

Warsaw, 3 October 2024

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**President of the Court**  
**European Court of Human Rights**  
**Council of Europe**  
**67075 Strasbourg-Cedex, France**

Application no. 42120/21  
*R.A. and Others v. Poland*  
Communicated on 27<sup>th</sup> September 2021  
Relinquished to the Grand Chamber on 25<sup>th</sup> June 2024

**WRITTEN COMMENTS BY THIRD PARTIES:  
ASSOCIATION FOR LEGAL INTERVENTION AND  
HELSINKI FOUNDATION FOR HUMAN RIGHTS**

**I. INTRODUCTION**

1. This third-party intervention is submitted by the Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej, SIP) and Helsinki Foundation for Human Rights (Helsinkińska Fundacja Praw Człowieka, HFHR), pursuant to the leave granted by the President of the Grand Chamber of the European Court of Human Rights (ECtHR) under Rule 44 §3 (a) of the Rules of the Court.

2. SIP is a Polish non-governmental organization established in 2005 with the aim of combating social exclusion as well as protecting and advancing the rights of asylum seekers and migrants. HFHR is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of an open society in Poland. Both organizations actively participate in legal actions undertaken for the public interest such as representing parties and preparing legal submissions to national and international courts. They have already submitted – jointly and separately – a number of third-party interventions to the ECtHR<sup>1</sup>. Both SIP and HFHR have been actively involved in the reporting on pushbacks at the Polish-Belarusian border<sup>2</sup> and in the intertwined strategic litigation before national and international courts<sup>3</sup>.

3. The case of *R.A. and Others v. Poland* concerns 32 applicants from Afghanistan who were denied entry to Poland and were given no possibility to seek asylum therein. These events mark a beginning of a humanitarian crisis at the Polish-Belarusian border that has been lasting for over 3 years now. Since then, third-country nationals have been systematically pushed back to Belarus without a proper

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<sup>1</sup> See e.g. *C.O.C.G. and Others v. Lithuania* (no. 17764/22); *Muhammad and Muhammad v. Romania* (no. 80982/12); *A.S. v. Poland* (no. 37691/20); *Marakchi v. Poland* (no. 32462/15); *V.M. and Others v. Poland* (no. 40002/22); *Z.H.R. and Others v. Poland* (no. 55558/22); *Baka v. Hungary* (no. 20261/12); *Big Brother Watch and Others v. United Kingdom* (no. 58170/13); *Kövesi v. Romania* (no. 3594/19); *M.C. and Others v. Romania* (no. 44654/18); *Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18); *Xero Flor v. Poland* (no. 4907/18); *Biliński v. Poland* (no. 13278/20).

<sup>2</sup> See e.g. HFHR, 'The Lawless Zone: Polish-Belarusian Border Monitoring', 2022, <https://hfhr.pl/upload/2023/09/the-lawless-zone.pdf>; reports concerning pushbacks in Europe published by the PRAB coalition (incl. SIP), 2022-2024: <https://pro.drc.ngo/resources/documents/prab-reports/>.

<sup>3</sup> See e.g. SIP, 'Pushbacks are inhumane, illegal and based on illegal regulation – the Court says', 31 March 2022, <https://interwencjaprawna.pl/en/pushbacks-are-inhumane-illegal-and-based-on-illegal-regulation/>; HFHR, 'The courts speak a clear language: the treatment of foreigners at the Polish-Belarusian border is unlawful. We summarise the existing jurisprudence', 3 July 2023, <https://hfhr.pl/en/news/the-courts-speak-a-clear-language-the-treatment-of-foreigners-at-the-polish-belarusian-border-is>.

examination of their individual situation and irrespective of their pleadings for asylum. They have been also subjected to inhuman and degrading treatment on the both sides of the border.

4. Since August 2021, the far-reaching legislative changes in the Polish border management and asylum procedure have been adopted that were aimed at legitimizing and enabling the ongoing pushbacks and use of violence. These changes were and are heavily criticized by the Polish civil society, national human rights institutions, international organizations and judiciary as violating international, EU and domestic law. Relying on their experience and expertise, SIP and HFHR are grateful for the opportunity to provide in this third-party intervention a comprehensive information about:

I. law and practice applied at the Polish borders in July-October 2021, and

II. the judicial response to the crisis at the Polish-Belarusian border.

SIP and HFHR hope that this information will effectively assist the Court in the *R.A. and Others v. Poland* case.

## II. LAW AND PRACTICE AT THE POLISH BORDERS IN JULY-OCTOBER 2021

5. **Under the Polish law, asylum seekers are allowed to enter Poland and seek asylum therein.** Upon declaring that they want to apply for international protection in Poland, they cannot be denied entry<sup>4</sup> and their asylum application must be registered.<sup>5</sup> These domestic rules implement the principle of non-refoulement that is derived from international law, i.e. Article 33 of the Geneva Convention<sup>6</sup> and Article 3 ECHR. They were in force in July-October 2021 and have remained in force since then.

6. **These rules, however, have not been respected in practice.** The access to the Polish territory for asylum seekers had been limited even before the humanitarian crisis at the Polish-Belarusian border started. For many years, asylum seekers have been systematically denied entry at the official border checkpoints, in particular at the Polish-Belarusian border, in Terespol. In practice, the Border Guard officers intentionally do not hear the pleadings for asylum of some persons arriving at the official border checkpoints. Thus, asylum seekers are issued with decisions on a refusal of entry instead of having their asylum applications registered. The ECtHR – in several judgments – reproached Poland for employing this deterring practice.<sup>7</sup> Despite the clear and strong position of the Court expressed in these rulings, many asylum seekers are still denied entry at the official checkpoints at the Polish-Belarusian border.<sup>8</sup>

<sup>4</sup> Article 28(2) point 2 of the Act on Foreigners (*Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach*).

<sup>5</sup> Article 28 and 30 of the Act on International Protection (*Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej*). See also Polish Human Rights Commissioner (*Rzecznik Praw Obywatelskich*), 'RPO: nieprzyjmowanie wniosków o ochronę międzynarodową w strefie przygranicznej to naruszenie prawa. Odpowiedź MSWiA', 20 September and 19 October 2021, <https://bip.brpo.gov.pl/pl/content/rpo-nieprzyjmowanie-wnioskow-o-ochrone-miedzynarodowa-w-strefie-prygranicznej-naruszenie>.

<sup>6</sup> Convention Relating to the Status of Refugees, 28 July 1951, Geneva.

<sup>7</sup> At the Belarusian border: *M.K. and Others v. Poland* (nos. 40503/17, 42902/17 and 43643/17); *D.A. and Others v. Poland* (no. 51246/17); *A.I. and Others v. Poland* (no. 39028/17); *A.B. and Others v. Poland* (no. 42907/17); *T.Z. and Others v. Poland* (no. 41764/17). At the Ukrainian border: *Sherov and Others v. Poland* (nos. 54029/17, 54117/17, 54128/17 and 54255/17).

<sup>8</sup> See e.g. SIP and Rule of Law Institute (FIPP), 'Communication of the Association for Legal Intervention and the Rule of Law Institute on the execution of the *M.K. and Others v. Poland* judgment', 27 February 2023, <https://interwencjaprawna.pl/wp-content/uploads/2023/03/COE-CM-M.K.Others-execution-communication-ALI-and-RLI-1.pdf>, 3-5; HFHR, 'Z jednej strony zaporą na granicy, z drugiej mur biurokracji - historia rodziny z Afganistanu, która stara się o ochronę

**7. The COVID-19 pandemic induced changes in the border management that hampered even more the access to the Polish territory for asylum seekers.** Since 15 March 2020, access to Poland via the Belarusian border has been granted only to persons directly listed in the Border Regulation.<sup>9</sup> Despite the calls of the NGOs and human rights institutions, asylum seekers were never added to this list.<sup>10</sup> Meanwhile, persons, who were not mentioned in the Regulation as having a right to enter Poland, could cross the border only upon receiving a special agreement from the Chief Commander of the Border Guard (§3(3) of the Border Regulation). While the Polish government argued that the right to asylum was respected upon the introduction of these rules, NGOs informed about the increased difficulties of asylum seekers at the Polish borders during the pandemic.<sup>11</sup> The systemic practice of denying entry to asylum seekers observed for many years in Terespol, and the legal limitations to entry introduced in response to the pandemic, resulted in the much-hindered access to the Polish territory via the official border checkpoints for persons seeking asylum since 2020, including in 2021.

**8. In summer 2021, Poland responded to the increased migration flows via the Belarusian border with pushing third-country nationals back to Belarus irrespective of their pleadings for asylum and vulnerabilities.<sup>12</sup> Until 20 August 2021, these pushbacks had no legal basis.** Until then, only a person who *unintentionally* irregularly crossed the Polish border could have been taken the border line by the Polish authorities without issuing any decision (Article 35 and Article 303(1), point 10 of the Act on Foreigners). Return proceedings could also be omitted when an immediate readmission could be enforced (Article 303(9) of the Act on Foreigners). Nevertheless, in summer 2021, it was not possible with Belarus as the EU-Belarus Readmission Agreement had been suspended since June.<sup>13</sup> In all other circumstances, if asylum was not claimed, either a decision on a refusal of entry had to be issued, or a return procedure should have been initiated. If asylum was claimed, an asylum application had to be registered. Asylum seekers could not be denied entry, so as return proceedings could not be initiated while the

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międzynarodową w Polsce', 28 August 2024, <https://hhr.pl/aktualnosci/afganska-rodzina-starala-sie-o-ochrone-miedzynarodowa-w-polsce>.

<sup>9</sup> §2 and §3(2) of the Border Regulation (*Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 13 marca 2020 r. w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych*).

<sup>10</sup> See e.g. Polish Human Rights Commissioner, 'RPO: nieprzyjmowanie wniosków...', *op. cit.*; SIP, 'SIP in Action. The rights of migrants in Poland in 2020', 2021, [https://interwencjaprawna.pl/wp-content/uploads/2021/01/report\\_SIP\\_in\\_action\\_2020.pdf](https://interwencjaprawna.pl/wp-content/uploads/2021/01/report_SIP_in_action_2020.pdf), 35-37.

<sup>11</sup> See e.g. SIP and FIPP, *op. cit.*, 3-5.

<sup>12</sup> See e.g. 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', 19 November 2021, <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>; Human Rights Watch, 'Violence and Pushbacks at Poland-Belarus Border', June 2022, <https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>; UN Special Rapporteur on the human rights of migrants, 'Visit to Poland. Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales', April 2023, <https://www.ohchr.org/en/documents/country-reports/ahrc5326add1-visit-poland-report-special-rapporteur-human-rights-migrants>, 14; SIP and FIPP, *op. cit.*, 6, 9; Polish Human Rights Commissioner, 'Sprawa zatrzymanych cudzoziemców ubiegających się o ochronę międzynarodową w RP. Pismo do KG SG oraz odpowiedź', 2 October 2024, <https://bip.brpo.gov.pl/pl/content/rpo-cudzoziemcy-pelnomocnicy-pushbacki-kgsg>.

<sup>13</sup> See e.g. recital 5 of the Council Decision (EU) 2021/1940 of 9 November 2021 on the partial suspension of the application of the Agreement between the European Union and the Republic of Belarus on the facilitation of the issuance of visas.

asylum application was pending (Article 28(2) and Article 303(4) of the Act on Foreigners).

**9. On 20 August 2021, the Border Regulation was amended in order to legitimize the ongoing pushbacks. The amendment allowed for immediate removals of irregular entrants without any decision being issued.** According to the added §3(2b), third-country nationals apprehended on the Polish territory who are not listed in the Regulation as persons authorized to enter Poland must be returned to the border line. The regulation does not provide for any more rules regarding the removal procedure: it does not specify the authority responsible (the fact that the Border Guard conducts these removals is based only on the presumption of their competence), does not define the obligations of this authority, nor does it provide for the rights of the removed individuals. In practice, §3(2b) of the Border Regulation is applied by the Border Guard by escorting a third-country national to the border line with Belarus and forcing him/her to leave Poland. No decision is being issued. Before the pushback, the Border Guard does not examine the individual situation of the persons concerned, does not allow them to present arguments against their expulsion, and does not provide access to an interpreter during the removal. It is not required by the Border Regulation.

**10. Polish Human Rights Commissioner has expressed his profound disapproval of §3(2b) of the Border Regulation from its adoption.** The Commissioner considered it to be incoherent with the Geneva Convention and national law, including the Constitution of the Republic of Poland. While the Polish government argued that the Border Regulation does not conflict with the right to seek asylum, the Commissioner received reports of third-country national being returned to the border line despite their pleadings for asylum.<sup>14</sup> Accordingly, for many years now, the Commissioner has been calling on the Polish government to repeal §3(2b) of the Border Regulation.<sup>15</sup> The Commissioner's critical approach was mirrored by e.g. OSCE ODIHR and Polish NGOs, which indicated also that the regulation violates EU law,<sup>16</sup> albeit to no avail.

**11. On 2 September 2021, an emergency state at the Polish-Belarusian border was announced and a closed zone was created near the border.**<sup>17</sup> Accordingly, until 30 June 2022, the area of 3 km from the border was inaccessible for medics, national and international organizations and institutions, and media. Only inhabitants and persons directly listed in the Council of Ministers' Regulation<sup>18</sup> were able to access the zone. In those circumstances, access to humanitarian, medical and legal assistance to third-country nationals crossing the Polish-

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<sup>14</sup> See e.g. Polish Human Rights Commissioner, 'Zmiany w rozporządzeniu w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego sprzeczne z Konwencją Genewską i Konstytucją RP. Wystąpienie RPO do MSWiA', 26 September 2021, <https://bip.brpo.gov.pl/pl/content/zmiany-w-rozporzadzeniu-w-sprawie-czasowego-zawieszenia-lub-ograniczenia-ruchu-granicznego>.

<sup>15</sup> See e.g. Polish Human Rights Commissioner, 'Rzecznik: wyeliminować pushbacki z polskiego prawa. Odpowiedź MSWiA', 27 July and 28 August 2023, <https://bip.brpo.gov.pl/pl/content/rpo-pushbacki-prawo-usuniecie-mswia-odpowiedz>.

<sup>16</sup> See e.g. OSCE ODIHR, 'Urgent opinion no. MIG-POL/428/2021[JB]', 10 September 2021, [https://www.osce.org/files/f/documents/3/3/498252\\_0.pdf](https://www.osce.org/files/f/documents/3/3/498252_0.pdf); SIP, 'SIP in Action. Report on the activities of the Association for Legal Intervention (SIP) in 2021', 2022, <https://interwencjaprawna.pl/wp-content/uploads/2022/06/RAPORT-2022-ENG.pdf>, 8-9; HFHR, 'Pushbacks must end immediately - NGOs' appeal to the Prime Minister', 10 January 2024, <https://hfhr.pl/en/news/pushbacks-must-end-immediately-ngos-appeal-to-the-prime-minister->.

<sup>17</sup> *Rozporządzenie Prezydenta RP z dnia 2 września 2021 r. w sprawie wprowadzenia stanu wyjątkowego na obszarze części województwa podlaskiego oraz części województwa lubelskiego.*

<sup>18</sup> *Rozporządzenie Rady Ministrów z dnia 2 września 2021 r. w sprawie ograniczeń wolności i praw w związku z wprowadzeniem stanu wyjątkowego.*

Belarusian border has been hampered to a great extent.<sup>19</sup> Moreover, the lack of access to the closed zone of media and national and international organizations and institutions enabled conducting pushbacks and using violence with hardly any independent monitoring.<sup>20</sup>

**12. Even Dunja Mijatović, the CoE Commissioner for Human Rights, was not allowed to enter the zone in November 2021.** Upon her visit in Poland, she stated:

“The ban on access to areas adjacent to the border, covered by Poland’s state of emergency, has harmful consequences. It prevents international organisations and civil society from providing vital humanitarian assistance and carrying out crucial monitoring and human rights work. It also denies access of the media to the border zone, undermining freedom of expression and information and limiting much-needed transparency and accountability. (...) Restrictions introduced through the state of emergency must be discontinued and not perpetuated by new legislation.”<sup>21</sup>

**13. Despite the widespread criticism,<sup>22</sup> the closed zone – albeit ordered by diverse authorities and in different shapes – have persisted.** Since 1 July 2022, the area of the closed zone was reduced to 200 m from the Belarusian border; since 1 January 2023, to 15 m from the border.<sup>23</sup> In June 2024, the area of the closed zone was again extended (so far until 11 December 2024),<sup>24</sup> against the protests of the civil society and national and international human rights institutions.<sup>25</sup>

**14. In October 2021, the Act on Foreigners was changed to further legitimize pushbacks. A new procedure for issuing orders to leave the territory of Poland was introduced.** According to the newly introduced Article 303b (in conjunction with Article 303(1), point 9a), removal orders with an entry ban are issued as regards third-country nationals who were apprehended immediately upon irregularly crossing the external EU border. A removal order is accompanied with a protocol, but its contents are not specified in law. Legal representatives of the removed third-country nationals are often not allowed to take part in these proceedings.<sup>26</sup> The order is enforced straightaway. The execution of the order is carried out in the same manner as under §3(2b) of the Border Regulation. A

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<sup>19</sup> See e.g. HFHR, ‘The Lawless Zone’, *op. cit.*, 16-18; CESCR, ‘Concluding observations on the seventh periodic report of Poland’, E/C.12/POL/CO/7, 27 September 2024, 2-3.

<sup>20</sup> See e.g. UN Special Rapporteur on the human rights of migrants, *op. cit.*, 14.

<sup>21</sup> CoE Commissioner for Human Rights, ‘Commissioner calls for...’, *op. cit.*

<sup>22</sup> See e.g. HFHR, ‘The Lawless Zone’, *op. cit.*, 14-16.

<sup>23</sup> See e.g. ECRE, ‘Seeking Refuge in Poland: A Fact-Finding Report on Access to Asylum and Reception Conditions for Asylum Seekers’, April 2023, <https://ecre.org/ecre-fact-finding-report-seeking-refuge-in-poland-access-to-asylum-and-reception-conditions-for-asylum-seekers/>, 14.

<sup>24</sup> *Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 12 czerwca 2024 r. w sprawie wprowadzenia czasowego zakazu przebywania na określonym obszarze w strefie nadgranicznej przyległej do granicy państwowej z Republiką Białorusi; Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 9 września 2024 r. w sprawie wprowadzenia czasowego zakazu przebywania na określonym obszarze w strefie nadgranicznej przyległej do granicy państwowej z Republiką Białorusi.*

<sup>25</sup> CoE Commissioner for Human Rights, ‘Poland: all laws and practices related to the situation on the border with Belarus should comply with human rights standards’, 23 July 2024, <https://www.coe.int/en/web/commissioner/-/poland-all-laws-and-practices-related-to-the-situation-on-the-border-with-belarus-should-comply-with-human-rights-standards>; Polish Human Rights Commissioner, ‘Stanowisko RPO dotyczące wprowadzenia strefy buforowej przy granicy z Białorusią’, 14 June 2024, <https://bip.brpo.gov.pl/pl/content/stanowisko-rpo-strefa-buforowa-granica>; HFHR, ‘Position statement by the Board of the Helsinki Foundation for Human Rights on the temporary ban on entry into the border zone’, 3 June 2024, <https://hfhr.pl/en/news/position-statement-by-the-board-of-the-helsinki-foundation-for-human-rights-on-the-temporary-ban-on>; SIP, ‘We disagree with a no-go border zone’, 11 June 2024, <https://interwencjaprawna.pl/en/we-disagree-with-a-no-go-border-zone/>;

<sup>26</sup> Polish Human Rights Commissioner, ‘Sprawa zatrzymanych...’, *op. cit.*

foreigner who receives the order is escorted to the border line – outside of the official border crossings – and forced to cross it, i.e., he/she is pushed back to Belarus.

**15. The introduction of Article 303b of the Act on Foreigners did not result in repealing §3(2b) of the Border Regulation.** As a result, both provisions are applied by the Border Guard in similar situations. The discretionary choice of procedure undermines the principle of legal certainty and makes the Border Guard's actions in individual cases even more arbitrary. No national provision explicitly resolves the conflict between these two legal acts.

**16. In October 2021, the Act on International Protection was also amended in order to enable denying access to asylum procedure for irregular entrants.** Since then, under Article 33(1a), the Head of the Office for Foreigners can refuse considering an asylum application of a person who has been apprehended just after his/her irregular entry, unless he/she arrived directly from a territory where he/she was in danger, reasonably explained the irregular entry, and applied for international protection straightaway upon this entry.

**17. These amendments of the Act on Foreigners and Act on International Protection were also much criticized.** OSCE ODIHR called on the Polish authorities to abandon the idea of adopting these new laws. In particular, it claimed that the procedure based on the drafted Article 303b of the Act on Foreigners can lead to violations of Article 33 of the Geneva Convention and Article 2 and 3 of the ECHR.<sup>27</sup> The CoE Commissioner for Human Rights mirrored this opinion:

“Poland’s current legislation on access to territory and international protection, which allows for immediate returns to the border of persons who entered the territory outside of official border crossings, undermines the right to seek asylum and the crucial safeguards associated with it, including the right to effective remedies. It must be amended to enable those found on the territory of Poland to enter the asylum procedure and have their individual situation assessed in all cases”.

The UN Special Rapporteur on the human rights was “deeply concerned about the legislative framework adopted by Poland allowing the practice of pushbacks, in violation of international human rights and refugee law”. In particular, he criticized the introduction of Article 33(1a) of the Act on Protection. Thus:

“The Special Rapporteur urges Poland to review its legislation and to put an end to pushback practices, to respect fully the prohibition of collective expulsion, to uphold the principle of non-refoulement and to ensure access to asylum procedures and individual assessment of the protection needs of migrants, without discrimination, regardless of their status and country of origin”.<sup>28</sup>

These critical comments are in line with the opinions of Polish civil society indicating that the amendments of October 2021 violate international, EU and domestic laws.<sup>29</sup>

### III. JUDICIAL RESPONSE TO THE CRISIS AT THE POLISH-BELARUSIAN BORDER

**18.** The widespread critical assessment of the laws and practices applied at the Polish-Belarusian border was followed by the judiciary, as exemplified below. Removals under §3(2b) of the Border Regulation can be challenged before the

<sup>27</sup> OSCE ODIHR, *op. cit.*, 11-17.

<sup>28</sup> UN Special Rapporteur on the human rights of migrants, *op. cit.*, 17.

<sup>29</sup> See e.g. HFHR, ‘The Lawless Zone’, *op. cit.*, 27-28; SIP, ‘SIP in Action’, 2022, *op. cit.*, 9-10; Amnesty International, ‘Poland: Cruelty Not Compassion, at Europe’s Other Borders’, 11 April 2022, <https://www.amnesty.org/en/documents/eur37/5460/2022/en/>, 5.

administrative court. An order to leave the territory of Poland based on Article 303b of the Act on Foreigners can be appealed to the Chief Commander of the Border Guard and next to the administrative court. However, these complaints do not entail a suspensive effect, so they are not effective remedies.<sup>30</sup> Moreover, in practice, they are rarely submitted.<sup>31</sup>

## 1. JUDICIAL RESPONSE TO THE AMENDMENT OF THE BORDER REGULATION

**19. As the first in Poland, the District Court in Bielsk Podlaski, in its decision of 28 March 2022, no. VII Kp 203/21, concluded that pushbacks at the Polish-Belarusian border are inhuman, illegal and based on incorrectly adopted law.**<sup>32</sup> The case concerned detention in the Border Guard's outpost of three Afghan nationals before their pushback to Belarus. The court found deporting the foreigners to the woods, without proper equipment and in the middle of the night, to be highly inhumane. Moreover, procedural rights of the third-country nationals were breached too: their detention was not documented, no interpreter was made available, the legal representative was not able to contact them, and they were not informed about their rights. Lastly, according to the court, the Border Regulation was adopted in excess of the Ministry's powers provided for in Article 16(3), point 2 of the State Border Protection Act.<sup>33</sup>

**20. The Voivodeship Administrative Court in Białystok considered several cases concerning third-country nationals removed from Poland under §3(2b) of the Border Regulation.**<sup>34</sup> Its jurisprudence unequivocally and consistently confirms that the Border Regulation, and the act of removing individuals to the border line as defined therein, are significantly flawed. According to this court, the Border Regulation violates, on the one hand, the international law related to human rights protection, and, on the other hand, the principles of legality/rule of law and the hierarchy of legal sources.

**21. The Voivodeship Administrative Court in Białystok highlighted that Poland, as a party to the Geneva Convention, is obliged to adhere to the principle of non-refoulement** wherever its jurisdiction extends, meaning when a person is under the effective control of the state authorities. In each of the cases examined, the court held that the act of removing the complainants to the border line as specified in §3(2b) of the Border Regulation violated the principle of non-refoulement and breached Article 33(1) of the Geneva Convention.

**22. The court also stated that the Border Guard's failure to consider the situation in Belarus and the circumstances of the humanitarian crisis at the Polish-Belarusian border contributed to a violation of the principle of non-refoulement.** In the cases considered by the court, the Border Guard did not investigate the situation at the border, particularly it ignored the information on how migrants were treated by the Belarusian forces, whether they were subjected to violence, and whether removing them to Belarus would put their life at risk, or expose them to torture or inhuman treatment. The court further emphasized that it is irrelevant whether a third-country national had previously entered Belarus legally

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<sup>30</sup> See e.g. CoE Commissioner for Human Rights, 'Commissioner calls for...', *op. cit.*

<sup>31</sup> SIP and FIPP, *op. cit.*, 7.

<sup>32</sup> SIP, 'Pushbacks are inhumane...', *op. cit.*

<sup>33</sup> *Ustawa z dnia 12 października 1990 r. o ochronie granicy państwowej.*

<sup>34</sup> Judgments of 15 September 2022, in cases no. II SA/Bk 492/22, no. II SA/Bk 493/22 and no. II SA/Bk 494/22; judgment of 13 April 2023, in case no. II SA/Bk 145/23; judgment of 30 May 2023, in case no. II SA/Bk 244/23; and judgment of 18 January 2024, in case no. II SA/Bk 664/23; judgments of 5 March 2024 in case no. II SA/Bk 71/24 and in case no. II SA/Bk 72/24.

or not. Moreover, it did not consider relevant for its findings that the complainants entered Poland irregularly.

**23. The prohibition of collective expulsions, as provided for in Article 4 of Protocol No. 4 to the ECHR, was also considered violated.** In all its rulings, the Voivodeship Administrative Court in Białystok noticed that the Border Guard authority, before removing a third-country national to the border line, did not examine the individual's personal situation (e.g. his/her medical condition or age), did not collect any evidence, and did not verify the factual circumstances of the case. Moreover, it did not take into account the situation at the Polish-Belarusian border. In those circumstances, the court had no doubt that the Border Guard violated its obligation to individually assess each case and, in consequence, collectively expelled the complainants.

**24. Removals to the border line were also considered incoherent with a right to asylum.** According to the Voivodeship Administrative Court in Białystok, each – even only verbal – declaration by a third-country national regarding his/her intention to apply for international protection should be accepted by the Border Guard. A third-country national making such a declaration should be provided with the opportunity to submit a formal application in this regard as quickly as possible and should be treated as an asylum seeker from the very beginning, enjoying the right to remain in Poland until his/her application is considered. Importantly, the court indicated that §3(2b) of the Border Regulation does not allow for accepting asylum applications and for this reason it is inconsistent with Article 56(2) of the Constitution of the Republic of Poland and Article 18 of the EU Charter of Fundamental Rights. Both provisions guarantee a right to apply for international protection.

**25. In addition to these findings of human rights violations, the Voivodeship Administrative Court in Białystok indicated that, by introducing §3(2b) of the Border Regulation, the Minister of the Interior and Administration exceeded his statutory authorization.** Thus, the Border Regulation violates Article 92(1) of the Constitution of the Republic of Poland, which states that regulations are issued based on specific authorization contained in a law and solely for its implementation, within the scope of matters assigned for regulation and guidelines concerning the content of the act. Moreover, the court found §3(2b) of the Border Regulation to be inconsistent with other national laws in force (e.g. the Act on International Protection) as well as EU and international law. Accordingly, applying §3(2b) of the Border Regulation conflicts with Article 7 (the principle of the rule of law) and Article 87(1) (the principle of the hierarchy of legal sources) of the Constitution of the Republic of Poland. Border Guard cannot apply the regulation that was defectively adopted and violates national, EU and international law. Thus, according to the court, §3(2b) of the Border Regulation should be considered unenforceable.

## 2. JUDICIAL RESPONSE TO THE AMENDMENT OF THE ACT ON FOREIGNERS

**26. The Voivodeship Administrative Court in Warsaw identified several procedural shortcomings in the way that Article 303b of the Act on Foreigners is applied that contributed to finding the principle of non-refoulement violated.** In its judgment of April 26, 2022, case no. IV SA/Wa 420/22, the court found that the actions taken by the Border Guard before issuing a decision based on Article 303b of the Act on Foreigners, which are limited to drawing up a short protocol, are insufficient to determine all essential circumstances of the case. The court noted that the protocol presented by the Border Guard only indicated when and in what area of the border (without specifying the exact location) the third-



country national irregularly crossed the border. This document did not specify the circumstances or reasons for crossing the border. These procedural deficiencies might have led to a violation of the principle of non-refoulement. According to the Court, this principle applies to all third-country nationals, including those at the state's borders, regardless of how they arrived there and how they crossed the border (regularly or not). Moreover, the principle of non-refoulement cannot be excluded or suspended by the state authorities even in the event of a border crisis.

**27. In April 2022, the Voivodeship Administrative Court in Warsaw concluded that the evidence collected by the Border Guard before issuing the decisions based on Article 303b of the Act on Foreigners was insufficient to determine whether the third-country nationals intended to apply for international protection in Poland.**<sup>35</sup> According to the Court, the information provided in the protocols was inadequate. Moreover, the Border Guard failed to consider the situation at the Polish-Belarusian border, especially the inhuman treatment of migrants by the Belarusian forces. Meanwhile, taking this information into consideration was essential for determining whether issuing and executing the order to leave Poland did not violate the right to life and prohibition of torture and inhuman treatment (as provided for in Articles 2 and 3 ECHR). The Court emphasized that it did not matter whether the foreigner entered Belarus legally or not. Instead, it was crucial that the border crisis exposed third-country nationals to the extreme conditions that violated their dignity and endangered their life and limb. A similar opinion was voiced by the Voivodeship Administrative Court in Warsaw in its judgment of 5 October 2022, case no. IV SA/Wa 1031/22. In this judgment, the Court listed the shortcomings of the Border Guard's actions, including the lack of conducting evidentiary proceedings. Most importantly, the Border Guard did not interview the concerned third-country national.

### 3. JUDICIAL RESPONSE TO THE HUMAN RIGHTS SITUATION IN BELARUS

**28. The gravity of the ongoing human rights violations in Belarus is recognized by the Polish courts.** The Supreme Court, in its extradition decision of May 30, 2023 (no. III KK 265/21), referred to the Ministry of Justice's letter dated November 24, 2022, which indicated that "the Republic of Belarus is a non-democratic, authoritarian state and does not respect the standards of rule of law and protection of human and civil rights." The court also had no doubt that:

**"(T)he Republic of Belarus is a dangerous state that does not guarantee the observance of basic human rights both for foreigners and its own citizens. This is further evidenced by reports on the situation of migrants on the Polish-Belarusian border.** The website of Human Rights Watch contains many confirmed testimonies of brutality by Belarusian forces ([https://\[...\]](https://[...])). They show that abuse of people by Belarusian forces at the border is equal to inhuman or degrading treatment or punishment and can be considered torture in certain cases, which is a violation of Belarus' international legal obligations."

The Supreme Court also underlined that:

**"Under such circumstances, any forced expulsion from the territory of the Republic of Poland to Belarus is also inadmissible in extradition procedures or on the basis of concluded international agreements on legal assistance. In accordance with the Polish Constitution, fundamental human rights are guaranteed to everyone who resides on the territory of Poland, regardless of**

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<sup>35</sup> Judgments of 27 April 2022, case no. IV SA 471/22, of 20 May 2022, case no. IV SA/Wa 615/22, and of 27 May 2022, case no. IV SA/Wa 772/22.

whether he is a Polish citizen or a foreigner, regardless of how he found himself in Poland. The surrender of such a person to a country in which there is no guarantee that these rights will be respected and which is treated by the authorities of the Republic of Poland as a hostile state, complicit in the crime of aggression, would constitute a flagrant violation of these very basic rights in constitutional freedoms, regardless of the procedure by which the removal of the person in question would take place.”

#### IV. CONCLUDING REMARKS

**29. Polish courts invariably claim that the practice of removing irregular migrants to Belarus – without a proper examination of their individual situation and asylum claims – violates domestic, EU and international law, including the ECHR.** The domestic laws legitimizing pushbacks have been criticized since their adoption by national and international organizations and institutions. Despite the strong position of the judiciary and other entities against the pushback laws and practices applied at the Polish-Belarusian border, as of October 2024, third-country nationals continue to be pushed back to Belarus and subjected to inhuman and degrading treatment both in Poland and Belarus.<sup>36</sup>

**30. In September 2024, upon his visit in Poland, the CoE Commissioner for Human Rights urged Poland “to respect its international human rights obligations on the Belarusian border”.** He stated that:

“(…) Poland’s current summary return practice at the Polish-Belarusian border, facilitated by legislative changes adopted in Poland in 2021, does not allow for full respect of international human rights standards. The practice of summary returns of persons across the border to Belarus, without an individual assessment, including in some cases persons who have formally requested asylum on Polish territory, exposes them to the risk of serious violations of the rights protected by the European Convention on Human Rights.”<sup>37</sup>

**31. This third-party intervention confirms the Commissioner’s findings and conclusions. SIP and HFHR agree that pushbacks and violence observed since summer 2021 at the borders with Belarus are clearly incoherent with international human rights standards, in particular Article 3 ECHR and Article 4 of the Protocol no. 4 to the ECHR.**

On behalf of the Helsinki  
Foundation for Human Rights

Piotr Kłodoczyński



Vice President

On behalf of the Association  
for Legal Intervention

Katarzyna Słubik



President

<sup>36</sup> See e.g. Polish Human Rights Commissioner, ‘Sprawa zatrzymanych ...’, *op. cit.*; SIP, ‘Current situation on the Polish-Belarusian border – statement by Grupa Granica’, 11 July 2024, <https://interwencjaprawna.pl/en/current-situation-on-the-polish-belarusian-border-statement-by-grupa-granica/>; Grupa Granica, ‘August 2024. Report from the Poland-Belarus border’, September 2024, <https://wearemonitoring.org.pl/wp-content/uploads/2024/09/2407-ST-CM-August-2024-ENG.pdf>.

<sup>37</sup> CoE Commissioner for Human Rights, ‘Poland needs to respect its international human rights obligations on the Belarusian border, says Commissioner O’Flaherty’, 23 September 2024, <https://www.coe.int/en/web/commissioner/-/poland-needs-to-respect-its-international-human-rights-obligations-on-the-belarusian-border-says-commissioner-o-flaherty>.