



HELSINKI FOUNDATION FOR HUMAN RIGHTS' LEGAL BRIEF ON JUDGMENTS IN CASES INVOLVING THE EXPEDITED RETURNS OF MIGRANTS TO BELARUS

In connection with the ongoing humanitarian crisis on the Polish-Belarusian border and complaints filed by foreigners before the courts, ten domestic judgments have been delivered so far confirming that the way of returning migrants to Belarus by the Polish Border Guard, used in most cases, is unlawful.¹ Numerous cases are also pending before the European Court of Human Rights.

1. Domestic courts' judgements

The District Court in Bielsk Podlaski VII Judicial Department in Hajnówka, in a judgment of 28 March 2022 (case no VII Kp 203/21), found that the short-term detention of Afghan citizens who had crossed the border from Belarus to Poland was unjustified, illegal and irregular. Despite the fact that the case file contained recordings of the applicants requesting international protection in Poland, they were taken to the Border Guard Post in Narewka and then summarily returned to Belarus. No protocol of apprehension was drawn up, and the applicants were not allowed to contact an attorney or an interpreter. According to the Court, the Border Guard's action of taking the foreigners to the area of a strict nature reserve in the middle of the night without proper equipment was highly inhumane. The court held that the Minister of Interior's Ordinance, amended in August 2021, was issued in excess of the statutory authorization and should not be applied. According to the court, the Minister could only restrict or suspend traffic at border crossings, but did not have the authority to regulate the situation of people who crossed borders outside the border crossing.

The Provincial Administrative Court in Warsaw, in four judgments, revoked orders to leave the Republic of Poland issued by the Border Guard Commander based on the amended provisions of the Law on Foreigners, which were challenged by foreigners. The Court found that the orders had been issued in violation of the provisions of

¹ These procedures are based on the Ordinance of the Minister of Internal Affairs and Administration of August 20, 2021, amending the Ordinance on Temporary Suspension or Restriction of Border Traffic at Certain Border Crossings (Journal of Laws 2021, item. 1536) authorizing the Border Guard to turn back to the border line persons who do not belong to one of the categories of foreigners authorized to enter Poland in times of the COVID-19 pandemic (on the basis of a verbal instruction solely) and Article 303b of the Law on Foreigners, amended in October 2021, which introduced immediately enforceable "orders to leave the Republic of Poland" which are issued towards migrants apprehended immediately after crossing the border in the irregular manner. It is unclear on what basis the Border Guard decides which procedure is applied in a given case.

administrative procedure (among other things, by improperly collecting evidence that did not allow for the issuance of the order to leave the country). In all cases, the foreigners were apprehended on Polish territory shortly after crossing the border from Belarus in the irregular manner. The court assessed that because of improperly collected evidence, it was impossible to determine whether the foreigners expressed a wish to apply for international protection in the territory of Poland. The court pointed out that only properly conducted proceedings can guarantee compliance with the principle of non-refoulement and obligations under the UN Refugee Convention, the EU asylum acquis, and the European Convention on Human Rights. These judgments are the following:

- judgment of the Provincial Administrative Court in Warsaw of 26 April 2022, case no IV SA/Wa 420/22
- judgment of the Provincial Administrative Court in Warsaw of 27 April 2022, case no IV SA/Wa 471/22
- judgment of the Provincial Administrative Court in Warsaw of 20 May 2022, case no. IV SA/Wa 615/22
- judgment of the Provincial Administrative Court in Warsaw of 27 May 2022, case no IV SA/Wa 772/22

The Provincial Administrative Court in Bialystok in three cases held that the Border Guard's action of escorting foreigners to the border line with Belarus under the provisions of the Minister of Interior's Ordinance adopted in August 2021 was ineffective. As the Court pointed out, after the Border Guard officers discovered the illegal crossing of the Polish border (which is also the external border of the EU), they should have - depending on the situation - either initiated proceedings to oblige the applicant to return or allowed the applicants to formally apply for international protection as soon as possible. At the same time, the Court, in its judgments, held that the Minister of Interior's Ordinance was issued in excess of its statutory authority and, as such, should not be applied. This is because the Minister can only restrict or suspend traffic at border crossings but does not have the authority to regulate the situation of people who have crossed the borders outside the territorial scope of a border crossing. Those judgements are the following:

- judgment of the Provincial Administrative Court in Bialystok of 15 September 2022, case no II SA/Bk 492/22
- judgment of the Provincial Administrative Court in Bialystok of 15 September 2022, case no II SA/Bk 493/22
- judgment of the Provincial Administrative Court in Bialystok of 15 September 2022, case no II SA/Bk 494/22

In a judgment of 5 October 2022, the Provincial Administrative Court in Warsaw (case no IV SA/Wa 1031/22) upheld a complaint against the decision of the Commander-in-Chief of the Border Guard to refuse to annul a decision to leave the territory of the Republic of Poland issued against a Syrian citizen who had crossed the border from Belarus to Poland. In this case, the Court found that the order was issued in gross violation of the law, and is therefore vitiated by a defect of invalidity. The violation consisted, among other things, of improper collection of evidence, lack of justification of the issued decision and failure to conduct an investigation, including evidence of a hearing with the party.

In a judgment of 27 October 2022, delivered as a result of a complaint filed by the Polish Ombudsman, the Provincial Administrative Court in Białystok (case no II SA/Bk 558/22) overturned the appealed decision to leave the Republic of Poland, which resulted in the return of an unaccompanied minor of Syrian citizenship from Poland to Belarus. According to the Court, it did not appear from the apprehension protocol of the minor foreigner and the accompanying foreign adult that they were informed of the possibility of filing an application for international protection, as would be required by respect for the principle of non-refoulement. The case file also does not show that the foreigners were heard before being returned to Belarus. In the Court's view, the case was not properly investigated, and, moreover, the appropriate procedures related to the appointment of a guardian and other guarantees enjoyed by unaccompanied minors were not applied. The Court found that the case involved a collective expulsion in violation of Article 4 of Protocol 4 of the European Convention on Human Rights.

The ruling is available on the Ombudsman's website at: <https://bit.ly/3hleKF7>

2. Proceedings before the European Court of Human Rights

In addition, between October 2021 and December 2022, the European Court of Human Rights granted nearly 100 interim measures under Rule 39 of the Court's Rules of Procedure, ordering the Polish authorities to refrain from returning the complaining foreigner to Belarus, considering that this could constitute a violation of Article 3 of the European Convention on Human Rights. Most of the interim measures issued have already been lifted due to the initiation of lawful procedures against the foreigners in the territory of Poland (proceedings on return or to grant international protection in the territory of the Republic of Poland), with the result that the risk of return to Belarus has ceased.

Individual complaints have been filed in some of these cases, and several have already been communicated to the Polish government. These cases are R.A. and others v. Poland, complaint no. 42120/21, communicated on 27.09.2021; K.A. v. Poland and M.A. and others v. Poland, complaint nos. 52405/21 and 53402/21, communicated on 1.06.2022; F.A. and S.H. v. Poland, complaint no. 54862/21, communicated on 20.06.2022.

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