

Ref: CommHR/MoF/sf 074-2024

Mr Donald TUSK
Prime Minister of the Republic of Poland

Strasbourg, 17 July 2024

Dear Prime Minister,

My mandate is to foster the effective observance of human rights in the member states of the Council of Europe. An important part of my work is to engage in dialogue with the governments and parliaments of member states, and to assist them in addressing possible shortcomings in their laws and practices.

Accordingly, I share with you my concern about reports on the continuing practice of summary returns of persons across the border to Belarus, without an individual assessment, putting them at risk of refoulement and other human rights violations. According to information that has been seen by my Office, based on the official figures, 7 317 people were summarily returned to Belarus in this manner between December 2023 and June 2024. Apparently, in some cases, summary returns concerned persons who had formally requested asylum on Polish territory in the presence of witnesses. Some people were reportedly sent back across the border into Belarus despite being in poor health or having suffered injuries.

I recall that the repeated and systematic practice of summary returns across the border, based on legislative changes adopted in Poland in 2021, has been criticised by my predecessor as well as by the Office of the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees, and other human rights bodies, as contrary to Poland's obligations under international law. The prohibition of refoulement, encompassed by Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment) of the European Convention on Human Rights (ECHR) 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. This absolute prohibition also applies irrespective of the conduct of the people involved, which may include the act of crossing a border in an irregular manner.

The risk of summary returns, including those occurring without any legal proceedings or decision, is particularly high in the so-called buffer zone (*strefa buforowa*) which bans public access to parts of Poland's border with Belarus. Although several categories of people are exempt from the ban, the exceptions do not explicitly include civil society organisations, humanitarian actors, providers of legal assistance, human rights monitors, the national human rights institution (Poland's Human Rights Commissioner), and journalists. While local border guard commanders are empowered to grant temporary access to the zone, the criteria for obtaining such a special access permit are not clearly defined in law.

I am concerned about the impact of the buffer zone on the provision of humanitarian and legal assistance to people stranded in the border area, on human rights monitoring, and on the right to information. Human rights defenders have reported that the requirement for access permits to the zone has already resulted in delays in providing vital assistance to people in need in the border areas. In the most urgent cases, it is placing them in front of a difficult choice between withholding life-saving assistance and breaking the law. In this regard, I recall that humanitarian access is essential to protect the human rights of people stranded in the border areas and to prevent inhuman or degrading treatment or even threats to their right to life. Legal assistance is an essential safeguard to uphold the absolute prohibition of refoulement, to prevent collective expulsions as prohibited by Article 4 of Protocol No. 4 to the ECHR, and to ensure access to effective remedies as guaranteed by Article 13 of the ECHR.

Such assistance is also of paramount importance to protect the dignity and human rights of particularly vulnerable groups, including children, pregnant women, persons with disabilities, and victims of torture or trafficking in human beings. At the same time, the inability of journalists and the media to freely access the buffer zone inevitably reduces the degree of public scrutiny of the respective actions of the Polish and Belarusian state agents and the human rights situation there. Upholding media freedom and the public's freedom to receive information, in accordance with the requirements of Article 10 of the ECHR, is therefore of particular importance.

With reference to the bill adopted by the Polish Sejm and now before the Senate, proposing, among other things, to exempt from criminal liability certain categories of state agents deployed in border areas who, under certain conditions and in situations of urgency, use direct force or firearms in violation of the applicable rules, please be informed that I have written separately to the Marshal of the Senate.

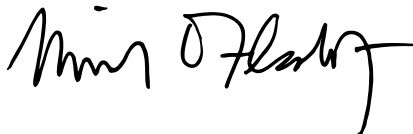
I understand that the measures addressed in this letter are motivated by considerations of national security and related to a reported increase in the number of irregular border crossings as well as a number of reported incidents of cross-border attacks on Polish state agents. I was deeply saddened to learn that a young soldier died as a result of one such attack. I acknowledge the seriousness and complexity of the tasks faced by the Polish authorities in managing migration at the border. However, although the member states are given a certain margin of appreciation in restricting certain rights on grounds of national security, the invocation of national security cannot serve as a *carte blanche* to adopt measures that raise questions of compatibility with human rights standards.

I recognise the challenges posed by the instrumentalisation of irregular migration. Such actions are to be condemned as they exploit migrants, placing them in a situation of great vulnerability, while at the same time imposing burdens on the member states. Nevertheless, the European Court of Human Rights has made clear that the problems which states may encounter in managing migratory flows or in the reception of asylum seekers cannot justify having recourse to practices that are not compatible with the ECHR. This is also reflected in Resolution 2404 (2021) of the Parliamentary Assembly of the Council of Europe on Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus.

It is my expectation that the Polish authorities will take the necessary steps to ensure that all laws and practices in connection with the situation on Poland's border with Belarus comply with relevant Council of Europe human rights standards.

I look forward to continuing our dialogue and cooperation.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Michael O'Flaherty', written in a cursive style.

Michael O'Flaherty