The Commissioner
Le Commissaire

COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Ref: CommHR/MOF/sf 031-2025

Ms Małgorzata KIDAWA-BŁOŃSKA
Marshal of the Senate of the Republic of Poland

Strasbourg, 4 March 2025

Dear Marshal,

Further to my previous letter regarding the draft law proposing, among other things, to exempt from criminal liability certain categories of state agents deployed in border areas, I write to continue the dialogue on ensuring the effective observance of human rights on the Poland-Belarus border.

In this regard, I express my concerns regarding the draft law amending the Act on Granting Protection to Foreigners in the territory of the Republic of Poland which was adopted by the Polish Sejm on 21 February and is currently before the Senate. The proposed amendments restricting access to asylum procedures raise serious questions about their compatibility with Council of Europe human rights standards, especially those enshrined in Article 3 of the European Convention on Human Rights (ECHR). In particular, Article 3 ECHR encompasses a prohibition on removing any person to a country where they would be at real risk of torture or inhuman or degrading treatment or punishment (non-refoulement).

I visited Poland in September 2024 and engaged with Polish authorities and civil society representatives regarding the treatment of asylum seekers and migrants at the border with Belarus. I acknowledged the challenges posed by the instrumentalisation of migration and condemned the destabilising actions of the Belarusian authorities. At the same time, I stressed that the practice of summary returns of persons across the border to Belarus, without an individual assessment, carries a risk of violations of the rights protected by the European Convention on Human Rights. Additionally, in February, following my submission of written observations in October 2024, I intervened orally as a third party before the Grand Chamber of the European Court of Human Rights in the case of *R.A. and Others v. Poland*, concerning the alleged summary returns of asylum seekers. These actions reflect my continued commitment to ensuring compliance with human rights standards in these areas.

I understand that the draft law (art 33a para. 1) makes possible the imposition of limitations to the right to file an application for protection, both geographically and in terms of time. This would apply in cases defined by law as instrumentalisation, where such acts pose serious and real threats to state and citizen security, and where restrictions are necessary to mitigate these threats and other measures are insufficient. The restrictions can be implemented for a maximum of 60 days, but the period could be extended if the reasons to impose the limitations are still in place.

I am concerned that the provisions introduced by the law may restrict access to the territory for persons who may be in need of protection, or lead to their summary return from the territory of Poland, without a prior examination of their international protection needs. While the law provides for some humanitarian exemptions to restrictions, the proposed amendments may lead to situations where individuals are denied the opportunity to present their claims, exposing them to potential treatment contrary to the refoulement prohibition in the state to which they are returned.

The European Court of Human Rights (the Court) has repeatedly affirmed that the prohibition of refoulement is absolute. It is not subject to limitations clauses (including in relation to national security) and cannot be derogated from, even in terms of an emergency threatening the life of a nation. Ensuring an appropriate, individualised examination of any risks faced upon return is a crucial safeguard to uphold this prohibition.

F – 67075 Strasbourg Cedex, Fax: +33 3 90 21 50 53, http://www.coe.int/commissioner e-mail: commissioner@coe.int

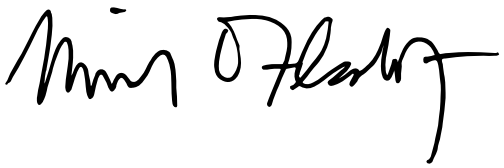
In particular, I highlight that in the case of *M.K. and Others v. Poland* as well as other judgments, the Court found that the refusal of entry and access to a procedure for international protection to asylum seekers at a border crossing point on the Belarusian border constituted a violation of Article 3. The Court underscored the importance of access to fair and efficient asylum procedures, a principle that the current amendments may further erode. The Court has further affirmed that any denial of entry or limitations on carrying out an individual examination of objections to return when persons are found to cross irregularly at any other part of the border must be without prejudice to the prohibition of refoulement.

Additionally, Article 13 ECHR requires that persons have an effective remedy against any violation of their rights under the Convention. When a person has an arguable claim in relation to risks related to Articles 2 (right to life) and 3 ECHR, such remedies must have automatic suspensive effect. I am concerned that the provisions of the draft law would also undermine the right to an effective remedy.

I note that the safeguards under the draft law, notably a case-by-case assessment of vulnerability, appear to me to be inadequate to prevent refoulement in all cases. There is a clear risk that those who are not immediately recognisable as a minor, person with health issues, or person at risk of serious harm in the country where they came from, would be unable to benefit from this provision. Furthermore, it may be doubted whether border guards can have the competence and ability to make such a difficult assessment on the spot and whether the right to appeal would be ensured. In particular, it is unclear how an assessment would be carried out as to whether it is “evident” that a person faces a real risk of being subjected to the threat of serious harm – this is precisely why a thorough asylum procedure is normally needed to fully assess such risks. This lack of adequate safeguards and individualised assessment would leave at risk of refoulement those persons who may face treatment contrary to Articles 2 and 3 ECHR in Belarus, but for whom this is not immediately “evident” in the border guards’ assessment.

Considering these concerns, I respectfully ask the Senate to refrain from adopting the bill in its current form.

Yours sincerely,



Michael O’Flaherty