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Warsaw, 16th June 2023

## COMMUNICATION

**In accordance with Rule 9.2. of the Rules of the Committee of Ministers  
regarding the supervision  
of the execution of judgments and of terms of friendly settlements  
*Bistieva and Others v. Poland* (application no. 75157/14)**

### I. Introduction

Under the Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgements and the terms of friendly settlements, the Helsinki Foundation for Human Rights (hereinafter: “HFHR”) presents its communication with regard to the Poland’s implementation of the *Bistieva and Others v. Poland* judgment (application no. 75157/14). This communication refers to the Revised Action Report of 6 February 2023 (DH-DD (2023)160) submitted by the Polish Government (hereinafter: “Revised Action Report”).

In its communication, the HFHR will refer to the Poland’s implementation of the general measures resulting from the judgment.

### II. Case summary

The case concerns the authorities’ failure to provide sufficient reasons to justify the administrative detention in 2014 for five months and twenty days of the applicant, an asylum seeker from Russia and her 3 minor children, without giving due consideration to possible alternative measures and to the best interests of the children (violation of Article 8).

### **III. Observations on the implementation of the general measures resulting from the judgment**

In its Revised Action Report, the Polish government states that it has fulfilled all its obligations regarding the implementation of the *Bistiéva and Others v. Poland* judgment. The Helsinki Foundation for Human Rights respectfully disagrees with this statement.

The Council of Europe adopted the Convention on the Exercise of the Rights of the Child in 1996, which refers in its preamble to the UN Convention on the Rights of the Child. The ECHR has repeatedly referred to international law, indicating that there must be a balance between the competing interests of the individual and society as a whole, which should take into account international conventions, in particular the Convention on the Rights of the Child. In the context of the detention to which children are subject, the ECHR indirectly refers to this instrument by stating that the protection of the best interests of the child includes 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.

Following its ratification on 7 June 1991, the Republic of Poland became a legally bound State Party to the Convention on the Rights of the Child ("the Convention"). Accordingly, the Polish Government must fully comply with its international obligations under Article 37 of the Convention on the Rights of the Child, according to which "No child shall be deprived of his or her liberty by unlawful or arbitrary means. The arrest, detention or imprisonment of a child should be lawful and used only as a measure of last resort and for the shortest possible period of time."

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.<sup>1</sup> As showed in the data presented by the Polish government in its Revised Action Report, **children with their families are still regularly detained in Poland in the immigration detention facilities.**

According to the information provided by the government of Poland, in 2021 alone, 571 children were detained in the immigration detention centres. In the first half of 2022, 165 children seeking asylum were detention. In addition, 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. Most of them were 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)<sup>2</sup>. The others were placed in detention centres under the provisions of the Act on Foreigners (meaning that they were not in the refugee procedure at the date of detention). This data confirms that **detention is a frequent measure applied towards families with children, including those seeking asylum.**

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<sup>1</sup> 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>.

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

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<sup>3</sup>, 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.<sup>4</sup>

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).<sup>5</sup> 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 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.

Even before the Polish-Belarusian border crisis, in its previous thematic report entitled “Aliens 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.<sup>6</sup> At that time, the NMPT

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<sup>3</sup> Details of 2017 – 2020 in Revised Action Report of 6 February 2023 (DH-DD (2023)160).

<sup>4</sup> 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>.

<sup>5</sup> 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](https://bip.brpo.gov.pl/sites/default/files/2022-08/Situation%20of%20foreigners%20in%20guarded%20centres%20during%20the%20Poland-Belarus%20border%20crisis_0.pdf).

<sup>6</sup> NMPT 2021 report is available at: <https://bip.brpo.gov.pl/sites/default/files/Foreigners%20in%20Administrative%20Detention.pdf>.

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.

The aforementioned reports were published by the National Mechanism already after the regulations on alternative measures to detention were introduced into the Act on Granting Protection to Foreigners and the Act on Foreigners. This means that **the introduction of alternative measures alone did not change 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. 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.

The government of Poland cannot therefore claim that Poland has fulfilled all its obligations under the *Bistieva and Others v. Poland* judgment only by the fact that alternative measures to deprivation of liberty have been introduced into the domestic legislation. On top of this, Poland has been found in violation of ECHR by the Court on several occasions in similar cases involving children detained in guarded centres.

Since the *Bistieva and Others v. Poland* judgment, the provisions of the Polish law, in the part concerning the use of detention of foreigners, have not changed significantly. However, the practice of the authorities adjudicating on the placement of foreigners (including minors) in guarded centres has changed even for the worse. It is worth recalling the statistics quoted by the government: in 2018, when the *Bistieva* judgment was delivered, 229 children were detained in the guarded centres for foreigners. In 2020, when two more judgments were delivered, the number of foreign minors deprived of liberty was 85. In 2021, the number of minors in detention increased to 571, while in the first half of 2022, the number has reached 165. Since 2019, the percentage of cases in which the alternative (non-custodial) measures are being applied is decreasing. The average time of placing a minor in the guarded centre in the first half of 2022, was 125 days.

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

In its Revised Action Report, the Polish government underlined having introduced alternative measures to detention, particularly for vulnerable persons. It referred to the amendments to the Act on Foreigners and the Act on Granting Protection to Foreigners, which came into force in May 2014, i.e., four years before the Court had delivered its judgment in *Bistieva and Others v. Poland* case. The HFHR considers this argument of the government to be completely misplaced. The mere introduction of the alternative

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

The Polish government wrongly asserts that families with children are the main beneficiaries of the implementation of the alternative measures to detention. 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 (the designated place can be a private flat, but also, in the case of applicants for international protection, a reception centre run by the Office for Foreigners). 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.

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-custodial measures applied in 2021 and the first half of 2022. 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. It happens, for example, that courts consider that placing children in a guarded centre with their parents serves to 'protect their rights and interests' and is justified by 'the principle of family integrity and the welfare of minors'. In such cases, the courts do not take into account that also alternative measures to detention should be applied to the whole family and therefore also comply with the principle of integrity and, moreover, actually serve the interests of the children. The study has also shown that detention is usually applied for the maximum period contrary to the principle deriving from the CRC.<sup>7</sup>

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,

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<sup>7</sup> 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>.

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.

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.<sup>8</sup> The CAT takes the view that **the Republic of Poland has never introduced into its legislation the principle that the 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.

The issue of adjudicating measures alternative to detention is regulated differently by the provisions of the Act on Foreigners (regulating the returns of foreigners), also amended in 2014. Pursuant to Article 398 of the Act, the possibility of adjudicating a measure of liberty instead of placing a foreigner in a guarded centre has been limited to a few, enumerative listed cases. In cases not enumerated in Article 398, as a rule, foreigner is placed in a guarded centre. The Act on Foreigners does not exclude the possibility of placing in detention families with children and unaccompanied minors above the age of 15. However, unlike the Act on Granting of Protection to Foreigners, the Act on Foreigners obliges the authorities to consider the best interest of a child when deciding on detention (Article 401(4) of the Act or, in the context of unaccompanied minors, Article 397(4)). The need to consider the welfare of the child when applying detention measures does not equal, however, to recognising the detention of a minor as a measure of last resort.

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.<sup>9</sup> 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.

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<sup>8</sup> CAT, 2019 Concluding Observations on the Seventh Periodic Report of Poland, CAT/C/POL/CO/7.

<sup>9</sup> See Ombudsman's letter of 25 January 2022, KMP.572.1.2021.PK - Annex 1.

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.<sup>10</sup> It violates children's rights and may have a negative impact on their further development. Therefore, the HFHR is of the opinion that **in order to best secure the rights of children, the detention of both children travelling with their families and those who are unaccompanied, should be abolished.** Currently such a prohibition exists only for unaccompanied minors in the asylum proceedings.

On the other hand, the minimum standard for proper implementation of the general measures set out in the *Bistieva 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. AIDA<sup>11</sup> 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".<sup>12</sup>

## V. 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 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.

The Polish government explained that the Office for Foreigners prioritises cases of granting international protection to persons who are placed in the guarded centres. This priority is to be based on the preparation of weekly reports on such cases and shortening the time of their examination. The average time for proceedings concerning foreigners placed in guarded centres is 3-4 months, while for foreigners subject to alternative

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<sup>10</sup> AIDA. Country Report: Poland, available at: [https://asylumineurope.org/wp-content/uploads/2023/05/AIDA-PL\\_2022-Update.pdf](https://asylumineurope.org/wp-content/uploads/2023/05/AIDA-PL_2022-Update.pdf).

<sup>11</sup> See: AIDA. Country Report: Poland.

<sup>12</sup> 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>.

measures it is 5-7 months. Despite those assurances, the HFHR does not see that the approach of the Polish government or the modus operandi of the Office for Foreigners has resulted in the significant changes in the average duration of detention since the duration of the detention of children pending their asylum proceedings can still reach 4 months.

## **VI. Conditions in the guarded centres for foreigners**

In its Revised Action Report, the Polish government stated that it was undertaking efforts to ensure the optimal detention conditions for minors detained in the guarded centres for foreigners. This is to be evidenced, according to the government, by the various services provided in detention centres to meet the needs of children.

According to data provided by the Polish government, 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, they increased again, this time up to 90-95%. This was the result of the humanitarian crisis on the Polish-Belarusian border and the large number of migrants, including families with children, who, upon reaching Belarus, crossed the Polish-Belarusian border outside of the regular border crossings, often forced to do so, including by violence, by Belarusian services. 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 centre in Czerwony Bor, which operated as a guarded centre until August 2022, was subject to such a transformation. As of 30 June 2022, it was occupied in approximately 90% (81 persons for 90 places) and 31 children were detained there, most of them pending their asylum proceedings.<sup>13</sup>

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. This regulation did not make an exception for children. 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.

The government argues that the places of immigration detention have been adapted to the special needs of children in terms of providing them with adequate medical care, education, or special equipment for children in the premises. However, as far as the conditions in guarded centres are concerned, it is worth referring to the observations

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<sup>13</sup> See: letter of the Border Guard Headquarters to the HFHR dated 25 January 2023 no. KG-OI-VIII.0180.184.2022.BK – Annex 2.

presented in the two NMPT reports mentioned above, i.e., the one of 2022 and the earlier 2021 report. The reports were summarised in a letter of the Ombudsman 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 traumatising, 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.

The crisis at the Polish-Belarusian border periodically led to overcrowding in the centres. This also affected centres where families with children were detained. For example, in the guarded centre in Ketrzyn, families were placed in containers that did not have sanitary facilities. Sanitary facilities were several hundred metres away, which could be pose a health hazard due to the weather conditions in Poland in autumn and winter (sub-zero temperatures). In addition, the number of sanitary containers was too small in the light of the number of foreigners placed in the centre. The NMPT, when visiting the centre, also noted a case where two families were placed in one container, which did not respect their right to privacy and forced migrants to separate their living spaces with sheets and blankets.<sup>14</sup>

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.**

The Polish government explains further that it has standardised the procedures contained in the Border Guard's Rules of Conduct with Vulnerable Groups of Foreigners, developed, and implemented in 2015. 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 com-

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<sup>14</sup> See the letter from the Ombudsman of 25 January 2022, KMP.572.1.2021.PK - Annex 1.

ments 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.<sup>15</sup> 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.”<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> 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.

## VII. Conclusions

Considering all the arguments presented above, the HFHR concludes that the Republic of Poland has still not complied with obligations stemming from the judgment of the Court in the case of *Bistieva and Others v. Poland*. Detention is still not being applied as a measure of last resort and the best interest of a child is rarely considered by the authorities deciding on detention, which leads to disproportionate interferences with the right to respect for family life. Contrary to its international obligation, Poland does not detain children for the shortest possible period. Moreover, conditions in detention centres need to improve with regard to the special situation of children, particularly when it comes to medical and psychological assistance.

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<sup>15</sup> NMPT 2022 report.

<sup>16</sup> CAT, Concluding Observations on the Seventh Periodic Report of Poland, CAT/C/POL/CO/7.

<sup>17</sup> Asylum Database Report (AIDA) - POLAND, updated on 31 December 2022, available at: <https://asylumineurope.org/reports/country/poland/>.

<sup>18</sup> NMPT 2022 report.

The HFHR appeals to the Committee of Ministers to oblige the Polish authorities to:

- introduce into Polish domestic law the principle that the detention of parents/guardians with children and unaccompanied minors (where the law allows their detention at all) is a measure of last resort, used only in exceptional cases, and that alternative measures not involving deprivation of liberty should be the first choice;
- introduction in Polish national law of an obligation for the Border Guard authorities applying for detention and its prolongation, as well as courts considering such applications, to take into account the interests of the child, which should also include an individual assessment of the impact of possible detention on the child's psychophysical condition;
- ensure that vulnerable persons, including children, victims of torture and inhuman treatment, as well as sexual and gender-based violence, are promptly and appropriately identified and not deprived of their liberty;
- ensure that detainees, in particular children and minors, have access to appropriate health care and psychological services adapted to their age and needs, including access to external doctors and psychologists, i.e. not employed or contracted by the Border Guard.

Your sincerely,

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

Piotr Kładoczny

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