. Everyone has the right to respect for his ... family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

68. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

69. The applicants submitted that the family's administrative detention had constituted an unjustified and disproportionate interference with the effective exercise of their family life. They claimed that there had been no risk of absconding because Ms Bistieva would not have left Poland without her youngest child, whose stay in Poland had not been illegal.

70. The Government argued that there had been no interference with Ms Bistieva's rights under Article 8 because she had not been separated from her children. Alternatively, the Government submitted that the applicants' administrative detention had been justified under paragraph 2 of that provision.

71. The Court finds that there is no doubt as to the existence of "family life", within the meaning of its case-law, in the present case.

72. The essential object of Article 8 is to protect the individual against arbitrary action by public authorities. This creates positive obligations inherent in effective "respect" for family life. States are under an obligation to "act in a manner calculated to allow those concerned to lead a normal family life" (see *Popov v. France*, nos. 39472/07 and 39474/07, § 133, 19 January 2012, with further references).

73. Whilst mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, it cannot be inferred from this that the sole fact that the family unit is maintained necessarily guarantees respect for the right to a family life, particularly where the family is detained. The Court finds that, even though Ms Bistieva was not separated from her children, the fact of confining the applicants to a detention centre for almost six months, thereby subjecting them to to living conditions typical of a custodial institution, can be regarded as an interference with the effective exercise of their family life (see, *mutatis mutandis, Popov*, cited above, § 134; *A.B. and Others v. France*, no. 11593/12, § 145, 12 July 2016; *R.K. and Others v. France*, no. 68264/14, § 106, 12 July 2016; *A.M. and Others v. France*, no. 24587/12, § 86, 12 July 2016; and *R.C. and V.C. v. France*, no. 76491/14, § 72, 12 July 2016).

74. Such an interference entails a violation of Article 8 of the Convention unless it can be justified under paragraph 2 of that Article, that is, if it is "in accordance with the law", pursues one or more of the aims enumerated in that provision, and is "necessary in a democratic society" for the fulfilment of the said aim or aims.

75. The legal bases for the first three applicants' detention were the relevant provisions of the 2003 Act and the 2013 Act (see paragraphs 34 and 35 above); see also *Popov*, cited above, § 136; *A.B. and Others v. France*, cited above, § 147; and *R.K. and Others v. France,* cited above, § 108).

76. When the first three applicants were brought back to Poland on 9 January 2014 (see paragraph 9 above), the Polish authorities' original expulsion decision of 6 March 2013 was in force (see paragraph 7 above). It remained enforceable until it was temporarily suspended on 5 June 2014 (see paragraph 28 above). That legal effect was not altered despite the fact that the applicants' new asylum proceedings were pending between 28 January and 18 April 2014 and between 22 May and 29 June 2014, when

the applicants were ultimately released from administrative detention (see paragraphs 19, 20, 22, 24, 27 and 31 above). In view of the timeline described above, it must be considered that the detention measure was taken in the context of the prevention of illegal immigration, in particular for the purpose of expulsion. The interference therefore pursued a legitimate aim for the purposes of Article 8 § 2 of the Convention (see *Popov*, cited above, § 137; *A.B. and Others v. France*, cited above, § 148; and *R.K. and Others v. France,* cited above, § 109).

77. The Court must further determine whether the family's placement in detention, for a duration such as that in the present case, was necessary within the meaning of Article 8 § 2 of the Convention, that is to say, whether it was justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Popov*, cited above, § 138).

78. The authorities have a duty to strike a fair balance between the competing interests of the individual and of society as a whole. This balance should be guaranteed taking account of international conventions, in particular the Convention on the Rights of the Child. The protection of fundamental rights and the constraints imposed by a State's immigration policy must therefore be reconciled. A measure of confinement must therefore be proportionate to the aim pursued by the authorities, namely the enforcement of a removal decision in the present case. It can be seen from the Court's case-law that, where families are concerned, the authorities must, in assessing proportionality, take account of the child's best interests. In this connection, the Court would point out that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (ibid., §§ 139 and 140, with further references). It can also be seen from international reports that the protection of the child's best interests involves both keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort (ibid., § 141).

79. In the present case, the applicants were placed in administrative detention following their transfer from Germany, where they had fled shortly after their first asylum application had been rejected by the second-instance authority in Poland (see paragraphs 7-9 above).

80. Throughout the applicants' detention, until early June 2014, the 2013 expulsion decision remained binding and enforceable (see paragraphs 7, 20, 22, 24 and 28 above), despite numerous requests on the part of the first applicant to stay its enforcement.

81. The Court notes that the first applicant's youngest child was not covered by the family's first asylum application (see paragraph6 above) and that he had not crossed the Polish border illegally (see paragraph 18 above). The Warmińsko-Mazurski Governor refused to order the expulsion of Ms Bistieva's youngest child on 27 January 2014 (see paragraph18 above).

Three weeks later the head of the Aliens Office held that the expulsion decision concerned all four applicants (see paragraph 22 above). On 11 March 2014 the same authority removed the child from the scope of the original expulsion decision (see paragraph 22 above). Nonetheless, on 18 April 2014 the new asylum proceedings, which also concerned the youngest child, were discontinued on the grounds that the 2013 expulsion decision was enforceable (see paragraph 24 above). Ultimately the applicants' expulsion was stayed on the ground that new circumstances have arisen in the case (see paragraph 28).

82. Lastly, in the initial phase of the applicants' detention in Poland, the first applicant's husband was hospitalised in Germany (see paragraphs 17 and 23 above).

83. In view of all the above-mentioned elements, the Court concludes that the applicants clearly presented a risk of absconding, the three of them, having previously fled to Germany and, all four of them, having been separated from their husband and father who had initially stayed behind in that country. Their confinement in a guarded centre could therefore appear to be justified by a pressing social need (see, *mutatis mutandis*, *A.M. and Others v. France*, cited above, § 95, and, by contrast, *Popov*, cited above, § 145; *A.B. and Others v. France*, cited above § 154; and *R.K. and Others v. France*, cited above, § 115).

84. The Court notes furthermore that the Helsinki Foundation issued a relatively positive evaluation of the organisation and the living conditions in the Kętrzyn guarded centre when compared to similar facilities in the country (see paragraphs 11-16 and 21 above; see also, by contrast, *Popov*, cited above, §§ 91-103; *A.B. and Others v. France*, cited above, §§ 112-15; *R.K. and Others v. France*, cited above, §§ 67-72; and *R.C. and V.C. v. France*, cited above, §§ 35-40, in which the Court found a violation of Article 3 on account of inadequate conditions of the children's detention). It cannot, however, overlook the fact that the centre had many features of a custodial facility. Indeed, it amounted to such a facility.

85. The Court is of the view that the child's best interests cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life (see, *mutatis mutandis*, *Popov*, cited above, § 147).

86. In this context, given the reasoning of the domestic authorities' decisions, the Court is not convinced that the Polish authorities had in fact, as they should have, viewed the family's administrative detention as a measure of last resort. Nor had they given due consideration to possible alternative measures, especially in the period of time when the applicants were reunited with their husband and father. The Court also has serious doubts as to whether the authorities had given sufficient consideration to the best interests of the first applicant's three children, in compliance with

obligations stemming from international law and from section 401(4) of the 2013 Act (see paragraphs 36 and 42 above).

87. Lastly, the Court observes that the applicants' administrative detention lasted five months and twenty days, which is many times longer than in the reference cases against France (see, fifteen days in *Popov*; eighteen days in *A.B. and Others v. France*; ten days in *R.C. and V.C. v. France*, and nine days in *R.K. and Others v. France*; all cited above). In that time, the authorities examined three appeals and two asylum applications lodged by the first applicant (see paragraphs 17, 19, 26, 27 and 30 above), carried out verification of the applicants' identity (see paragraph 20 above) and had first applicant's husband transferred back from Germany (see paragraph 23 above). Nevertheless, the Court has to note that the examination of the asylum application lodged by the applicants on 28 January 2014 took more than two months, ending with the decision of 18 April 2014 to discontinue the proceedings (see paragraph 24 above). Apparently the authorities remained inactive from that date until 2 May 2014 when a new application for asylum was lodged by the applicants. In this context, the Court is of the view that the detention of minors called for greater speed and diligence on the part of the authorities.

88. Accordingly, the Court finds that, even in the light of the risk that the family might abscond, the authorities failed to provide sufficient reasons to justify the detention for five months and twenty days in a secure centre, and as a result that there has been a violation of Article 8 of the Convention (see *Popov*, cited above, § 148; *A.B. and Others v. France*, cited above § 156; and *R.K. and Others v. France*, cited above, § 117).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

89. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

90. The applicants claimed 12,000 euros (EUR) in respect of non-pecuniary damage, stressing that their administrative detention was lengthy and that two of the children were of age to have an understanding of the situation giving rise to the violation in the present case and to suffer distress due to the detention measure imposed on the family.

91. The Government argued that that claim was excessive in comparison to what the Court awarded in the cases of *Dagirat Dzhabrailova v. Poland*

(friendly settlement), no. 78244/11, 9 September 2014 and *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, 19 January 2010.

92. The Court, in view of the circumstances of this case, in particular the length of the applicants' detention, and in light of its practice, awards jointly to all four applicants EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

93. The applicants did not submit any claims under this head. The Court therefore makes no award.

C. Default interest

94. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention.

3. *Holds*
   (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12,000 (twelve thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 10 April 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Vincent A. De Gaetano
Registrar	President