

Rada Fundacji:
Danuta Przywara - Przewodnicząca
Henryka Bochniarz
Janusz Grzelak
Ireneusz Cezary Kamiński
Witolda Ewa Osiatyńska
Andrzej Rzepliński
Wojciech Sadurski
Miroslaw Wyrzykowski

Zarząd Fundacji:
Prezes: Maciej Nowicki
Wiceprezes: Piotr Kłodoczny
Sekretarz: Małgorzata Szuleka
Skarbnik: Lenur Kerymov
Członkini: Aleksandra Iwanowska

Warsaw, 21 April 2022

L.Dz. 63/2022

**DGI - Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the ECHR
F-67075 Strasbourg Cedex France
E-mail: dgi-execution@coe.int**

**COMMUNICATION
FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
CONCERNING THE EXECUTION OF THE JUDGMENT IN THE CASE
M.K. AND OTHERS AGAINST POLAND
(APPLICATIONS NOS. 40503/17, 42902/17, 43643/17)**

The Helsinki Foundation for Human Rights ("HFHR") would like to respectfully present to the Committee of Ministers of the Council of Europe its communication, under the Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, regarding the execution of the judgement of the European Court of Human Rights ("ECtHR", "the Court") in the case M.K. and Others v. Poland by the Polish authorities.

I. EXECUTIVE SUMMARY

1. Since the M.K. judgment became final, the Polish authorities have continued to implement their policy at the Polish-Belarusian border. The Polish authorities have never publicly acknowledged that there had been a violation of the Convention at that border and refused to implement the jurisprudence of national courts in cases of refusal of entry. NGOs and the Commissioner for Human Rights have observed that asylum applications still have not been accepted at the border crossing in Terespol.

2. According to the Action Plan, the government proposed a border procedure intended as a measure to implement the M.K. judgment. However, these proposals do not ensure the proper implementation of the aforementioned ruling. The violations of the Convention identified in the judgment concerned the failure to implement the existing procedures rather than the lack of adequate procedures, as well as broader state policy of refusing to accept asylum applications and summarily returning foreigners to Belarus.

3. Since August 2021, significant numbers of migrants have started to arrive to Poland irregularly through the Polish-Belarusian border as a result of an operation orchestrated by the Belarusian authorities, aimed at exerting political pressure on the EU. Polish border guards started to transfer migrants summarily to the borderline and force them to cross the border with Belarus (outside of the official border crossings), at the same time ignoring their asylum requests and exposing them to violence from the hands of the Belarusian officers. As a result of such practice, a number of persons became stranded in the forest suffering from extreme starvation and hypothermia, a lot of them requiring immediate medical attention. The situation at the border has led to the death of over twenty people since the beginning of the crisis.

The government representatives have publicly acknowledged these violations. The Court granted a number of interim measure decisions indicating that the Polish government must not remove migrants to Belarus. At least 11 applications have been lodged to the Court in the push-back cases.

Between August and October 2021, the government introduced legal amendments attempting to legalise the practice of push-back.

4. The activities of the Polish authorities, amendments to the asylum and migration law and statements of the government representatives, in particular made since August 2021, indicate that the Polish authorities are not complying with binding obligations under EU and international asylum law, including the principle of non-refoulement, at the Polish-Belarusian border. Therefore, it has to be concluded that the government has no intention to introduce general measures aimed at the proper execution of the M.K. and Others judgment.

5. HFHR recommends to the Committee of Ministers that Polish authorities should be requested to repeal the laws allowing summary returns of migrants who had crossed the border in an irregular manner and to end push-back practices, by full observance of relevant Convention provisions, as well as national, EU and international asylum law and non-refoulement principles.

II. CASE SUMMARY: M.K. AND OTHERS v. POLAND

M.K. and Others judgment concerns Chechen asylum seekers who appeared at the Polish-Belarusian border crossing point in Terespol in 2016 and 2017. The Court found that Poland was in violation of Article 3 of the Convention, as Polish border guards refused to receive asylum applications from the applicants and removed them to Belarus with a risk of chain-refoulement and ill-treatment in the country of origin. The Court found also a violation of Article 4 of Protocol 4 to the Convention, as the collective expulsion of the applicants was an example of a wider state policy of refusing entry to foreigners entering Poland from Belarus. As the applicants

who were removed to Belarus had no opportunity to exercise effective remedy with suspensive effect to challenge the refusal of entry decision, the Court found a violation of Article 13 in conjunction with Article 3 and Article 4 of Protocol 4. The Court also found a violation of Article 34 of the Convention due to the non-compliance with interim measures granted by the Court under Rule 39.

III. THE ACTION PLAN PRESENTED BY THE GOVERNMENT AND HFHR'S COMMENTS ON THE PROPOSAL OF THE INTRODUCTION OF BORDER PROCEEDINGS

In the Action Plan presented on 8 December 2021, the Polish government referred to the New Pact on Migration and Asylum, which had been announced by the European Commission. The Government referred to some elements of the Pact, such as a proposal for a Regulation that provides rules on screening at the external borders of foreigners who are not authorised to enter the territory or who declare they wish to apply for international protection. The government also referred to a proposal for a Regulation introducing a border procedure which allows for a quick assessment of whether asylum applications made by migrants at the external borders are unfounded or inadmissible and to swiftly return those with no right to stay, while ensuring that those with well-founded claims are channelled into the regular procedure and provided a quick access to international protection.

The government also referred to the amendment to the Act on granting protection to foreigners within the territory of the Republic of Poland. The above-mentioned changes were supposed to introduce a possibility to process applications for international protection under the so-called border procedure. According to the Polish government, such a procedure would eliminate the risk of issuing a decision ordering the foreigner to return in breach of Article 3 of the Convention.

However, these provisions will not lead to the proper execution of the M.K. judgment. The violation of the Convention indicated in the judgment did not result from the lack of adequate procedures, but from the failure to implement the existing ones, as well as from a broader state policy of refusing to accept asylum applications and summarily returning foreigners to Belarus. Therefore, the appropriate means of implementing the judgment should be, first and foremost, a change in state policy and the acceptance of asylum applications made by the foreigners at the border.

The government's proposed border procedures lead to risk of further violations of migrants' rights. According to the draft amendment to the Act on granting protection to foreigners on the territory of the Republic of Poland,¹ asylum-seekers will be placed in detention facilities pending the border procedure. Their cases will be examined within the period of 20 days. The main concern of NGOs is that such a short period of time might hinder access to a lawyer, psychological assistance and to an interpreter and will be too short to allow the asylum-seeker to gather and submit all necessary evidence to support their asylum claim. The identification of vulnerable groups, such as victims of torture or unaccompanied children, might also not be effective. The decision refusing asylum

¹ Draft law is available at: <https://legislacja.rcl.gov.pl/projekt/12294700>

made under the border procedure will be final. The only remedy available to the applicant will be a complaint to the administrative court submitted within 7 days from the delivery of the decision. However, as stipulated in the Article 1(5) of the draft law, introducing new article 39b of the Law on granting protection to foreigners, the appeal will not have an automatic suspensive effect. According to the HFHR, these provisions raise serious doubts as to their compliance with the EU asylum law, including the right to an effective remedy enshrined in Article 46 of the Asylum Procedures Directive.²

IV. VIOLATIONS OF MIGRANTS AND ASYLUM SEEKER'S RIGHTS ON THE EASTERN BORDER OF POLAND

1. Situation between the delivery of the M.K. judgment and the outbreak of the humanitarian crisis at the Polish-Belarusian border in August 2021

Since the M.K. judgment was delivered, the Polish authorities have continued to refuse asylum applications made on the Polish-Belarusian border. According to the HFHR's report analysing the situation at the border between 2015-2019, this practice of the Border Guard is systemic.³ The report refers to the testimonies of asylum seekers and the inspection of the border conducted by the Polish Commissioner for Human Rights which demonstrate that in many cases Border Guard officers ignore asylum declarations and claim that migrants present personal or economic reasons for leaving their country of origin rather than fear of persecution. The report indicates that the lack of audio-video monitoring in rooms where border checks are conducted, as well as the Border Guard officers' practice of not allowing UNHCR employees and other external monitors access to such rooms, result in the lack of possibility to verify the legitimacy of Border Guard actions. The report shows that usually only a few asylum applications a day were received by the Border Guard in Terespol, whereas the majority of foreigners who claim they had tried to apply for international protection are being sent back to Belarus. Some of them make several or even several dozen unsuccessful attempts to apply for asylum and it is never clear if they will eventually succeed.

Similar information was presented in the reports of the Belarusian organisation Human Constanta. Between January and March 2020, Human Constanta recorded 667 attempts by migrants to cross the border and apply for international protection in Terespol. Only in 73 cases, people were allowed to enter Poland and lodge asylum applications.⁴ Human Constanta also indicated a closure of train border crossings in March 2020 due to the COVID-19 regulations, which makes applying for asylum at the border crossing in Terespol impossible.

² See: Helsinki Foundation for Human Rights, Access to asylum procedure at Poland's external borders. Current situation and challenges for the future, April 2019, available at: <https://www.hfhr.pl/en/hfhr-report-access-to-asylum-procedure-at-polands-external-borders-current-state-of-affairs-and-future-challenges/>, page 15.

³ Ibidem

⁴ Human Constanta, Report on the situation with transit refugees on the Belarusian-Polish border (January – March 2020), April 2020, available at: <https://humanconstantata.org/en/report-on-the-situation-with-transit-refugees-on-the-belarusian-polish-border-january-march-2020/>

In 2018, the Polish Supreme Administrative Court issued a number of judgments concerning entry refusals issued to foreigners in Terespol and Medyka border crossings.⁵ In these cases, migrants claimed that during border controls they had declared a wish to apply for international protection, whereas – according to the Border Guards – they had declared only an economic purpose of entry (not related to a fear of persecution), therefore entry refusal decisions were issued. The entry refusal decisions were based on the official memos drafted by the Border Guard officers and not signed by foreigners themselves. In all of the cases, the Supreme Administrative Court revoked the entry refusal decisions. The Supreme Administrative Court has observed that an official memo prepared by the Border Guard officers does not constitute a sufficient piece of evidence of the interview conducted with a foreigner and does not prove what the declared reason of entry was. The Supreme Administrative Court held that the interviews shall be recorded in the form of an official protocol (*protokół*) signed by all persons taking part in the interview, including foreigners themselves. The Supreme Administrative Court pointed out that, although it was not certain, there were many indicators allowing for a reasonable assumption that foreigners had applied for asylum at the border.

In October 2018, the Polish Commissioner for Human Rights urged the Ministry of the Interior and Administration to implement the Supreme Administrative Court's case law. However, the Ministry replied that the practice of drafting official memos would remain unchanged as the case-law of the Supreme Administrative Court is legally binding only in these particular cases which were examined by the Supreme Administrative Court.⁶

In September 2019, a Ministry of Interior representative, referring also to the M.K. and Others judgment in the Parliament, stated that the Polish authorities had not violated the law in this case. According to the government, in this case, the applicants had not applied for asylum at the border and, therefore, had been refused entry. The government representative referred in this respect to the content of an official memo prepared by the Border Guard officer. The government representative also stated that the provisions of domestic law did not regulate the procedure in the event of issuing an interim measure by the ECtHR. The government representative also emphasised that such interim measure was not a basis for allowing a foreigner to enter Poland or for accepting his or her asylum application.⁷

On 8 July 2021, the Court delivered another judgment concerning entry refusal in Terespol, [D.A. and Others v. Poland](#) (application no. 51246/17), in which the Court has confirmed that entry refusals constitute a part of a wider state policy of not accepting asylum applications at the Polish-Belarusian border. Another five cases

⁵ Including judgment of 17 May 2018, case no. II OSK 2766/17, available at: <https://orzeczenia.nsa.gov.pl/doc/342A4C3FC1>

⁶ Commissioner for Human Rights letter and response of the Ministry of Interior and Administration available at: <https://bip.brpo.gov.pl/pl/content/rozmowy-strazy-granicznej-z-cudzoziemcami-na-granicy-nieb%C4%99d%C4%85-protokolowane-odpowied%C5%BA-mswia-dla-RPO>

⁷ Reply to MP's question No 9352 on violation of the European Convention on Human Rights by not accepting applications for international protection from foreigners seeking protection in Poland, answered by: Undersecretary of State Bartosz Grodecki (*Odpowiedź na interpelację nr 9352 w sprawie naruszania Europejskiej Konwencji Praw Człowieka poprzez nieprzyjmowanie wniosków o udzielenie ochrony międzynarodowej od cudzoziemców poszukujących w Polsce ochrony, odpowiadający: podsekretarz stanu w Ministerstwie Spraw Wewnętrznych i Administracji Bartosz Grodecki*) available at: <http://www.sejm.gov.pl/sejm9.nsf/Interpelacja-Tresc.xsp?key=BT8J9B>

concerning push-backs at the Eastern borders of Poland have been communicated to the Polish authorities by the Court since December 2020 (including [Sherov and Others v Poland](#), applications nos. 54029/17 54117/17 54128/17 54255/17 and [R.A. and Others v. Poland](#), applications no. 42120/21).

2. Extraordinary measures introduced in response to the outbreak of the COVID-19 pandemic

In response to the SARS-CoV-2 pandemic, Poland has closed its borders, making access to the asylum procedure for people seeking protection at the external EU border much more difficult or even impossible. By terms of the Regulation of the Minister of the Interior and Administration of 13 March 2020, border traffic was suspended or limited at selected border crossings. The shortlist of foreigners authorized to enter Poland included, inter alia, spouses of Polish citizens, foreign employees and persons with residence permits. However, it did not include people seeking international protection. Polish Ombudsman has repeatedly pointed to the gap in this regard,⁸ demanding that the Minister include this particular category of migrants in the text of the Regulation. However, despite the fact that the Regulation was amended many times by adding new groups of foreigners to the list of persons authorized to enter, people seeking protection have not been explicitly mentioned in it until today.

Although the Regulation authorised the commanders of the Border Guard stations to grant entry to other categories of foreigners not explicitly mentioned in the content of the Regulation [Article 3(3) of the Regulation], the statistics show that throughout the entire 2020, out of more than twenty thousand entry permits, only eleven were granted to foreigners declaring their wish to seek international protection.

As a result, in 2020 Poland received only 2,811 asylum applications, which was the lowest number since 1999. In the first months of the pandemic, i.e. in the period from April to July 2020, no asylum application was accepted at the Polish-Belarusian border crossing in Terespol. The reason for such a drastic decline (when compared to recent years) was not only the lower mobility of people and difficulties in crossing the borders or the suspension of the Brest-Terespol train, related to the outbreak of the global SARS-CoV-2 pandemic. This situation was also influenced by the legislation adopted by Poland, which in practice excluded persons wishing to submit an application for international protection at the border from the possibility of entering Poland.

3. Humanitarian crisis on the Polish–Belarusian border since August 2021

a) Unlawful push-back practices

According to NGOs, the media and international organisations reports, since the beginning of August 2021, Polish authorities have been apprehending migrants attempting to cross the Polish-Belarusian border and summarily

⁸ Polish Ombudsman, *Coronavirus. The situation of migrants. Position of the Ombudsman and the Committee of Experts for Migrants and an appeal to the Ministry of Interior and Administration*, 13 May 2020, available at: <https://bip.brpo.gov.pl/pl/content/sytuacja-migrantow-pandemii-stanowisko-rpo-i-komisji-ekspertow-ds-migrantow>

returning them back to Belarus.⁹ The influx of migrants, coming mostly from the Middle Eastern and African countries, seeking entry to Poland from Belarus in order to apply for international protection, was a result of an orchestrated operation of the Belarusian regime.¹⁰

In most of the cases, no formal procedures are initiated towards foreigners crossing the border from Belarus, and they are removed not through official border crossings but by being forced to cross the border to Belarus in the middle of the forest in the border area. In a number of cases, it was documented that the foreigners had declared their intention to apply for international protection in Poland in the presence of Polish Border Guard officers, but no asylum procedures were started.

According to the official announcements of the Border Guard, they “prevent attempts of the irregular crossing of the border by groups of foreigners”. The information provided by the Border Guard does not indicate, however, the legal basis of such operations, nor how and through which border crossings the persons are being returned to Belarus.¹¹ It must be noted that according to Article 13(1) of the Schengen Borders Code, a person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC. Provisions of this Directive require i.e. issuing a return decision, which can be appealed against (Articles 12-13). Moreover, migrants approaching the border with Belarus receive a text message warning them not to enter Poland and referring them to government website: <https://www.gov.pl/mswia/migrants>.¹² As a result of the push-back policy, migrants are often exposed to human rights violations by the Belarusian officers who force them to return to Poland or, in some cases, remove them to their countries of origin with the violation of non-refoulement principle and exposing them to human rights violations there.

As a result, there were a number of cases in which foreigners circulated for many days or even weeks in the Polish-Belarusian border region, pushed back and forth by officers from both countries. They were exposed to

⁹ Human Rights Commissioner: Failure to accept applications for international protection in the border zone is a violation of the law. Reply of the Ministry of Interior (*RPO: nieprzyjmowanie wniosków o ochronę międzynarodową w strefie przygranicznej to naruszenie prawa. Odpowiedź MSWiA*) 2021-10-19, 2021-08-20, available at: <https://bip.brpo.gov.pl/pl/content/rpo-nieprzyjmowanie-wnioskow-o-ochrone-miedzynarodowa-w-strefie-przygranicznej-naruszenie>; Helsinki Foundation for Human Rights, On the side of the law. An analysis of the situation on the Polish-Belarusian border, September 2021, available at: <https://www.hfhr.pl/en/on-the-side-of-the-law-an-analysis-of-the-situation-on-the-polish-belarusian-border/>

¹⁰ Politico, *Lukashenko warns EU that Belarus won't stop migrant border surge*, 6 July 2021, available at: <https://www.politico.eu/article/belarusian-president-alexander-lukashenko-warns-eu-belarus-wont-stop-migrant-border-surge-lithuania/?fbclid=IwAR3m0rAGiNkV51TTUuMKU2GgEUOQ2-eTaVBPHdwEHEP-tPnvyHnxjg1YTWwG>.

¹¹ See: Podlaskie Voivodship Office, *Mol: Activities of Polish services on the Polish-Belarusian border (MSWiA: Działania polskich służb na granicy polsko-białoruskiej)*, August 2021, available at: <https://www.gov.pl/web/uw-podlaski/mswia-dzialania-polskich-sluzb-na-granicy-polsko-bialoruskiej>; Border Guards Headquarters, *Another attempt of smuggling of migrants has failed (Kolejny przerzut migrantów nie doszedł do skutku)*, October 2021, available at: <https://www.strazgraniczna.pl/pl/aktualnosci/9518,Kolejny-przerzut-migrantow-nie-doszedl-do-skutku.html>

¹² See: Notes from Poland, *Poland sends “Go back to Minsk” texts to people attempting to cross Belarus border*, September 2021, available at: <https://notesfrompoland.com/2021/09/29/poland-sends-go-back-to-minsk-texts-to-people-attempting-to-cross-belarus-border/>

extreme weather conditions (sub-zero temperatures, rain, humidity), and they lacked food, shelter, drinking water and medical aid. Cases of death from exhaustion and hypothermia of several migrants have been confirmed.¹³ Given the lack of access for humanitarian organisations to operate in the border area due to the introduction of the exclusion zone along the borderline with Belarus at the beginning of December 2021, this has resulted in a humanitarian crisis.

This practice was widely described in the Commissioner for Human Rights' statements, as well as in a number of reports prepared by Polish and international NGOs.¹⁴ It has also raised concerns of international organisations, including the Council of Europe's Commissioner on Human Rights, the UN High Commissioner for Human Rights, the UN Special Rapporteurs on the human rights of migrants, on torture and on the right to physical and mental health.¹⁵

On 27 September 2021, the Court communicated to the Polish authorities the case R.A. and Others v. Poland (application no. 42120/21). It concerns a group of 32 citizens of Afghanistan stranded at Polish-Belarusian border

¹³ See: Der Spiegel: "Mama, Pray for Us" A Chronicle of Refugee Deaths along the Border Between Poland and Belarus", available at: <https://www.spiegel.de/international/world/a-chronicle-of-refugee-deaths-along-the-border-between-poland-and-belarus-a-de0d7ace-3322-4ac9-9826-9f2774a540ee>

¹⁴ Commissioner for Human Rights, Failure to accept applications for international protection in the border zone is a violation of the law. Reply of the Ministry of Interior (*RPO: nieprzyjmowanie wniosków o ochronę międzynarodową w strefie przygranicznej to naruszenie prawa. Odpowiedź MSWiA*), 2021-10-19 2021-08-20, available at: <https://bip.brpo.gov.pl/pl/content/rpo-nieprzyjmowanie-wnioskow-o-ochrone-miedzynarodowa-w-strefie-przygranicznej-naruszenie>; Human Rights Watch, "Die Here or Go to Poland". Belarus' and Poland's Shared Responsibility for Border Abuses, November 2021 available at: <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>; Amnesty International, Poland: 17 Afghans at the border violently pushed back to Belarus, October 2021, available at: <https://www.amnesty.org/en/latest/news/2021/10/poland-17-afghans-at-the-border-violently-pushed-back-to-belarus/>; Amnesty International Poland/Belarus: New evidence of abuses highlights 'hypocrisy' of unequal treatment of asylum-seekers, April 2022 available at: <https://www.amnesty.org/en/latest/news/2022/04/poland-belarus-new-evidence-of-abuses-highlights-hypocrisy-of-unequal-treatment-of-asylum-seekers/>; Helsinki Foundation for Human Rights, Legal Analysis of the Situation on the Polish-Belarusian Border, September 2021, available at: <https://www.hfhr.pl/wp-content/uploads/2021/09/Legal-analysis-ENG.pdf>; Grupa Granica, Humanitarian crisis at the Polish-Belarusian border, November 2021, available at: <https://www.grupagranica.pl/files/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf>; Joint Statement: Call on the EU: Restore Rights and Values at Europe's Borders, November 2021, available at: <https://ecre.org/joint-statement-call-on-the-eu-restore-rights-and-values-at-europes-borders/>

¹⁵ Commissioner for Human Rights, Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights. R.A. and others v. Poland (no. 42120/21), January 2022 available at: <https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-in-/1680a5527a>; Commissioner for Human Rights, Commissioner calls for immediate access of international and national human rights actors and media to Poland's border with Belarus to end human suffering and violations of human rights, November 2021, available at: <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu>; Stop sacrificing migrant lives to political dispute—UN Special Rapporteurs, October 2021, available at: <https://www.ohchr.org/en/press-releases/2021/10/belarus-and-poland-stop-sacrificing-migrant-lives-political-dispute-un>; Comment by UN High Commissioner for Human Rights Michelle Bachelet on the Belarus-Poland border situation, November 2021, available at: <https://www.ohchr.org/en/2021/11/comment-un-high-commissioner-human-rights-michelle-bachelet-belarus-poland-border-situation>; Office of the High Commissioner for Human Rights, Press briefing notes on Poland/Belarus border, December 2021, available at: <https://www.ohchr.org/en/2021/12/press-briefing-notes-polandbelarus-border>;

near the Usnarz Gorny village in August 2021. The applicants allegedly crossed the "green" border between Belarus and Poland before being forcibly returned to Belarusian territory by the Polish Border Guard officers. Their applications for asylum in Poland were ignored by the Polish authorities. Under Rule 39 of its Rules of Procedure, the Court has obliged the Polish government to provide the applicants with food, water, clothing, adequate medical aid and, if possible, a temporary shelter. In addition, the Court ordered that the Polish government should allow the applicants' lawyers to establish a necessary contact with them, and not return the applicants to Belarus (provided that they were in the Polish territory). Polish authorities did not comply with these interim measures, stating that the applicants stayed in the territory of Belarus.¹⁶ However, a digital investigation by Amnesty International found that the applicants had been forcibly returned from Poland to Belarus.¹⁷

Moreover, since August 2021 the Court has granted interim measures obliging Polish authorities not to remove applicants to Belarus in over 65 cases considering Polish-Belarusian border. Only four applications were rejected.¹⁸

b) Legal amendments introduced since August 2021

In the described period, the Polish government introduced a number of legal amendments attempting to legalise the push-backs and limit the asylum-seekers' access to the territory of Poland.

- amendment to the Regulation restricting border traffic

On 20 August 2021, the Regulation of the Minister of the Interior and Administration amending the Regulation on temporary suspension or restriction of border traffic at certain border crossings was introduced.¹⁹ This regulation was adopted in the context of the COVID-19 epidemic. According to the Regulation, individuals who are not authorised to enter Poland are returned to the state border line. Foreigners intending to apply for asylum are not included in the Regulation as persons allowed to enter the Polish territory. Therefore, according to the Regulation, making an asylum application does not prevent authorities from returning the respective person to

¹⁶ See: Human Rights Commissioner, What about interim measures in refugees cases? Commissioner asks Ministry of Interior (*Co ze środkami tymczasowymi ETPC ws. uchodźców? Rzecznik pyta MSWiA*), available at: <https://bip.brpo.gov.pl/pl/content/rpo-mswia-uchodzcy-srodk-tymczasowe-etpc>.

¹⁷ Amnesty International, Poland: Digital investigation proves Poland violated refugees' rights, September 2021, available at: <https://www.amnesty.org/en/latest/news/2021/09/poland-digital-investigation-proves-poland-violated-refugees-rights/>

¹⁸ ECtHR Update on interim decisions concerning member States' borders with Belarus, 21 February 2022, available at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7264687-9892524&file-name=Update%20on%20interim%20decisions%20concerning%20member%20States%E2%80%99%20borders%20with%20Belarus.pdf>

¹⁹ Regulation of 13 March 2020 of the Minister of Interior on temporary suspension or restriction of border traffic at certain border crossing points, available at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000435> ; Regulation of 20 August 2021 of the Minister of Interior and Administration amending the Regulation on temporary suspension or restriction of border traffic at certain border crossing points, available at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210001536>

the border. According to NGOs and the Commissioner for Human Rights, such provision violates international and EU asylum law, the Polish Constitution, as well as the principle of non-refoulement.²⁰

On 28 March 2022, the District Court in Bielsk Podlaski issued a judgment stating that the detention of three Afghan nationals who declared their wish to apply for asylum after they had crossed the border irregularly was unlawful. The Court found that the Regulation of 20 August 2021 was introduced in an excess of the statutory competence of the Minister as it could only concern the traffic at the border crossings and not along the entire borderline. Moreover, the Court stated that pending the examination of the application for international protection, the applicants could not have been removed from Poland, as they clearly expressed their wish to apply for international protection to the Border Guards officers.²¹

- state of emergency and amendment to the Law on the state border protection

On 2 September 2021, a state of emergency was introduced in certain parts of the Podlaskie and Lubelskie Voivodeships for 60 days, later prolonged until 2 December 2021. The state of emergency regulations introduced a restricted zone along the border with Belarus where unauthorised persons were not allowed to enter.²² As a result, journalists, NGOs and humanitarian organisations were excluded from entry to the restricted zone (a 3-kilometre-wide strip of land adjacent to the Polish-Belarusian border).

On 1 December 2021, another amendment entered into force: the Act of 17 November 2021 amending the Law on the state border protection and some other laws,²³ and the Regulation of the Minister of Internal Affairs and Administration of 30 November 2021 introducing a temporary ban on entering the specific area in the border zone along the border with the Republic of Belarus.²⁴ The Regulation introduced a prohibition of staying in the border zone until 1 March 2022. The ban was later extended until June 30 under another Regulation of the

²⁰ Commissioner for Human Rights, Amendments to the Regulation on temporary suspension or restriction of border traffic contrary to the Geneva Convention and the Polish Constitution. The Commissioner's appeal to the Ministry of Interior and Administration (*Rzecznik Praw Obywatelskich, Zmiany w rozporządzeniu w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego sprzeczne z Konwencją Genewską i Konstytucją RP. Wystąpienie RPO do MSWiA*), August 2021, available at: <https://bip.brpo.gov.pl/pl/content/rpo-mswia-granice-azyl-ochrona-cudzoziemcy>; Helsinki Foundation for Human Rights, Input by civil society to the EASO Annual Report 2021. <https://easo.europa.eu/sites/default/files/Helsinki-Foundation-for-Human-Rights-Poland.docx>.

²¹ Judgment available at: https://interwencjaprawna.pl/wp-content/uploads/2021/01/postanowienie-ws-zatrzymania_VII_Kp_203_21.-zanonimizowane.pdf

²² Regulation of the President of the Republic of Poland of 2 September 2021 on the introduction of a state of emergency on the territory of a part of Podlaskie voivodship and a part of the Lubelskie voivodship available at: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001612/O/D20211612.pdf>; Regulation of the President of the Republic of Poland of 1 October 2021 on the prolongation of a state of emergency implemented in the territory of a part of Podlaskie Voivodeship and a part of Lubelskie Voivodeship available at: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001788/O/D20211788.pdf>; Regulation of the Council of Ministers of 2 September 2021 on restrictions on freedom and rights in connection with the implementation of the state of emergency, available at: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001613/O/D20211613.pdf>

²³ Available at: <https://dziennikustaw.gov.pl/DU/2021/2191>

²⁴ Available at: <https://dziennikustaw.gov.pl/DU/2021/2193>

Minister of Internal Affairs and Administration.²⁵ The Regulation includes exceptions for certain categories of persons, such as residents of local towns, property owners or people working in the prohibited area. The Regulation, however, does not exclude journalists nor humanitarian organisations, which means that they still cannot enter the zone. Moreover, under the applicable provisions, the local commanders of the Border Guard posts may allow people to stay in the prohibited area.

The introduction of the state of emergency and the other abovementioned restrictions in the border area has been criticised by the Polish Commissioner for Human Rights, Commissioner for Human Rights of the Council of Europe, NGOs and the media.²⁶

In January 2022, the Polish Supreme Court ruled that the deprivation of the possibility of staying in the entire territory of the zone covered by the state of emergency, applying to almost all persons who were not residents, was in breach of the Polish Constitution and constituted an inadmissible restriction of civil rights. Therefore, such limitations should be considered illegal. The Supreme Court further added that it was illegal to restrict the activities of the Polish Red Cross by preventing it from providing humanitarian aid in any part of the territory of the Republic of Poland.²⁷

- amendments to the national migration law

In October 2022, the amendments to the Act on foreigners and the Act on granting protection to foreigners in the territory of the Republic of Poland came into force. A new institution was introduced by the new provisions: an order to leave the territory of Republic of Poland (*postanowienie o opuszczeniu terytorium Rzeczypospolitej Polskiej*). The order is to be issued in the case of apprehension of a foreign national directly after the unauthorised crossing of the external border of the EU. Such order results in recording the foreigner's personal data in the national list of undesirable foreign nationals and to the Schengen Information System for the purpose of refusing entry. According to the amendments, the order may be issued and executed regardless of the fact that the foreign national had made an application for international protection and without taking into account possible consequences of the removal. The appeal against the order has no suspensive effect.

²⁵ Regulation of the Minister of Internal Affairs and Administration of 28 February 2022 on introducing a temporary ban on staying in a specific area in the border zone next to the state border with the Republic of Belarus, available at: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220000488/O/D20220488.pdf>

²⁶ Human Rights Commissioner, State of emergency. RPO has doubts about restrictions on journalists' work and access to public information (*Rzecznik Praw Obywatelskich, Stan wyjątkowy. RPO ma wątpliwości ws. ograniczeń pracy dziennikarzy oraz dostępu do informacji publicznej*), available at: <https://bip.brpo.gov.pl/pl/content/stan-wyjatkowy-rpo-ma-watpliwosci-ws-ograniczen-pracy-dziennikarzy-oraz-dostepu-do> ; Helsinki Foundation for Human Rights, Amendment of the Law on Border Protection. Towards a permanent state of emergency? (*Nowelizacja ustawy o ochronie granicy. W stronę permanentnego stanu wyjątkowego?*), available at: <https://www.hfhr.pl/wp-content/uploads/2021/11/novelizacja-ustawy-o-ochronie-granicy.pdf>; CoE Commissioner for Human Rights, *Commissioner calls for immediate access of international and national human rights actors and media to Poland's border with Belarus to end human suffering and violations of human rights*, available at: <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu>

²⁷ Judgment of 18 January 2022, case no I KK 171/21, available at: <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/i%20kk%20171-21.docx.html>

These provisions have been criticised by the HFHR as violating EU asylum law, the Convention and ECtHR case law on the prohibition of torture and collective expulsion.²⁸ The OSCE Office for Democratic Institutions and Human Rights and UNHCR indicated that new provisions violate the principle of non-refoulement, the prohibition of collective expulsion and unjustifiably restrict the right to an effective remedy.²⁹ The amendments were also criticised by the UNHCR and the Polish Ombudsman.

- Polish government comments to the temporary measures proposed by the European Commission

On 1 December 2021, the European Commission proposed a set of temporary asylum and return measures to assist Latvia, Lithuania and Poland in addressing the emergency situation at the European Union external border with Belarus. According to these measures, the Member States could, among others, apply the asylum procedure at the border to process all asylum claims, including the appeals, within a maximum period of sixteen weeks – except for situations where an adequate support for applicants with particular health issues cannot be provided.³⁰ However, Poland's permanent representative to the European Union described the European Commission's proposal as 'counterproductive' and stated that Poland had expected that, during a hybrid attack, asylum application procedures would be suspended.³¹

c) the Polish government representatives' statements as to the situation on the Polish-Belarusian border

Since the beginning of the humanitarian crisis at the Polish-Belarusian border, the government's representatives publicly expressed their support for the activities described above and stated that they are aimed at securing the Polish border. Polish Prime Minister also stated that if a few months ago Poland had accepted migrants from the Middle East, today there would have been even several hundred thousand of them in Poland.³² Moreover, on 27 September 2022, a joint press conference of the Minister of Defence, the Minister of the Interior and the Commander-in-Chief of the Border Guard was held, during which they described foreigners attempting to cross

²⁸ Helsinki Foundation for Human Rights, Comments of the Helsinki Foundation for Human Rights on the bill amending the Act on foreign nationals and the Act on granting protection to foreign nationals in the territory of the Republic of Poland, October 2021, available at: <https://www.hfhr.pl/wp-content/uploads/2021/09/draft-law-comments-eng-FINAL.pdf>.

²⁹ OSCE Office for Democratic Institutions and Human Rights, Urgent Opinion On Draft Amendments To The Aliens Act And The Act On Granting Protection To Aliens On The Territory Of The Republic Of Poland And Ministerial Regulation On Temporary Suspension Of Border Traffic At Certain Border Crossings, available at: https://www.osce.org/files/f/documents/3/3/498252_0.pdf; UN High Commissioner for Refugees (UNHCR), UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265), available at: <https://www.refworld.org/docid/61434b484.html>.

³⁰ European Commission, Asylum and return: Commission proposes temporary legal and practical measures to address the emergency situation at the EU's external border with Belarus, December 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6447

³¹ The first news, Poland suggests changes to EC asylum rules proposal, January 2022, available at: <https://www.thefirstnews.com/article/poland-suggests-changes-to-ec-asylum-rules-proposal-27604>

³² Newsweek, Morawiecki went to a border wall construction site. He attacked the EU, Tusk and Hołownia (*Morawiecki pojechał na budowę muru granicznego. Zaatakował UE, Tuska i Hołownię*), February 2022, available at: <https://www.newsweek.pl/polska/polityka/mateusz-morawiecki-o-budowie-muru-na-granicy-polsko-bialoruskiej/tvglmny>; Polsat News, Mariusz Błaszczak: We will not allow the creation of a migration route through Poland (*Mariusz Błaszczak: nie pozwolimy na stworzenie szlaku przerzutu migrantów przez Polskę*), August 2021, available at: <https://www.polsatnews.pl/wiadomosc/2021-08-23/konferencja-mariusza-blaszczaka/>

the border as persons posing a threat to the national security. They also stated that among migrants there were persons with sexual disorders.³³

In January 2022, the Polish government announced that it had started the construction of a 186 kilometre-long wall along the Polish-Belarusian border in order to protect Poland from an influx of migrants.³⁴

V. CONCLUSIONS AND RECOMMENDATIONS

Violations similar to those found in the *M.K. and Others v Poland* judgment have continued to occur after the delivery of the ruling, on a particularly large scale since August 2021. Most of the asylum applications made at the border are not accepted and migrants are summarily removed to Belarus. In Belarus, they are exposed to violence from the hands of Belarusian officers who force them to return to Poland. This results in numerous cases of foreigners wandering in the border zone in extremely poor conditions, risking their health and lives. Moreover, due to the restrictions introduced in the Polish-Belarusian border area, the foreigners are deprived of the possibility to obtain proper medical, legal and humanitarian assistance. Furthermore, legal developments and statements made by representatives of the Polish authorities indicate that these violations still take place.

The introduction of border procedures will not bring about proper execution of the *M.K.* judgment since the substance of the violation of the Convention, in that case, was the Border Guard's practice and the broader state policy of not accepting applications for the international protection and collective expulsion of foreigners. In such circumstances, the introduction of any new procedures, regardless of their verbosity or being guarantee-oriented, will not constitute a proper implementation of the judgment. It may also result in further human rights violations.

In order to properly implement the *M.K. and Others v. Poland* judgment, the HFHR recommends to the Committee of Ministers to request the Polish authorities to:

- publicly acknowledge that violations of the law are taking place at the Eastern border of Poland;**
- refrain from implementing the "border procedure", as it will not lead to the implementation of *M.K.* judgment but rather will result in further human rights violations against migrants at the border;**
- change the policy and practice of the State of not accepting asylum applications at the border and summarily returning foreigners to Belarus, and to comply with the principle of non-refoulement;**

³³ Onet news, Echoes of Kaminski and Blaszcak conference. They showed a photo from an old porn film (*Echa konferencji Kamińskiego i Błaszczaka. Pokazali zdjęcie ze starego filmu porno*), September 2021, available at: <https://wiadomosci.onet.pl/kraj/konferencja-blaszczaka-i-kaminskiego-zdjecie/4h6jhb8> ; Border Guard Headquarters, Joint press-conference in the Border Guard Headquarters (*Wspólna konferencja w Komendzie Głównej SG*), September 2021, available at: <https://www.strazgraniczna.pl/pl/aktualnosci/9451,Wspolna-konferencja-w-Komendzie-Glownej-SG.html>

³⁴ Border Guard Headquarters, The construction of the barrier on the Polish-Belarusian border has started, (*Ruszyła budowa bariery na granicy polsko-białoruskiej*), January 2022, available at: <https://www.strazgraniczna.pl/pl/aktualnosci/9752,Ruszyła-budowa-bariery-na-granicy-polsko-białoruskiej.html>.

- introduce an audio-video monitoring in the premises of the Border Guards units located at the Eastern border of Poland where asylum applications may be made; allow access of the UNHCR and independent human rights monitors to these premises and allow them to monitor the process of making asylum applications at the border;
- implement national courts jurisprudence concerning proper recording of the interviews taking place on the border crossings;
- repeal recent amendments to the legislation allowing push-backs;
- allow unrestricted access of media, humanitarian and human rights NGOs to the border area.

The HFHR would also like to recommend that the Committee of Ministers schedule a debate about the M.K. judgment execution again in December 2022.

On behalf of the Helsinki Foundation for Human Rights,

Małgorzata Szuleka



Secretary of the Board

Piotr Kładoczny, Ph.D.



Deputy President of the Board