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Warsaw, 19 June 2023

L.dz. 591/2023/MS

Application V.M. and others v. Poland

Application number 40002/22

The Registrar
European Court of Human Rights
67075 Strasbourg
FRANCE

Dear Madame,

In a reply of the letter of 26 May 2023, please find attached HFHR's writing observations in the case of V.M. and others v. Poland application no. 40002/22.

On behalf of the Board of the
Helsinki Foundation for Human Rights

Piotr Kłodoczny
Vice-President of the Board

HFHR's Writing observation in the case **V.M. and others v. Poland**

Application number 40002/22

I. General observations on the abuse of detention of foreign families with children by the Polish authorities.

Following its ratification on 7 June 1991, the Republic of Poland has become a legally bounded State Party to the Convention on the Rights of the Child (hereinafter: "CRC").¹ Consequently, the Government of Poland must fully comply with its international obligations stemming from the Article 37 of CRC, according to which "No child shall be deprived of his or her liberty in an unlawful or arbitrary manner. The arrest, detention or imprisonment of a child should be lawful and used only as a measure of last resort and for the shortest appropriate period of time."

The Council of Europe has based the implementation of the CRC on the Convention on the Exercise of the Rights of the Child, adopted in 1996². The Court often refers to the CRC when examining the complaints brought by or on behalf of children³ and in the context of detention to which children are subject, it additionally verifies whether the national authorities apply detention as a measure of last resort.

The practice of detaining families with children during their asylum and return proceedings is still a systemic problem in Poland. The concerns about the situation of families with children and unaccompanied minors placed in detention facilities in Poland were raised by the Committee Against Torture (CAT) in its 2019 report.⁴ **Children with their families are still regularly detained in Poland in the immigration detention facilities.**

Important data supporting the thesis of the abuse of detention against families with children was presented by the Polish authorities in Revised Action Report concerning the implementation by Poland of the ECHR judgment in the case of *Bistieva and Others v. Poland* (judgment of 10.04.2018, complaint no. 75157/14; Revised Action Report of 7.02.2023, no DH-DD(2023)160⁵). The Helsinki Foundation takes the position that this judgment, in the part concerning general remarks, has not been implemented by Poland. At this point, it is worth recalling the position of the Polish government in the aforementioned case precisely because of the statistics presented therein.

¹ Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20.11.1989.

² Preamble to the Council of Europe Convention of 25.01.1996 on the Exercise of the Rights of the Child.

³ Handbook of European Law on the Rights of the Child, European Union Agency for Fundamental Rights and Council of Europe, 2015, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf

⁴ CAT, 2019 Concluding Observations on the Seventh Periodic Report of Poland, CAT/C/POL/CO/7, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/257/10/PDF/G1925710.pdf?OpenElement>.

⁵ Revised Action Report DH-DD(2023)160

According to the information provided by the government of Poland, in 2021, 571 children were detained in the immigration detention centres. In the first half of 2022, detention was applied towards 165 children.

Information provided to the HFHR by the Border Guard Headquarters within the framework of access to public information shows that as of specific dates: 1 January 2022, 30 June 2022 and 31 December 2022, there were consecutively: 468, 77 and 45 children staying in the detention centres. The vast majority of them was detained under the provisions of the Act on Granting Protection to Foreigners, which means that their asylum proceedings were pending (these were: 420 children as of 1 January 2022, 58 children as of 30 June 2022 and 45 children as of 31 December 2022)⁶. This data confirms that **detention is a frequent measure applied towards families with children, including those seeking asylum.**

Data presented by the government of Poland in its *Revised Action Report* also proves that **placement of children in the detention centres is not regarded as a measure of last resort.** A comparison of the number of minors placed in the guarded centres with the numbers of minors subjected to alternative measures to detention, introduced into the Polish legal framework in 2014, leads to this conclusion. In 2021, compared to 571 children placed in detention, there were only 37 minors to whom non-custodial measures were applied (which constituted only 6% of all minors). In the first half of 2022, the number of minors in detention was 165, while the non-custodial alternative measures to detention were applied in the case of 53 minors (32% of all minors).

It is worth noting that the change in the trend in the use of detention, which can be seen when comparing the statistics of 2021 and 2022 with those of 2017 - 2020, was undoubtedly influenced by the humanitarian crisis at the Polish-Belarusian border, and above all by the policy of the Polish state towards the victims of this crisis, manifested not only in the abuse of detention measures against the border crossers, but also in the adoption and application of the legislation that allows to summarily return foreigners to the territory of Belarus. In numerous cases, the domestic administrative courts have already found this way of returning foreigners to Belarus as constituting a violation of the prohibition on collective expulsion of foreigners, as laid down in Art. 4 of Protocol No. 4 to the European Convention on Human Rights and the principle of non-refoulement, expressed in the Article 33(1) of the Geneva Refugee Convention.⁷

Similar remarks were made by the Polish National Mechanism for the Prevention of Torture (NMPT, operating within the structure of the Office of the Ombudsman) in its report titled “Situation of Foreigners in Guarded Centres during the Poland – Belarus border crisis” (published in June 2022).⁸ The NMPT points out that contrary to international standards, according to which the detention of minors should always be a measure of last resort, ordered in exceptional situations only, in mid-2021 most guarded centres for foreigners in Poland were transformed into family facilities. In its report, the NMPT also found that **there is a systemic preference for increasing the capacity**

⁶ Letter of the Border Guard Headquarters to HFHR of 25 January 2023 no. KG-OI-VIII.0180.184.2022.BK – Annex 2.

⁷ Summary of the domestic judgements regarding expulsions of migrants from Poland to Belarus as of December 2022 prepared by the HFHR: <https://hfhr.pl/upload/2022/12/hfhr-legal-brief-on-push-back-judgements-eng.pdf>.

⁸ NMPT 2022 report is available at: https://bip.brpo.gov.pl/sites/default/files/2022-08/Situation%20of%20foreigners%20in%20guarded%20centres%20during%20the%20Poland-Belarus%20border%20crisis_0.pdf.

of detention centres at the expense of the liberty-type measures. Moreover, according to the NMPT, the process of creating additional places for foreigners in the detention facilities did not consider the need to proportionally increase an access to medical and psychological care in those places. The National Mechanism therefore is of the opinion that the **effect of the measures taken by the government in response to the humanitarian crisis at the Polish-Belarusian border was to reduce guarded centres to exclusively isolating function**, which should not be the case given the legal status and special situation of the persons detained in them.

The applicant in *V.M. and Others v. Poland* was not a direct victim of the humanitarian crisis at the Polish-Belarusian border. She arrived in Poland on 19.03.2022 on a transit flight and submitted her application for international protection in the transit zone of the airport before the commanding officer of the locally competent Border Guard Post in Warsaw. However, after being placed in the guarded centre, the foreigner has already directly faced the consequences of the crisis, as described in the NMPT report cited above. The situation of her and her minor children in the guarded centre was influenced by the practice of the Polish authorities and the policy of the Polish state in response to the humanitarian crisis at the border.

It is worth noting that also before the Polish-Belarusian border crisis, in its previous thematic report entitled “Foreigners in Administrative Detention. Results of NMPT monitoring in guarded centres for foreigners in Poland” (published in March 2021), the National Mechanism drew attention to the problem of the detention of children in Poland.⁹ At that time, the NMPT noted that the group of children placed in guarded centres is still quite large. In the opinion of the National Mechanism, no matter how much care has been taken with regard to the conditions of stay and provision of care for minors in the guarded centres, deprivation of liberty of children should always be considered as a measure of last resort. The prison-like regime in those places and their oppressive character is not suitable for children and can be a traumatic experience for them, thus negatively influencing their psychophysical development and having consequences for their future.

In 2014, alternative measures to detention were introduced into the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland (hereinafter: the Act on Granting Protection to Foreigners) and the Act on Foreigners. The introduction of alternative measures alone has not changed the situation regarding the detention of minors. Despite the introduction of alternative measures into the Polish domestic law in 2014, the number of minors placed in the guarded centres remained high and was even subject to drastic increases, such as the one in 2021 and at the beginning of 2022. This is due, among other things, to the fact that under Polish regulations the application of an alternative measure to detention, also in the case of minors, is largely based on the discretion of the authority adjudicating detention. Due to this, the adjudication of alternative measures is not a principle in the treatment of minors and is often arbitrary.

Poland has been found in violation of ECHR by the Court on several occasions in similar cases involving children detained in guarded centres. The *Bistiéva and Others v. Poland* judgment, delivered on 10 April 2018, was followed by other judgments based on similar grounds. In the case *Bilalova and Others v. Poland* (26 March 2020, application no. 23685/14), the Court found that the Polish authorities had not considered

⁹ NMPT 2021 report is available at:
<https://bip.brpo.gov.pl/sites/default/files/Foreigners%20in%20Administrative%20Detention.pdf>.

other, less severe measures against the family and had not taken the necessary steps to keep the period of detention as short as possible. In the next judgment, which was delivered on 4 June 2020 in the case of *A.B. and Others v. Poland* (applications nos. 15845/15 and 56300/15), the Court again found that *the authorities had failed to provide adequate and sufficient reasons to justify the applicants' detention as a measure of last resort and in relation to the best interests of a young child*; consequently, it concluded that there had been a violation of Article 8 of the Convention. Other cases include *Nikoghosyan and Others v. Poland* (application no 14743/17) and *R.M. and Others v. Poland* (application no 11247/18).

II. Comments on the alternative measures to detention introduced in the Act on Foreigners and the Act on Granting Protection to Foreigners in 2014

The introduction of the alternative measures into the domestic legal framework has not resulted in ending the violations of the rights of foreigners, including children.

Following the amendment of the Act on Granting Protection to Foreigners introduced in 2014, pursuant to Article 88(1), a foreigner seeking international protection and persons covered by an application for such protection (e.g. family members, including children) who fulfil the conditions allowing their detention may be obliged to (-) report to the designated authority, (-) deposit a financial guarantee or (-) reside in a designated place. These are non-custodial measures being an alternative to placing the foreigner and the persons covered by his/her application for international protection in a guarded centre. However, Article 88a of the Act on Granting Protection to Foreigners stipulates that if the application of alternative measures is not possible, the foreigner and the persons covered by his/her application for international protection are placed in a guarded centre. Thus, the only statutory ground for waiving the application of liberty measures is the *impossibility of applying such measures*. The law does not clarify what such “impossibility” should consist of or what circumstances are to be considered when examining the possibility of applying alternative measures. It is therefore a vague and entirely discretionary premise which can (and, in the view of the HFHR, often does) lead to arbitrary rulings on the placement of foreigners, including families with children, in the guarded centres, despite the fact that there are no objective circumstances proving that alternative measures cannot be effectively applied.

Proof of the arbitrariness of detention is also provided by the case of the Applicant. In its ruling of 20 March 2022, ref. no. V Ko 957/22, the District Court for the Capital City of Warsaw found that none of the alternative measures to detention could be applied to the foreigner and her minor children, as she was not domiciled in Poland and did not have funds which she could pay in cash security. The court completely disregarded the important fact that, as an applicant for international protection in Poland, the foreigner could benefit from the social assistance offered to persons undergoing the refugee procedure in the Act on Granting Protection to Aliens, should the detention be lifted. Such assistance, apart from financial support, includes the right to accommodation in an open centre run by the Office for Foreigners.

As proved by the available statistics, alternative measures are not the measure of first choice, which is proved by the disproportion between cases of detention and non-cus-

todial measures applied in 2021 and the first half of 2022¹⁰. The arbitrariness of detention has also been proved by the research conducted by the HFHR in cooperation with UNHCR in the framework of which 96 detention decisions were reviewed. The research showed that **courts not only rarely examined the alternatives to detention but also did not properly consider the best interest of the child**. The study has also shown that detention is usually applied for the maximum period contrary to the principle deriving from the CRC.¹¹

The above is also confirmed by the Asylum Information Database (AIDA)' Report on Poland. Citing information provided by non-governmental organisations providing legal aid to migrants in Poland (including the HFHR), AIDA notes that detention orders, issued e.g., by courts in Biala Podlaska, Lublin and Bialystok, usually do not determine the best interests of the child or the child's individual situation. When placing a child in a guarded centre together with his or her parents, the courts do not mention the children in the justification of the decision. Courts place families in guarded centres for no longer than allowed by the law, but not for as short a period as possible. Furthermore, courts generally do not conduct in-depth medical or psychological examinations and often do not hear the children but rely solely on the documents provided by the Border Guard. The detention of children is ordered automatically, without individual assessment of their situation and needs. Furthermore, in NGOs' opinion quoted by AIDA, some courts treat detention as a form of a punishment for illegal border crossing.¹²

An example of misinterpretation of the interests of children can be found in the justification of the decision of the Regional Court in Lublin of 8.06.2022. According to the Court, placing the children in a guarded centre together with their parents is aimed at "protecting their rights and interests" and is justified by the "principle of family integrity and the welfare of minors. In doing so, the court overlooked the fact that the application to all family members of a measure of liberty, alternative to detention, would also respect the integrity of the family and, moreover, only then would the interests and welfare of the minors be duly protected. In its Report on Poland AIDA, citing, inter alia, the position of the Ombudsman, recalls that detention, regardless of the migration status of a child and the decision of their parents, can never be in the best interest of children. It violates children's rights and may have a negative impact on their further development.

It is worth noting that the provisions of the Act on Granting Protection to Foreigners in the section on the application of detention, do not explicitly refer to the welfare of the child or the need to consider the interests of the child and his/her guardians when deciding between detention and non-custodial measures. Even if a reference to the interest of the child or the welfare of the child and his or her family were included in the provisions of the Act, such a provision would not automatically make detention applied as a measure of last resort. This is also pointed out by the Committee Against Torture (CAT) in its periodic observations on Poland.¹³ The CAT takes the view that **the Republic of Poland has never introduced into its legislation the principle that the**

¹⁰ Revised Action Report

¹¹ HFHR and UNHCR study is available on: <https://www.unhcr.org/pl/wp-content/uploads/sites/22/2016/12/HFHR-report-on-the-detention-of-children.pdf>.

¹² AIDA. Country Report: Poland, available at: https://asylumineurope.org/wp-content/uploads/2023/05/AIDA-PL_2022-Update.pdf.

¹³ CAT, 2019 Concluding Observations on the Seventh Periodic Report of Poland, CAT/C/POL/CO/7.

detention of applicants for international protection, in particular children and vulnerable persons, should be applied as a measure of last resort, for the shortest possible period of time and in centres appropriate to the needs of the foreigners. The CAT urged the Polish government to refrain from placing persons in need of international protection, in particular children, in guarded centres for foreigners.

In this context, the reference should also be made to the Ombudsman's letter of 25 January 2022, no. KMP.572.1.2021.PK, sent to the presidents of the district courts which rule as higher instance courts in the cases concerning the detention of foreigners.¹⁴ The fact that the Ombudsman decided to address the courts in such an unprecedented manner in his practice means that he had recognised the problem in the frequent use of detention against families with children. In its letter, the Ombudsman reminded the courts that in every case in which it is decided to place a foreigner in a detention centre, the court is obliged to thoroughly justify the reasons for not applying alternatives to detention instead and to prove that there is indeed no possibility for applying other, less severe measures in the case of minors. Furthermore, the Ombudsman noted that, whenever a child is deprived liberty, the duration of such detention should be limited to the shortest possible period.

On the other hand, the minimum standard for proper implementation of the general measures set out in the *Bistiéva and Others v. Poland* judgment would be the introduction into the Polish domestic law of a principle according to which the detention of children and their guardians as well as unaccompanied minors will become a measure of last resort, the application of which will in fact be limited to exceptional cases (e.g. situations related to a threat to public order or state security). However, even in these cases, detention should be as short as possible and the guarded centres where families with children are placed should be adapted to their needs and psycho-physical state, particularly providing adequate medical and psychological assistance as well as securing the right to education. AIDA¹⁵ and Amnesty International have adopted a similar position in their reports. Amnesty International states, inter alia, that "The right to liberty can only be restricted in specific and most exceptional circumstances. Immigration detention should only be used when necessary and proportionate and should never be used against children. The routine use of detention in Poland means that the authorities make no effort to assess the individual situation of each asylum seeker to determine whether any measure restricting their freedom is justified".¹⁶

III. Comments on the average duration of detention

According to the information presented by the Polish government in its Revised Action Report, the average duration of detention of children in the guarded centres ranged from 58 days in 2021 to as many as 125 days in the first half of 2022. It should be noted that according to the Act on Granting Protection to Foreigners, the maximum duration of

¹⁴ See Ombudsman's letter of 25 January 2022, KMP.572.1.2021.PK - Annex 1.

¹⁵ See: AIDA. Country Report: Poland.

¹⁶ Amnesty International report of 11 April 2022, "Poland: Cruelty Not Compassion, At Europe's Other Borders", available at: <https://www.amnesty.org.pl/wp-content/uploads/2022/04/Amnesty-report-POLAND-CRUELTY-NOT-COMPASSION-AT-EUROPES-OTHER-BORDERS.pdf>.

detention ordered under this Act may be no more than 6 months, i.e., approximately 180 days. Thus, according to the statistics presented by the government, the average duration of detention was between 1/3 and 2/3 of the permitted period. It should also be noted that the legal basis for detention, i.e., the provisions of the Act on Granting Protection to Foreigners and the Act on Foreigners, as well as the maximum periods of stay in a guarded centre specified in these provisions may overlap in certain situations. In such cases, the total permissible duration of detention may be up to 2 years. Detention of children is no exception.

IV. Conditions in the guarded centres for foreigners

In August 2021, the amendment to the law was introduced according to which the standards of accommodation in the detention centres can be lowered. Under the amended §11(1a) of the Annex to the Regulation of the Minister of the Interior of 24 April 2015 on the Guarded Centres and Arrests for Foreigners, if it is necessary to place a large number of foreigners in a guarded centre or in arrest at the same time, in the absence of vacancies in rooms for foreigners or in residential cells, a foreigner may be placed in a room for foreigners or in a residential cell for a specified period of time, not longer than 12 months, the area of which is smaller than specified in par. 1 point 1 [4 square metres], but not less than 2 square metres per foreigner. In means, that permissible living space for foreigners placed in the immigration detention facilities can currently be lower than that in the regular prisons and lower than what the Court has accepted in its case-law as compliant with Article 3.

According to data provided by the Polish government in its Revised Action Report, guarded centres for families with children in Ketrzyn, Biala Podlaska and Przemysl were 40-50% occupied in 2017 and 2018. In 2019 and 2020, these numbers dropped to 20% on average. In 2021, because of the crisis on the Polish-Belarusian border, they increased again, this time up to 90-95%. As a result of the crisis, the Polish government decided to open temporary guarded centres (such as the centre in Wedrzyn, widely criticised due to its dramatic detention conditions, currently closed) and to transform previously existing reception centres for foreigners seeking international protection into guarded centres. Among others, the reception centre in Biala Podlaska, which operated as a guarded centre until June 2022, was subject to such a transformation. As of 01.01.2022, it was occupied in approximately 70% (142 persons for 200 places) and 69 children were detained there, most of them pending their asylum proceedings. At that time, the renovated guarded centre of the Border Guard was also operating in Biala Podlaska to a limited extent. As at 1 January 2022, there were 10 detainees, including 3 children.

With regard to the conditions in guarded centres, it is worth referring to the observations made in the two NMPT reports mentioned above, i.e. the 2022 report and the earlier 2021 report. These reports were summarised in the Ombudsman's letter to the presidents of district courts.

The NMPT and the Ombudsman criticised the low level of medical and psychological care provided in the guarded centres. They found it being far from sufficient which may ultimately lead to the deterioration of the health of detained foreigners through their secondary traumatisations, to which those who had experienced torture and violence in the past are particularly prone. **The psychological assistance provided to foreigners**

in detention, according to the NMPT and the Ombudsman, is illusory. The main reason for these shortcomings is the insufficient number of psychologists and problems of a linguistic nature, making it difficult or even impossible for a psychologist to establish a proper contact with his patient, which is the minimum condition for creating a therapeutic relationship based on trust. It needs to be emphasised that serious deficiencies in both psychological and medical care provided to foreigners detained in guarded centres were diagnosed by the NMPT even before the crisis on the Polish-Belarusian border. The situation at the border has only worsened this already dramatic state of affairs.

Also, the children's right to education under Article 70(1) of the Polish Constitution is not implemented in any of the centres. The education for detained children is limited to didactic and educational classes organised in the centre that do not follow the minimum of the mandatory school curriculum, regardless of the fact that they are conducted in cooperation with public schools. Therefore, a stay in a guarded centre always means an interruption in the education of a child and lack of interactions with children of the hosting society, which undoubtedly has a negative impact on the development and well-being of a child. For the above-mentioned reasons, **the HFHR agrees with the position of the Polish Ombudsman expressed in a letter of January 2022 to the presidents of the district courts, and being the conclusion of the NMPT reports, that none of the detention centres is a suitable place for children.**

In 2015, the Border Guard's Rules of Conduct for Vulnerable Groups of Foreigners were developed and implemented in guarded centres. Those rules define vulnerable groups, which include, among others, children, pregnant women, persons of different sexual orientation and persons who have experienced physical or psychological violence. In 2017, a further tool was added to the above-mentioned rules in the form of the observation sheets, in which social workers, Border Guard officers and medical staff can include their comments regarding the foreigner. In addition, the Border Guard Headquarters, in cooperation with the non-governmental organisation "Dajemy Dzieciom Siłę" (We Give Children Strength), has taken measures to introduce to the guarded centres a policy to prevent and counteract abuse of detained migrant children, which includes the Principles for Intervention in Case of Child Abuse. And finally, it refers to the fact that it has established specific training for staff in the guarded centres, which has been carried out in connection with the introduction of the above principles.

The HFHR noted the existence of such principles in the functioning of the immigration detention centres with the highest approbation and strongly encourages the Polish government to continue applying them. Indeed, children, especially unaccompanied minors, are extremely vulnerable to violence and to falling victims to criminal acts, including human trafficking.¹⁷ However, current evidence has shown the lack of effectiveness of these rules and principles in practice for the children directly affected. Various Border Guard units revealed only two cases of child abuse in 2021, including one in Ketrzyn and one in Biala Podlaska. This substantiates CAT concerns about "Poland's insufficient capacity to identify asylum seekers, refugees and other persons in need of international protection who have been victims of torture, and the lack of adequate protection and care for victims of sexual and gender-based violence."¹⁸

¹⁷ NMPT 2022 report.

¹⁸ CAT, Concluding Observations on the Seventh Periodic Report of Poland, CAT/C/POL/CO/7.

Although the Polish government has trained officers working in the detention centres to identify child abuse, there is no system of effective identification of the victims of violence and victims of torture who may still be placed in such centres.¹⁹ The Ombudsman, by interviewing detainees and analysing their documentation, found that foreigners' statements about the violence experienced generally did not influence the actions of the Border Guard and did not prevent the Border Guard from applying to the court to place a person in detention or prolong their stay there.²⁰ Moreover, the Border Guard, despite having such competences, relatively rarely issues decisions on the release from detention of families with children whose mental health deteriorated rapidly after being placed in detention.

Your sincerely,

On behalf of the Board of the
Helsinki Foundation for Human Rights

Piotr Kłodoczny

Vice-President of the Board

Annex 1: Ombudsman's letter of 25.01.2022, KMP.572.1.2021.PK

Annex 2: Letter of the Border Guard Headquarters to the HFHR dated 25 January 2023
no. KG-OI-VIII.0180.184.2022.BK

¹⁹ Asylum Database Report (AIDA) - POLAND, updated on 31 December 2022, available at: <https://asylumineurope.org/reports/country/poland/>.

²⁰ NMPT 2022 report.