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Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

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Meeting: 1459th meeting (March 2023) (DH)

Communication from NGOs (Association for Legal Intervention and the Rule of Law Institute) (27/02/2023) in the case of M.K. and Others v. Poland (Application No. 40503/17).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1459^e réunion (mars 2023) (DH)

Communication d'ONG (Association for Legal Intervention and the Rule of Law Institute) (27/02/2023) dans l'affaire M.K. et autres c. Pologne (requête n° 40503/17) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Warsaw, 27 February 2023

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SERVICE DE L'EXECUTION
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Department for the Execution of Judgments of the ECHRSERVICE DE L'EXECUTION
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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

I. Introduction

Under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, the Association for Legal Intervention (*Stowarzyszenie Interwencji Prawnej*, SIP) and the Rule of Law Institute (*Fundacja Instytut na rzecz Państwa Prawa*, RLI), hereby present a communication regarding the execution of the European Court of Human Rights' (hereinafter: ECtHR) judgment in the case of *M.K and Others v. Poland* (23 July 2020, nos. 40503/17, 42902/17 and 43643/17).

SIP is a Polish professionalised non-governmental organization, based in Warsaw, established in 2005 with the aim of combating social exclusion as well as protecting and advancing the rights of foreigners, including asylum seekers and migrants. For many years, SIP has been providing legal assistance to persons refused entry at the Polish borders, including asylum seekers. With regard to the humanitarian crisis at the Polish-Belarusian border, SIP have been collaborating with other Polish NGOs within the 'Grupa Granica' initiative. Since 2021, the NGOs have been providing humanitarian and legal assistance to third-country nationals stranded at the Polish-Belarusian border. SIP also actively takes part in the 'Protecting Rights at Borders' (PRAB) initiative of the Danish Refugee Council by gathering information about the situation at the Polish borders, especially about the pushbacks to Belarus. SIP is also a member of the EUAA Consultative Forum.

RLI is an independent non-profit NGO established in 2001 by Polish and American lawyers representing different backgrounds and generations – both from academia and practice. RLI is based in Lublin (eastern Poland), where it is involved in research activities, legal training and providing free legal assistance. In

order to promote standards of civil society, RLI undertakes actions focused on increasing access to justice for people who are threatened by marginalization and social exclusion. Since the very beginning, RLI has focused on providing legal aid to refugees and migrants. The Institute also takes part in comparative law research projects thanks to many cooperative relations with legal research organizations from other countries. RLI is a member of the EUAA Consultative Forum. Since July 2022, RLI – as an UNHCR-partner organization – has been involved in more than 70 border interventions in Terespol, a Polish-Belarusian border crossing point, assisting asylum seekers, who have reported problems with applying for international protection in Poland.

In the *M.K. and Others v. Poland* judgment, the ECtHR concluded that the applicants were not allowed to enter Poland and seek asylum there, but instead they were summarily returned to Belarus, with no effective remedy available, in violation of Article 3 ECHR, Article 4 of the Protocol no. 4 to the ECHR and Article 13 ECHR. These findings have been subsequently repeated in the following judgments concerning similar factual situations: *D.A. and Others v. Poland*, no. 51246/17, 8 July 2021; *A.I. and Others v. Poland*, no. 39028/17, of 30 June 2022; *A.B. and Others v. Poland*, 42907/17, 30 June 2022; *T.Z. and Others v. Poland*, no. 41764/17, 13 October 2022.

Despite this clear disapproval of the practice of not allowing entry to asylum seekers, the situation of asylum seekers approaching the official check points located at the Polish-Belarusian border has not improved since the *M.K. and Others v. Poland* case. Some asylum seekers are still denied entry to Poland, their cases are not individually examined, and they are collectively expelled to Belarus. The rules as regards remedies against decisions on a refusal of entry have not been amended as well.

In addition, as has been already indicated in the earlier communications of the civil society organizations and academic institutions submitted to the Committee of Ministers, the situation at the Polish-Belarusian border significantly deteriorated since August 2021. Daily, third-country nationals trying to irregularly enter Poland are being pushed back to Belarus by the Polish authorities. Asylum claims are often ignored in those circumstances, and the effective remedies are not available. Three cases have been already communicated to the Polish government in this respect: *R.A. and Others v. Poland*, no. 42120/21; *K.A. and M.A. and Others v. Poland*, nos. 52405/21 and 53402/21; *F.A. and S.H. v. Poland*, no. 54862/21. Other applications are awaiting communication.¹

In this submission, SIP and RLI would like to share the most recent information concerning the situation at the Polish-Belarusian border – both with regard to the official border check points and irregular border

¹ See e.g. SIP, 'We are suing Poland for pushbacks on the border with Belarus', 27 October 2022, <https://interwencjaprawna.pl/en/we-are-suing-poland-for-push-backs-on-the-border-with-belarus/>.

crossings, as well as to address some comments of the Polish government submitted in 2023 to the Committee of Ministers in this regard.

II. Official border check points at the Polish-Belarusian border

The situation at the official check points located at the Polish-Belarusian border has not improved since 2016. Some asylum seekers are still denied entry to Poland there; their asylum claims are not heard nor individually assessed. Moreover, against the Polish and EU law, decisions on a refusal of entry are now not issued to all third-country nationals denied entry to Poland.

Between July 2022 and February 2023, RLI assisted with submitting 70 applications for international protection (covering 219 persons) in Terespol.² In most of these cases applicants were earlier “unofficially” returned to Belarus by the Polish Border Guard officers, who did not even put a stamp in the foreigners’ passports.³ Decisions on a refusal of entry were issued only in cases of the third-country nationals with the SIS entry ban or foreigners using forged travel documents. Many of the asylum applicants entering Poland during this period had *prima facie* evidence of being victims of torture (related to forced mobilization). Nevertheless, to access Polish territory, they often needed three or four entry attempts. RLI is also aware of a Chechen single mother with 8 children asking for international protection in Terespol, who was pushed back to Belarus at least 8 times between 13 October 2022 and 21 December 2022.⁴ Experience of this family is not different of dozens of other cases reported to RLI in the second half of 2022. Our daily border observation during this period shows that usually Border Guard in Terespol was accepting only 1-2 asylum applications per day.

Another example of a flagrant violation of the principle of non-refoulement at the Polish border, was the case of asylum seekers – I.S. and his family – who were 8 times pushed back from Terespol to Belarus in 2017. This was followed by the six-month imprisonment in Belarus and the deportation to Russia. The asylum seeker faced persecution after seeking remedy against Russian Federation in the ECtHR.⁵ When the Belarusian entry ban expired, I.S. attempted to seek international protection in Poland on 13 October 2022, but he was pushed back again (without a refusal of entry decision). After the RLI’s intervention,⁶ on

² In fact, the demand for assistance was much greater. RLI estimates that we could support only 10% of asylum seekers attempting to enter Poland via the Brest-Terespol border, who were fleeing the Russian Federation after announcing mobilization.

³ It is evidenced by the passports deposited by the Head of the Office for Foreigners, where several exit stamps from the Belarus border guard and only one Polish entry stamp were put. Further proof, gathered by RLI, includes witnesses testimonies and video recordings.

⁴ Letter to the Commander of the Terespol Border Guard of 20 December 2022 (no. IPP-TS-10/12/2022).

⁵ ECtHR, *Petimat Ismailova and Others v. Russia*, nos. 25088/11 etc., Judgment of 18 September 2014.

⁶ Letter to the Commander of the Terespol Border Guard of 15 October 2022 (no. IPP-TS-5/10/2022).

19 October 2022, he was finally allowed to lodge an asylum application in Poland. It has been his tenth attempt to enter Poland.

In addition to unlawful practice of denying entry to asylum seekers, the access to international protection in Poland has been hampered to a great extent in the recent years due to the COVID-19 pandemic restrictions. The train connection between Brest and Terespol – the means of transport that was most often used by asylum seekers attempting to enter Poland for many years – has been suspended in mid-March 2020. Nowadays, asylum seekers very often report that to cross the border by car they need to pay private drivers 400-900 EUR. Not many persons can afford multiple attempts to cross the border in this way.⁷

Those recent developments clearly show that the situation at the official check points at the Polish-Belarusian border has worsened since 2016/2017, when M.K. and other applicants received decisions on a refusal of entry to Poland. The practice of denying entry to asylum seekers in Terespol, by misrepresenting their statements in the official documents prepared by the Polish Border Guard and issuing decisions on a refusal of entry, was condemned not only by the ECtHR in the *M.K. and Others v. Poland* judgment, but also by the Polish Supreme Administrative Court.⁸ Despite the domestic court's rulings, no official protocols are drawn up at the border, only some internal notes of the Border Guard (in Polish) are included into the case files. Moreover, the third-country nationals' lawyers are not allowed to take part in the proceedings at the border.

The Polish law concerning decisions on a refusal of entry was not amended in the recent years. In particular, the rules as regards remedies have not been changed. A third-country national can appeal against a decision on a refusal of entry, but it does not entail a suspensive effect. Hence, even if a prospective asylum seeker appeals directly at the border crossing, he/she is still returned to Belarus. Thus, there is no effective remedy in this respect in Poland. Moreover, the ineffectiveness of this remedy is indirectly confirmed by the fact that appeal proceedings in this regard are in practice initiated rarely. For instance, in 2022, 28.170 decisions on a refusal of entry were issued in Poland. At the Polish-Belarusian border, 2.623 such decisions were issued throughout the year.⁹ Meanwhile, with regard to all border crossings, only 80 appeals against decisions on a refusal of entry were submitted to the first-instance

⁷ When the train connection was operating, a Russian woman – N.M. – was only able to submit asylum application after 71 unsuccessful attempts to do so in Terespol. RLI intervened and N.M. finally applied for international protection during her 72nd attempt. Intervention letter to the Commander of Border Guard in Terespol of 16 September 2019 (no. IPP-TS-4/9/2019).

⁸ See e.g. Supreme Administrative Court (*Naczelny Sąd Administracyjny*), judgment of 17 May 2018, no. II OSK 2766/17 and two judgments of 20 September 2018, no. II OSK 345/18 and no. II OSK 890/18.

⁹ Border Guard, 'Informacja statystyczna za 2022 r.', January 2023, <https://strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html>.

appeal authority and 1 onward appeal to the court. Only one appeal has been considered justified by the Commander-in-Chief of the Border Guard.¹⁰

Despite the strong standing of the ECtHR as regards the need to provide for an access to Polish territory and asylum at the Polish-Belarusian border, the condemned national policy of ignoring asylum claims, has not been changed. The Polish government took no measures aiming at solving the underlying problem and it clearly does not envisage taking such measures in the future. It is confirmed by the government's replies of 26 January and 15 February 2023, where no such measures – adopted or planned – are mentioned. Overall, the Polish government just denied the existence of the policy that was condemned by the ECtHR in the *M.K. and Others v. Poland* case.

The Polish government in its replies of 26 January and 15 February 2023 also stated that systemic changes in Polish law may be introduced upon the adoption of the 'New Pact for Migration and Asylum'. This statement requires two comments. First, it is unknown whether the Pact will be agreed on by the EU Member States. Second, as it is the draft EU law it must be in accordance with the Charter of Fundamental Rights of the EU (hereinafter: CFREU); thus, also in accordance with the ECHR, including Articles 3 and 13 of the Convention as well as Article 4 of the Protocol no. 4 thereto. There is then no reason for the Polish government to wait for the new EU legislation – the changes expected by the *M.K. and Others v. Poland* judgment may – and should – be introduced straightaway, both in law and practice.

The Polish government also recalls, in its letter of 26 January 2023, that the Polish law is based on the EU law, in particular on the Schengen Borders Code¹¹. While it is true that Article 14(3) of this Regulation states that lodging an appeal against a decision on a refusal of entry shall not have suspensive effect, it must be reminded that Article 47 of the CFREU – which is based on Article 13 ECHR¹² – requires effective remedies in all national proceedings, including those relating to entry.¹³ This is EU primary law and as such should have a priority before secondary law, including the Schengen Borders Code.

Moreover, in its reply of 15 February 2023, the Polish government stated that the decisions on a refusal of entry are issued only if an application for international protection has not been submitted. It is true, but only in law, not in practice. The Polish law does guarantee access to asylum and Polish territory to

¹⁰ Data made available to SIP by the Polish Border Guard. Data concerning appeals against the decisions issued at the Polish-Belarusian border are not available to SIP.

¹¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016R0399>.

¹² 'Explanations Relating to the Charter of Fundamental Rights' (2007/C 303/02), OJ C 303/17, 14 December 2007.

¹³ See e.g. CJEU, joint cases C-225/19 and C-226/19 *Minister van Buitenlandse Zaken*, judgment of 24 October 2020, where the CJEU applied Article 47 CFREU to visa proceedings.

those seeking protection. This law is, however, often not observed by Polish authorities deciding on entry to Poland from Belarus. It was a case in 2016/2017, when M.K. and other applicants were denied entry to Poland, and it is still a problem nowadays, as has been explained above.

Moreover, the Polish government claimed in the same letter that the number of decisions on a refusal of entry is in decline and that the number of asylum applications has grown in the recent years. However, to prove that points, the government compared the statistical data for 2019 with the data for the pandemic years of 2020-2021. Those data are incomparable. It is a well-known fact that the COVID-19 pandemic, especially at its beginning, strongly affected international travels and hampered seeking international protection in Europe and beyond. For instance, due to pandemic, border crossings in Poland were closed, so no asylum applications could be submitted there¹⁴ and no decisions on a refusal of entry were issued then. Moreover, as explained above, in 2022 asylum seekers were denied entry to Poland and expelled to Belarus without refusal of entry decisions being issued. Furthermore, currently, there is only one border check point where the Polish-Belarusian border can be crossed in a regular manner. Moreover, when the COVID-related measures were mitigated and finally ceased, in 2021-2022, more persons decided to seek protection in Europe, including Poland. However, in the Polish context, many of them were forced to enter Poland irregularly instead of approaching the official check points at the Belarusian border. No decisions on a refusal of entry are issued in those circumstances, as explained in more detail below. Thus, the decline of the number of decisions on a refusal of entry and the increase in the number of asylum applications in the most recent years, is intertwined with many different factors, and cannot be seen as a proof that the policy at the Polish-Belarusian border has changed.

III. Humanitarian crisis at the Polish-Belarusian border

Since August 2021, third-country nationals trying to irregularly enter Poland are pushed back to Belarus. Pushbacks are reported irrespective of a nationality or vulnerability of persons concerned, including families with children, pregnant women, elderly, disabled and ill persons. Asylum claims of the persons crossing the Polish-Belarusian border in an irregular manner are often ignored by the Polish authorities. They are pushed back despite their pleadings for international protection.

Those third-country nationals are not receiving decisions on a refusal of entry. Some of them are being pushed back without any decision being made beforehand, in accordance with the Regulation of the

¹⁴ Moreover, the Ministry of Interior and Administration's Regulation of 13 March 2020 – which was adopted in a response to a COVID-19 pandemic to limit travel via the external EU border (still in force) – does not mention that asylum seekers are entitled to enter Poland despite the introduced limitations. *Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 13 marca 2020 r. w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych*, <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000435>.

Ministry of Interior and Administration of 20 August 2021.¹⁵ Others receive decisions based on Article 303b of the Act on Foreigners,¹⁶ in force since October 2021, that enables ordering an immediate removal of a person who crossed a border in an irregular manner and who has been immediately apprehended. Moreover, also since October 2021, 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 crossing of the border, 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 (Article 33(1a) of the Act on Protection¹⁷).

The abovementioned law attempting to legitimize pushbacks is used in practice. Only in 2022, 2,549 decisions on immediate removal were issued under Article 303b of the Act on Foreigners. In this period, the Border Guard registered also 12,144 'preventions of irregular crossings of the border'. This new statistical category has been introduced to gather data concerning persons who managed to avoid interception at the border (e.g. they run away from Polish officers to Belarus) and persons who were returned to Belarus in accordance with the Regulation of 20 August 2021.¹⁸ Article 33(1a) of the Act on Protection has been also applied in practice by the Head of the Office for Foreigners.

There is no effective remedy against those decisions and actions of Polish authorities. While a decision based on Article 303b of the Act on Foreigners may be appealed, an appeal does not entail a suspensive effect – the person concerned is immediately taken back to the Polish border and forced to leave Poland. In its reply of 15 February 2023, the Polish government shared some statistical data regarding remedies in those proceedings. According to this information, only 11 decisions based on Article 303b of the Act on Foreigners – out of several thousand – were challenged before the Polish administrative courts. The governmental data only confirm that this remedial pathway is ineffective for the majority of the affected third-country nationals.

The Regulation of the Ministry of Interior and Administration of 20 August 2021 as well as the new additions to the Act on Foreigners of October 2021, have prompted a profound criticism of the civil society organisations and human rights institutions.¹⁹ In a few cases that – despite all odds – managed to

¹⁵ *Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 20 sierpnia 2021 r. zmieniające rozporządzenie w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych*, <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210001536>.

¹⁶ *Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach*, <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20130001650>.

¹⁷ *Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej*, <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20031281176>.

¹⁸ PRAB, 'Beaten, punished and pushed back', January 2023, <https://pro.drc.ngo/media/cxihgutp/prab-report-january-to-december-2022.pdf>, based on statistical information provided to SIP by the Polish Border Guard.

¹⁹ See e.g. SIP, 'SIP in Action. Report on the activities of the Association for Legal Intervention (SIP) in 2021', <https://interwencjaprawna.pl/wp-content/uploads/2022/06/RAPORT-2022-ENG.pdf>, 8-10; K. Czarnota and M. Górczyńska,

reach Polish courts, the judiciary contested the new law as well.²⁰ With regard to the Regulation of 20 August 2021, the courts found that it has no legal basis in the Polish law, and it is incoherent with the Polish Constitution, the 1951 Refugee Convention and the CFREU.²¹ The courts also annulled several decisions based on Article 303b of the Act on Foreigners due to the lack of rigorous scrutiny on the part of the Border Guard, the incoherence with the principle of non-refoulement, and the lack of a suspensive effect of the available remedy.²²

In its response of 26 January 2023, '(w)ith regard to the issue of the guarantee of compliance with the principle of non-refoulement in the context of amendments in the domestic law', the Polish government relied on Article 56 of the Polish Constitution (a right to asylum), and indicated that '(a)ny lower level acts, such as statutes, cannot derogate from the provisions of the Constitution'. While it is indeed the most basic rule of the Polish law, national courts did conclude that the recent amendments to the Polish migration law are not coherent with the Polish Constitution and the principle of non-refoulement, as has been explained above.

In the same letter, the Polish government also claimed that Article 303b of the Act on Foreigners 'cannot be interpreted as a restriction on the possibility of submitting applications for international protection'. To prove this point, the government relied on the legislator's intentions expressed in the draft law. The aim of the new law was supposedly to enable access to asylum procedure to 'real' asylum seekers, and to expulse quickly those third-country nationals who want to abuse asylum proceedings. This statement requires two comments. First, there is no possibility to scrutinize asylum claims – and their credibility – within the Article 303b proceedings. In practice, those proceedings last at most couple of hours and no individual examination of a case is conducted. Moreover, under the Polish law, the Border Guard that issues decisions based on this provision is not entitled (and qualified) to assess asylum applications. This is a role of the Head of the Office for Foreigners. If an asylum application is made, the role of the Border Guard is limited to registering it and sending it to the Office for

'The Lawless Zone: Polish-Belarusian Border Monitoring', Helsinki Foundation for Human Rights (HFHR), June 2022, <https://archiwum.hfhr.pl/en/the-lawless-zone-12-months-of-the-polish-belarusian-border-crisis/>, 26-28; Amnesty International, 'Poland: Cruelty not Compassion, at the Europe's Other Borders', 11 April 2022, [Amnesty Public Statement](https://www.amnesty.org/en/documents/EUR60/001/2022/04/11/), 5.

²⁰ For the overview of the case-law, see HFHR, 'Helsinki Foundation for Human Rights' Legal Brief on Judgments in Cases Involving the Expedited Returns of Migrants to Belarus', December 2022, <https://hfhr.pl/upload/2022/12/hfhr-legal-brief-on-push-back-judgements-eng.pdf>.

²¹ See e.g. District Court in Bielsk Podlaski, VII Penal Division in Hajnówka (*Sąd Rejonowy w Bielsku Podlaskim, VII Zamięscowy Wydział Karny w Hajnówce*), order of 28 March 2022, no. VII Kp 203/21, <https://interwencjaprawna.pl/en/pushbacks-are-inhumane-illegal-and-based-on-illegal-regulation/>; Provincial Administrative Court in Białystok (*Wojewódzki Sąd Administracyjny w Białymstoku*), judgment of 15 September 2022, no. II SA/Bk 492/22, II SA/BK 493/22, II SA/Bk 494/22, <https://hfhr.pl/aktualnosci/nielegalne-pushbacki-a-odpowiedzialnosc-strazy-granicznej>.

²² See e.g. Provincial Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*), Judgments of 27 April 2022, no. IV SA/Wa 471/22, and 26 April 2022, no. IV SA/Wa 420/22, <https://interwencjaprawna.pl/en/obligation-to-examine-whether-migrants-in-belarus-are-at-risk-of-torture-and-other-inhumane-treatment/>; Provincial Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*), judgment no. IV SA/Wa 615/22, <https://hfhr.pl/co-nowego/straz-graniczna-uchodzcy-syria-granica-bialorus-sad-uchyla-decyzje>.

Foreigners. There, the application is considered on admissibility and merits. Thus, under the Polish law, the Border Guard deciding on whether a third-country national should be immediately removed in accordance with Article 303b of the Act on Foreigners, cannot assess whether he/she is a 'real' asylum seeker. Second, in practice, asylum claims at the Polish-Belarusian are ignored irrespective of the reasons for seeking protection indicated by third-country nationals, or of the evidence that they show to the Border Guard's officers. Furthermore, the nationals of Syria and Afghanistan are reported to be amongst persons pushed back to Belarus,²³ while the recognition rate as regards those nationalities is high in Europe. The practice of applying Article 303b of the Act on Foreigners is then far away from the legislator's intentions, and the Polish authorities are doing nothing to address this problem.

The life and limb of the third-country nationals crossing the Polish-Belarusian border in an irregular manner, and being pushed back to Belarus, is at risk. Since the construction of the 5.5 meters-high razor-wired fence at this border in mid-2022, third-country nationals increasingly suffer from limbs' fractures; they are also at a greater risk of drowning and hypothermia. Limb frostbites and food poisoning due to the lack of access to drinking water, are also often reported.²⁴ As of 17 February 2023, at least 37 third-country nationals were found dead at the Polish-Belarusian border; more bodies are reported to be still lying in the woods surrounding the border.²⁵

In its reply of 15 February 2023, the Polish government informed that all persons in need of medical assistance receive it and that it is incorrect to state that the deaths at the Polish-Belarusian border are a result of the Polish policy of not accepting asylum applications. Meanwhile, it has been confirmed in many reports that ambulances have been denying assistance to third-country nationals stranded at the Polish-Belarusian border and that the Border Guard has been taking migrants from Polish hospitals and pushing them back to Belarus.²⁶ Third-country nationals are often pushed back to Belarus irrespective of their

²³ See e.g. Grupa Granica, 'Periodic report of Grupa Granica on the situation at the Polish-Belarusian border. December 2022-January 2023', 23 February 2023, <https://hfhr.pl/aktualnosci/raport-dzialania-grupy-granica-zima-2023>, 8; PRAB, 'Beaten, punished and pushed back', January 2023, <https://pro.drc.ngo/media/cxihgntp/prab-report-january-to-december-2022.pdf>.

²⁴ Grupa Granica, 'Periodic report of Grupa Granica on the situation at the Polish-Belarusian border. December 2022-January 2023', 23 February 2023, <https://hfhr.pl/aktualnosci/raport-dzialania-grupy-granica-zima-2023>, 3-4, 10-11; PRAB, 'Beaten, punished and pushed back', January 2023, <https://pro.drc.ngo/media/cxihgntp/prab-report-january-to-december-2022.pdf>.

²⁵ Grupa Granica, 'Periodic report of Grupa Granica on the situation at the Polish-Belarusian border. December 2022-January 2023', 23 February 2023, <https://hfhr.pl/aktualnosci/raport-dzialania-grupy-granica-zima-2023>, 3.

²⁶ See e.g. M.J. Pietrusińska, N. Gebert, 'Leczymy uchodźców. Raport oparty na relacjach pracowników przygranicznych placówek służby zdrowia', December 2021, <https://bit.ly/3sFrOhQ>; K. Czarnota and M. Górczyńska, 'The Lawless Zone: Polish-Belarusian Border Monitoring', HFHR, June 2022, <https://archiwum.hfhr.pl/en/the-lawless-zone-12-months-of-the-polish-belarusian-border-crisis/>, 16; Grupa Granica, 'Situation on the Polish-Belarusian border July - October 2022', <https://hfhr.pl/aktualnosci/dzialania-grupy-granica-od-lipca-do-pazdziernika-2022>, 4; Fundacja Ocalenie, 'Przemoc państwa i działania oddolne', May 2022, <https://ocalenie.org.pl/aktualnosci/przemoc-panstwa-i-dzialania-oddolne-raport-fundacji-ocalenie>, 41-42; Stowarzyszenie EGALA, 'Relacja pełnomocniczki wywiezionego obywatela Syrii', 13 October 2022, <https://egala.org.pl/relacja-pelnomocniczki-wywiezionego-obywatela-syrii/>; HFHR, 'Wojewódzki Sąd Administracyjny

medical condition. Moreover, as reported by civil society organizations, some of the persons that died in Poland near the Belarusian border had been pushed back from Poland before, or could have survived if the Polish authorities would – at all, properly or timely – react to the other migrants’ calls for help for the ill foreigner who they had to leave in the woods to seek medical assistance.²⁷

Criminalization of the humanitarian assistance at the Polish-Belarusian border continues. Since 2021, persons providing humanitarian assistance to third-country nationals crossing the Polish-Belarusian border were arrested, or misdemeanor proceedings were initiated against them. Force and intimidation are increasingly used against those persons too.²⁸ First judgments in criminal proceedings initiated against persons providing assistance near the border were delivered in 2022. For example, on the one hand, in July 2022, an activist who had transported an ill third-country national to the hospital was acquitted. The court reminded in its judgment that providing humanitarian assistance is not a crime.²⁹ On the other hand, another activist, who had showed Police where to seek third-country nationals in distress, was found guilty of insulting a policeman.³⁰ In yet another case, concerning the arrest of persons wanting to aid a Syrian national in hypothermia, and the seizure of their phones and rescue equipment, the court found actions of the Polish army legal (albeit noticed some procedural violations).³¹

The attempts to criminalize irregular border crossings by asylum seekers/refugees have been also reported in 2022. A Belarusian national who swam through the Bug River in order to seek asylum in Poland and, subsequently, was granted refugee status here, was charged with illegally crossing the border in collusion with other persons who allegedly had provided him with information about the lie of the land as well as with the means of transport (Article 264 §2 of the Polish Criminal Code). In June 2022, the

w Warszawie uchylił decyzję Straży Granicznej o zawróceniu obywatela Syrii do granicy z Białorusią’, 10 June 2022, <https://hfhr.pl/aktualnosci/straz-graniczna-uchodzcy-syria-granica-bialorus-sad-uchyla-decyzje>.

²⁷ See e.g. Stowarzyszenie EGALA, ‘Kolejna śmierć’, 14 January 2023, <https://egala.org.pl/kolejna-smierc/>; Stowarzyszenie EGALA, ‘Wczoraj, 12 lutego, odnaleziono ciało na pograniczu polsko-białoruskim’, 16 lutego 2023, <https://egala.org.pl/wczoraj-12-lutego-odnaleziono-cialo-na-pograniczu-polsko-bialoruskim-28-letnia-etiopka-zmarla-po-tym-jak-funkcjonariusze-polskich-sluzb-nie-udzielili-jej-pomocy-laczymy-sie-w-bolu-z-rodzina-i-bli/>. See also Grupa Granica, ‘Periodic report of Grupa Granica on the situation at the Polish-Belarusian border. December 2022-January 2023’, 23 February 2023, <https://hfhr.pl/aktualnosci/raport-dzialania-grupy-granica-zima-2023>, 3-5, for the list of factors increasing the risk of loss of life and health at the Polish-Belarusian border.

²⁸ See e.g. HFHR and Szpila Collective, ‘We are afraid they will shoot at some point. And it's not a joke, it can happen even by accident’, 31 January 2023, <https://hfhr.pl/aktualnosci/sprawozdanie-z-dzialan-antyrepresyjnych>; Fundacja Ocalenie, ‘Przemoc państwa i działania oddolne’, May 2022, <https://ocalenie.org.pl/aktualnosci/przemoc-panstwa-i-dzialania-oddolne-raport-fundacji-ocalenie>, 24-27.

²⁹ Stowarzyszenie Egala, ‘Sąd uniewinnił aktywistę’, 20 July 2022, <https://egala.org.pl/sad-uniewinnil-aktywiste/>.

³⁰ Stowarzyszenie Egala, ‘Aktywistka winna. Wyrok w sprawie Elżbiety Podlesnej’, 16 September 2022, <https://egala.org.pl/aktywistka-winna-wyrok-w-sprawie-elzbiety-podlesnej/>; Stowarzyszenie Egala, ‘Saga sądowa Elżbiety Podlesnej trwa’, 16 February 2023, <https://egala.org.pl/saga-sadowa-elzbiety-podlesnej-trwa/>.

³¹ Information from Fundacja Ocalenie, 27 January 2023.

District Court in Biała Podlaska discontinued those criminal proceedings. The court noticed that Article 31(1) of the 1951 Refugee Convention provides for a conditional de-penalisation of illegal border-crossing by refugees, and the defendant did apply for asylum straightaway after his arrest.³²

Lastly, one more argument of the Polish government must be addressed. In its reply of 26 January 2023, the government claimed that third-country nationals are not interested in staying in Poland and seeking international protection therein. While it is true that Poland is mostly a transit country, this fact does not relive Poland from its obligations arising from Article 3 ECHR. The prohibition of torture, inhuman or degrading treatment or punishment is of absolute character. It is well-established by the ECtHR, that a third-country national cannot be removed to a country where there may be a risk of a treatment contrary to Article 3 ECHR. Direct and indirect refoulement are prohibited. Meanwhile, many reports confirm the ill-treatment that third-country nationals have been subjected to in Belarus since the beginning of the humanitarian crisis at the Polish-Belarusian border.³³ Moreover, as also has been established in the *M.K. and Others v. Poland* case, some asylum seekers are at risk of being removed from Belarus to their countries of origin irrespective of the risks upon their return.³⁴ In practice, those well-known risks – both in Belarus and upon expulsion from Belarus – are often not taken into account by Polish authorities when they apprehend third-country nationals near the Polish-Belarusian border. They just push them back to Belarus, not considering at all what will happen to them next.

IV. Conclusions

The general measures required by the *M.K. and Others v. Poland* judgment have not been implemented in Poland. Not only the situation at the official border check points have not changed since 2016/2017, when the M.K. and other applicants were denied entry to Poland, but also the situation at the Polish-Belarusian border significantly deteriorated since August 2021. The rights of third-country nationals, including asylum seekers, arising from Article 3 ECHR, Article 4 of the Protocol no. 4 to the ECHR and Article 13 ECHR, are violated on a daily basis at the Polish-Belarusian border.

³² District Court in Biała Podlaska (*Sąd Rejonowy w Białej Podlaskiej*), judgment of 3 June 2022, no. II K 796/21; SIP, 'Criminal proceedings against a refugee for illegally crossing the Polish border discontinued', 27 July 2022, <https://interwencjaprawna.pl/en/criminal-proceedings-against-a-refugee-for-illegally-crossing-the-polish-border-discontinued/>.

³³ See e.g. Amnesty International, 'Poland: Cruelty not Compassion, at the Europe's Other Borders', 11 April 2022, [Amnesty Public Statement](#), 14-15; Human Rights Watch, 'Violence and Pushbacks at Poland-Belarus Border', 7 June 2022, <https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>; PRAB, 'Beaten, punished and pushed back', January 2023, <https://pro.drc.ngo/media/cxihgntp/prab-report-january-to-december-2022.pdf>, 16; Grupa Granica, 'Periodic report of Grupa Granica on the situation at the Polish-Belarusian border. December 2022-January 2023', 23 February 2023, <https://hfhr.pl/aktualnosci/raport-dzialania-grupy-granica-zima-2023>, 10.

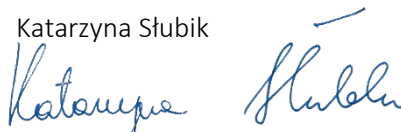
³⁴ See e.g. Amnesty International, 'Poland: Cruelty not Compassion, at the Europe's Other Borders', 11 April 2022, [Amnesty Public Statement](#), 15-16.

For those reasons, we call on the Committee of Ministers of the Council of Europe to:

1. demand from the Polish government a full and effective execution of the *M.K. and Others v. Poland* judgment, in particular as regards general measures,
2. urge Polish authorities to refrain from the practice of pushing third-country nationals back to Belarus, and to respect the principle of non-refoulement at the Polish-Belarusian border, both at the regular and irregular border crossings;
3. urge Polish authorities to repeal Article 303b of the Act on Foreigners, Article 33(1a) of the 2003 Act on Protection, and the Regulation of the Ministry of Interior and Administration of 20 August 2021,
4. schedule the case again for a debate in December 2023 with a view to assess the full and effective implementation of the general measures required by the *M.K. and Others v. Poland* judgment.

On behalf of Association for Legal Intervention and Rule of Law Institute,

Katarzyna Słubik



President of the Board
Association for Legal Intervention

Contact details:

Association for Legal Intervention

Siedmiogrodzka 5/51

01-204 Warsaw, Poland

www: <https://interwencjaprawna.pl/en>

email: biuro@interwencjaprawna.pl

Rule of Law Institute

Chopina 14/70

20-023 Lublin, Poland

www: www.panstwoprawa.org