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Communication from NGOs (AIRE Centre + ECRE) (01/04/2022) in the case of M.K. and Others v. Poland (Application No. 40503/17).

Information made available under Rules 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 : 1436e réunion (juin 2022) (DH)

Communication d'ONG (AIRE Centre + ECRE) (01/04/2022) relative à 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.

ecre
European Council
on Refugees and Exiles

COMMUNICATION

In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements by ECRE and the AIRE Centre

M.K. and Others v. Poland
Applications nos. 40503/17, 42902/17 and 43643/17

1. The case concerns the repeated refusal of Polish border guards on the border with Belarus to admit the applicants, between July 2016 and June 2017, who had come from Chechnya and had asked for international protection. The Court has found that the fact that the authorities failed to review the applicants' applications on many occasions when they presented themselves at the Polish border led to a violation of Article 3 of the Convention. Given the situation in Belarus, the Polish authorities had also subjected them to a serious risk of chain-refoulement and treatment prohibited by the Convention by not allowing them to stay on Polish territory while their applications were examined. The Court has further concluded that the decisions in the applicants' cases had been taken without proper regard to their individual situations and were part of a wider policy. Those decisions had amounted to a collective expulsion of aliens, in violation of Article 4 of Protocol No. 4. Moreover, since an appeal against a refusal to admit the applicants to Poland had no automatic suspensive effect and could not have prevented them being returned to Belarus, it could not be regarded as an effective remedy. Consequently, there was a violation of Article 13 of European Convention of Human Rights (ECHR), taken in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention. Lastly, the Court has noted that Poland failed to comply with the interim measures (violation of Article 34 of the Convention).
2. The European Council on Refugees and Exiles (ECRE), the DCR, The Advice on Individual Rights in Europe (the AIRE Centre) and the International Commission of Jurists (ICJ) were interveners in this case.
3. ECRE and the AIRE Centre wish to bring to the attention of the Committee its ongoing concerns with regard to the duty of the State to discharge its procedural obligations under Article 3 and Article 4 of Protocol No. 4 when assessing the risks of ill-treatment before automatically removing asylum-seeking applicants to a (safe) third country, particularly, in the context of the Committee's duty to satisfy itself that Poland has taken the General Measures necessary for it to comply with the judgment in *M.K and Others v. Poland*.

EXECUTIVE SUMMARY

4. The AIRE Centre and ECRE are of the opinion that the Polish authorities did not comply with the general measures indicated in *M.K. and Others v. Poland*. Contrary to Poland's Government submission in the Action Plan that "*legislative amendments (…) will eliminate the risk of issuing a decision ordering the foreigner to return in breach of Article 3 of the Convention*", such measures are of the utmost relevance given the developments in Polish law and practice following the judgment, as will be demonstrated further in the present submission. Practices contrary to the obligations set under Article 3 and Article 4 of Protocol No. 4 of the ECHR as found by the judgment in *M.K.* continue to be a matter of a grave concern in Poland. Additionally, border procedures - proposed by Polish

authorities - will not lead to the implementation of the MK judgment, on the contrary, they can only cause applications for protection to be arbitrarily rejected and applicants sent back to Belarus. The key areas of concern outlined in this submission include:

- The evolution of the relevant legislation and the lack of legal safeguards including a set of amendments to Poland's 2013 Foreigners' Act empowering Border Guard unit commanders to order the immediate removal of any person having crossed the border outside of an official border crossing.
- Summary returns at Poland's border with Belarus not only continue to take place but have increased exponentially, in violation of art 3 and Article 4 of Protocol No. 4 ECHR as stated in the *M.K.* judgment.
- The humanitarian, material and sanitary situation of the persons stranded at Poland's border with Belarus has deteriorated following *M.K.* due to barriers in accessing international protection procedures, and this situation is relevant when considering the general measures in *M.K.*

GENERAL MEASURES

I. New legislation introduced in 2021 and Poland's obligations under Article 3 ECHR

5. In August 2021, two amendments of national law entered into force, affecting the situation on the Polish-Belarusian border. The first was the Regulation of August 13, 2021[1] amending the Regulation of the Minister of the Interior of April 24, 2015[2] on guarded centres and arrests for foreigners, allowing for placing migrants in accommodation cells with a floor space of 2 m^2 per occupant. Thereby, twice as many migrants could be placed in guarded centres than before. The second one was the Regulation of the Minister of the Interior and Administration of August 20, 2021[3] amending the Regulation of 13 March, 2020[4] on **temporary suspension or restriction of border traffic at certain border crossings**, which introduced provisions stipulating that individuals who are not authorized to enter Poland are instructed to leave the territory of the Republic of Poland immediately and are returned to the state border line.
6. Another set of amendments to Poland's 2013 Foreigners' Act, was passed by the Sejm on 14 October 2021[5]. The bill provides for the introduction of a new institution: **an order on illegal crossing of the border**. The order is to be issued in the case of an apprehension of a migrant immediately after crossing the external border of the EU in an irregular manner. These provisions give grounds for **expelling a migrant from Poland, even if they apply for international protection**. The amendments include a procedure whereby a person found to be illegally crossing the border can be ordered to leave Polish territory based on a decision by the local Border Guard chief. The order may be appealed to the commander of the Border Guard, but this does not suspend its execution. Additionally, **the bill allows the chief of the Office of Foreigners to**

[1] Regulation of the Minister of Interior amending the Ordinance on guarded centres and detention centres for foreigners, item 1482, of 13 August 2021: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210001482.
[2] Regulation of the Minister of Interior on guarded centres and detention centres for foreigners, item 596, of 24 April 2015: http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150000596.
[3] Regulation of the Minister of Interior amending the Regulation on temporary suspension or restriction of border traffic at certain border crossing points, item 1536, of 20 August 2021: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210001536.
[4] Regulation of the Minister of Interior on temporary suspension or restriction of border traffic at certain border crossing points, item 435, of 13 March 2020: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000435.
[5] Act on amending the Act on foreigners and certain other acts, item 1918, of 14 October 2021: http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210001918.

disregard an application for international protection submitted by a foreigner that was found illegally crossing the border.

7. According to available statistics, on the basis of the new laws, the Office for Foreigners left application without examination in 5 cases in 2021[6] and 1098 persons were expelled in the period from 27 October to 10 November 2022.[7]
8. The amendments, which had been criticised by, among others, the OSCE Office for Democratic Institutions and Human Rights (ODIHR), the UN High Commissioner for Refugees (UNHCR), and Poland's Human Rights Ombudsman, entered into force on 26 October 2021.[8]
9. On 2 September 2021, a state of emergency was declared in Poland[9], motivated by alleged threats to security and public order in part of the territory of Poland. The President's decree was approved by the Sejm on 6 September 2021. The state of emergency, initially put in place for a period of 30 days, was extended on 1 October 2021 by another 60 days[10] – the maximum duration allowed under the Polish Constitution. Restrictions imposed as part of the state of emergency, set out in more detail in a decree adopted by the Government, entailed that **humanitarian and human rights actors, civil society organisations and independent human rights monitors,** with the exception of the Office of the Polish Ombudsman, **were not allowed to access the so-called "exclusion zone"** which covered 183 municipalities **adjacent to Poland's border with Belarus**, **severely limiting the possibility of journalists and civil society organisations to monitor the situation at the border and provide humanitarian assistance**.[11] The state of emergency expired on 1 December 2021.
10. On 30 November 2021, the Sejm passed a set of amendments to Poland's Border Protection Act,[12] which entered into force as soon as the state of emergency expired. The new rules authorised the Minister of Internal Affairs and Administration to impose restrictions on freedom of movement similar to those imposed by the state of emergency, in areas located within 15 kilometers of Poland's external border of the Schengen zone. On the basis of the new rules, the Minister of Internal Affairs and Administration immediately adopted a new decree extending the above-mentioned restrictions for three months[13] – until 1 March 2022.

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[6] See AIDA Country report on Poland, 2021 update, page 20.

[7] *Ibid.*

[8] OSCE Office for Democratic Institutions and Human Rights (ODIHR), Urgent Opinion on Draft Amendments to the Aliens Act and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland and Ministerial Regulation on Temporary Suspension of Border Traffic at Certain Border Crossings, 10 September 2021: https://www.osce.org/files/f/documents/3/3/498252_0.pdf; UNHCR, Observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265), 16 September 2021: https://www.refworld.org/docid/61434b484.html; Polish Ombudsman, General Comment by the Ombudsman to the Ministry of Foreign Affairs and Administration, 25 August 2021: https://bip.brpo.gov.pl/pl/content/zmiany-w-rozporzadzeniu-w-sprawie-czasowego-zawieszenia-lub-ograniczenia-ruchu-granicznego.

[9] Regulation of the Council of Ministers on limitations of freedoms and rights in connection with the introduction of a state of emergency, item 1613, of 2 September 2021: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210001613.

[10] Regulation of the President of the Republic of Poland on the extension of the state of emergency introduced in the territory of a part of Podlaskie Province and a part of Lubelskie Province, item 1788, of 1 October 2021: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210001788.

[11] See AIDA Country report on Poland, 2021 update, page 18, cited above in footnote 7.

[12] Act amending the Act on State Border Protection and certain other acts, item 2191, of 17 November 2021: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210002191.

[13] Regulation of the Minister of Interior on the introduction of a temporary ban on staying in a specified area in the border zone adjacent to the state border with the Republic of Belarus, item 2193, of 30 November 2021: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210002193.

11. Following a 4-day mission to Poland in November 2021, the Council of Europe Commissioner for Human Rights called for the "*immediate and unimpeded access of international and national human rights actors providing humanitarian and legal assistance and the media to the Polish border with Belarus*". She found that the current Polish legislation "*undermines the right to seek asylum and the crucial safeguards associated with it.*"[14]
12. Similarly, in December 2021, the spokesperson for the UN High Commissioner for Human Rights urged Poland to "*review its current legislation and to conduct meaningful individual assessments to determine individual protection needs, consistent with the international law prohibitions of refoulement and collective expulsions*."[15]
13. Most recently, in its third party intervention in the case of *R.A. and Others v. Poland*, the Council of Europe Commissioner for Human Rights acknowledged that "*a clear repeated and systematic practice of pushing migrants and asylum seekers back to Belarus exists in Poland"* and that *"such pushbacks happen without regard for those persons' individual situations and in particular, whether they may be entitled to international protection."*[16]
14. Furthermore, the Commissioner specified: *"recent changes in Poland's regulatory framework have made it largely illusory for those persons to access individual procedures and to apply for protection in Poland. The Commissioner observes that this practice is also likely to put them at risk of torture or inhuman or degrading treatment at the hands of Belarusian state agents, which is incompatible with Article 3 of the European Convention on Human Rights. She notes that the treatment of migrants and asylum-seekers by Belarus is well-documented and is, or at least should be, known to the Polish authorities."*[17]
15. On the basis of information gathered during visits near the border, recorded testimonies and reports from organizations present in the area, UNHCR noted "*an increase in reports of denial of access to the territory and asylum procedures by persons who expressed an intention to seek asylum*", as reported in its third party intervention in the case of *R.A. and Others v. Poland*. Moreover, it concluded that "*the systematic denial of asylum-seekers' access to the territory and to asylum procedures at the Polish-Belarusian border, which is not only current Polish State practice but authorized by law, is at variance with international refugee law and international and European human rights law*".[18]

II. Procedural duty under Article 3 ECHR and reports of summary removals at Poland's border with Belarus

16. The aforementioned legislative changes and practices create preconditions for the summary return and collective expulsion of asylum seekers, i.e., return at the border without an assessment of the individual circumstances of the person. Such summary returns result in the

[14] 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.
[15] United Nations OHCHR, Press briefing notes on Poland/Belarus border, 21 December 2021: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28004&LangID=E; United Nations, End 'appalling' Belarus-Poland border crisis, UN rights office urges, 21 December 2021: https://news.un.org/en/story/2021/12/1108502.
[16] CoE Commissioner for Human Rights, Third party intervention in R.A. and Others v. Poland (no. 42120/21), 27 January 2022, para. 33: https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-in-/1680a5527a.
[17] *Ibid*., para. 33.
[18] UNHCR, Submission in the case o*f R.A. and Others v. Poland* (Appl. No. 42120/21) before the European Court of Human Rights, February 2022, paras. 2.2.1 and 5.1, available at: https://www.refworld.org/docid/621ccfde4.html

impossibility to apply for asylum (except for the theoretical possibility to apply at border crossing points); the lack of individual decisions being taken; and the inability to appeal contested decisions, in violation of Article 3 ECHR and contrary to the M.K. judgment.

17. In fact, in the very recent *D.A. and Others v. Poland* case, of July 2021, the European Court of Human Rights (ECtHR) found violations of Article 3, Article 4 Protocol 4, Article 13 and Article 34 ECHR. The Court reiterated its findings from *M.K.* showing that the practices of the Polish Government continue to violate the rights of migrants.[19]
18. In a similar situation, the Court ruled that while Article 33(2) of the 1951 Convention provides for the possibility of exceptions to the application of the principle of non-refoulement on grounds of national security, neither Article 3 of the ECHR nor Article 4 of Protocol 4 to the ECHR provide justifiable grounds for not applying the principle of non-refoulement in emergency situations or other special cases.[20]
19. Although Member States can require the application for international protection in a specific designated place, such a requirement cannot prejudice the obligation to ensure effective access to asylum. In the absence of objective possibilities to apply at a border control post (that is the case of border crossing points that are tens of kilometres away such as in Poland), such a theoretical possibility may prove ineffective.[21] Accordingly, the expulsion of foreigners without examining their personal circumstances, and without enabling them to put forward arguments against expulsion was recognised as collective and, therefore, in violation of the Protocol.[22]
20. The Commissioner for Human Rights has observed that the Polish Border Guard, assisted by other armed formations deployed by Poland on its eastern border, has been repeatedly and systematically collectively removing migrants and asylum seekers found in Polish territory back over the border to Belarus. Figures made available by the Polish Border Guard in early 2022[23] accounted for 39,697 "attempts to cross the border with Belarus in an irregular manner, outside of the official border crossing points" recorded in the course of 2021. In their meetings with the Commissioner, local and regional commanders of the Border Guard argued that the legislation adopted by Poland in October 2021 had provided a legal basis for such actions. However, the Commissioner has noted that the **practice of summary removing migrants and asylum seekers had been occurring systematically even before the new legislation was adopted.**[24]
21. The Commissioner further noted that: *"Many persons crossing the Polish border, including those who made clear to the Polish authorities their intention to apply for international protection, have been pushed back and made to cross the border again multiple times. As an example, the two groups of people who emerged from the exclusion zone in the Commissioner's presence on the night of 16 November 2021 told her that they had by then spent several weeks in the woods on both sides of the border. A couple of Afghan asylum seekers, who had fled Afghanistan in August 2021, told the Commissioner that the Polish Border Guard had pushed them back into Belarus 13 times, despite them clearly stating their intention to request asylum in Poland to the Polish border guards on each*

[19] D.A. and Others v. Poland, ECtHR, 8 July 2021, Application No. 51246/17: https://hudoc.echr.coe.int/fre?i=001-210855.
[20] For more on the use of restrictions in relation to asylum during a state of emergency and other similar situations, see ECRE, Legal Note No. 6: Derogating from EU Asylum Law in the Name of "Emergencies": the Legal Limits under EU Law, June 2020: https://ecre.org/elena-legal-note-on-derogations-from-asylum-procedures-as-a-result-of-emergency-measures/. M.A. and Others. v. Lithuania, ECtHR, 11 December 2018, Application No. 59793/17, para. 115: https://hudoc.echr.coe.int/eng?i=001-188267.
[21] See ECRE, Legal Note No. 10: Across Borders: assessment of the limited Impact of N.D. and N.T. v. Spain in Europe, June 2021: https://ecre.org/wp-content/uploads/2021/07/Legal-Note-10.pdf and Shahzad v. Hungary, ECtHR, 8 July 2021, Application No. 12625/17, paras. 52 and 65: https://hudoc.echr.coe.int/eng?i=001-210853.
[22] D.A. and Others v. Poland, ECtHR, 8 July 2021, Application No. 51246/17, paras. 78-80: https://hudoc.echr.coe.int/fre?i=001-210855.
[23] See https://www.strazgraniczna.pl/pl/aktualnosci/9689,Nielegalne-przekroczenia-granicy-z-Bialorusia-w-2021-r.html.
[24] Coe Commissioner of human rights TPI in the case of R.A. and Others v. Poland, para.17.

occasion. Another group of asylum seekers from Ethiopia's conflict-torn Tigray region told the Commissioner that they had been pushed back to the border 5 times." [25]

22. Many other examples of repeated summary removals have been documented by international human rights NGOs, such as Human Rights Watch, as well as civil society organisations active near the border area.[26] The repeated and systematic nature of summary removals on Poland's border is further corroborated by the findings of the Office of the UN High Commissioner for Human Rights (OHCHR), which visited Poland from 29 November to 3 December 2021. The UN OHCHR team interviewed 31 migrants and asylum seekers, documenting recurring cases of individual persons and groups of people, including children and persons who said they had requested international protection, being immediately and automatically returned to or across the border with Belarus.[27]
23. The Commissioner also noted that it was informed by reliable sources that "*pushbacks are especially rife within the exclusion zone, where members of the Border Guard or of other armed formations often simply escort intercepted persons back to the border with Belarus without initiating any legal procedure or issuing any decision. While many migrants and asylum seekers are found outside of the exclusion zone, most – especially the weakest or the infirm – often do not make it that far before being summarily returned to the border*".[28] The lack of access by humanitarian actors and the media to the exclusion zone and the resulting lack of public scrutiny means there is little clarity as to how many migrants and asylum seekers have been intercepted within the zone and removed in this manner.[29]
24. According to reports by civil society actors, border guards also routinely confiscate migrants' and asylum seekers' phones and chargers or damage them in order to prevent them from communicating or to destroy evidence of summary removals. According to the Helsinki Foundation for Human Rights in Poland, the suspension of the activities of journalists and aid workers at the border "makes it impossible to document and publicise abuses by state officials".[30]
25. UNHCR reported having received hundreds of distress calls from a total of approximately 700 persons since August 2021, the majority of whom were Afghan, Syrian, Yemeni and Iraqi families with children. Many of these families declared that they had crossed the border into Poland and were returned to Belarus by the Polish Border Guards without being able to lodge applications for international protection.[31]
26. Amnesty International has also used satellite footage from 18 August to establish that people were illegally returned from Polish territory to Belarus.[32]

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[25] Coe Commissioner of human rights TPI in the case of R.A. and Others v. Poland, para. 18.
[26] Human Rights Watch report "Die Here or Go to Poland. Belarus' and Poland's Shared Responsibility for Border Abuses", 24 November 2021: https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses; see also, Grupa Granica report "Humanitarian crisis at the Polish Belarusian border", 10 December 2021: https://minorityrights.org/wp-content/uploads/2021/12/gg -Report-english-sources-incomplete.pdf.
[27] United Nations OHCHR, Press briefing notes on Poland/Belarus border, 21 December 2021, cited above.
[28] Coe Commissioner of human rights TPI in the case of R.A. and Others v. Poland, para. 19.
[29] For an analysis and estimates of the possible numbers of persons summarily removed to Belarus, as well as stories of the persons affected, see the Grupa Granica report "Humanitarian crisis at the Polish Belarusian border", cited above.
[30] Polish Helsinki Foundation for Human Rights (HFHR), 14 September 2021: https://www.hfhr.pl/wolnosc-mediow-zawieszona-w-pasie-przygranicznym-opinia-prawna-hfpc/; see also https://twitter.com/hfhrpl/status/1437725701218656257.
[31] UNHCR, Submission in the case of *R.A. and Others v. Poland* (Appl. No. 42120/21) before the European Court of Human Rights, February 2022, paras. 2.2.2, available at: https://www.refworld.org/docid/621ccfde4.html.
[32] Amnesty International, Poland/Belarus border: a protection crisis, September 2021: https://www.amnesty.org/en/latest/research/2021/09/poland-belarus-border-crisis/; see also, Amnesty International,

27. On some occasions, the actions of the Polish border guards led to the separation of families of migrants and asylum seekers. In one reported case, "*a mother with children was pushed back across the border to Belarus while her husband was being treated in a local hospital; the family was reunited several days later after its members were again made to cross the border into Poland. Activists met by the Commissioner told her that migrants and asylum seekers with health problems were sometimes reluctant to seek medical treatment for fear of being pushed back to Belarus or separated from loved ones. One asylum seeker met by the Commissioner just outside the exclusion zone refused to receive treatment at a local hospital out of fear of being separated from her spouse. Several distraught migrants and asylum seekers met by the Commissioner at a local hospital told her that they had been separated from family members, did not know their whereabouts and were worried about their fate*".[33]
28. The summary removal of migrants and asylum seekers from Poland to Belarus is in violation of the M.K. judgment and the consequences are deeply alarming. As Human Rights Watch has reported, *"once they were pushed back to Belarus from Poland they [migrants and asylum seekers] were routinely subjected to various types of abuse by Belarusian border guards, including beatings, being detained in open air spaces for extended periods of times (up to days at a time) with limited or no food or water and then forced to cross the border to Poland".*[34] People told Human Rights Watch that Belarusian border guards prevented them from leaving the border area to travel back to Minsk or to their countries of origin when they asked to be allowed to do so. In some cases, border guards asked migrants to pay for their release. Human Rights Watch also documented one incident where a young man died after Belarus border guards abused him, following a summary expulsion from Poland to the Belarusian side of the border.[35]
29. In a recently published legal analysis of the situation, the Polish Helsinki Foundation found that Poland's refusal to examine their asylum applications and attempts to conduct summary returns to Belarus violate the principle of non-refoulement. [36] In its assessment of the recent amendments to the Polish law, the Foundation also concurred with UNHCR finding that the legislative changes contravene the protection against the expulsion of asylum seekers.[37]
30. **In view of the above, the AIRE Centre and ECRE consider that the denial of entry and the immediate removal from its territory of asylum seekers who cross the borders or who are present on the territory irregularly as provided for by the law, fail to provide the necessary safeguards in breach of Poland's obligations under Article 3 ECHR and exposes**

Poland: Digital investigation proves Poland violated refugees' rights, 30 September 2021: https://www.amnesty.org/en/latest/news/2021/09/poland-digital-investigation-proves-poland-violated-refugees-rights/.

[33] CoE Commissioner for Human Rights, Third party intervention in R.A. and Others v. Poland (no. 42120/21), 27 January 2022, paras. 18-20: https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-in-/1680a5527a.

[34] Human Rights Watch individual interviews with 12 witnesses in Bialystok, Poland, October 26-29, 2021; Human Rights Watch interview with an Iraqi Kurd, Polish forest, Poland, October 26, 2021; Human Rights Watch individual interviews with "Afran," "Aswer," and "Destan," Hrodna, Belarus, October 9, 2021; Human Rights Watch individual phone interview with "Jean," October 11, 2021. Belarus did establish a shelter for some migrants near a border crossing in November 2021.

[35] HRW, Report "Die Here or Go to Poland" Belarus' and Poland's Shared Responsibility for Border Abuses, November 2021, page 17-18.

[36] Polish Helsinki Foundation for Human Rights (HFHR), Legal Analysis of the situation on the Polish-Belarusian Border, 9 September 2021: https://www.hfhr.pl/en/on-the-side-of-the-law-an-analysis-of-the-situation-on-the-polish-belarusian-border/.

[37] Polish Helsinki Foundation for Human Rights (HFHR), Comments on the bill amending the Act on foreign nationals and the Act on granting protection to foreign nationals in the territory of the republic of Poland, 6 September 2021: https://www.hfhr.pl/en/the-draft-amendment-of-the-act-on-foreigners-and-the-act-on-granting-them-protection-violate-eu-asylum-law-principles-legal-opinion-of-the-hfhr/; UNHCR, Observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265), 16 September 2021, cited above in footnote 8.

asylum seekers to a risk of *refoulement*, contrary to the obligations incumbent upon the Contracting Party as specified in the *M.K.* judgment.

III. The humanitarian, material and sanitary situation of the persons stranded near Poland's border with Belarus

31. Migrants attempting to cross the Belarus-Poland border often require medical assistance, particularly during winter. Many of them were starved, dehydrated, freezing, suffering from hypothermia and food poisoning, reportedly beaten up by Polish or Belarusian officers, and a large number presented foot and leg injuries from walking barefoot or climbing through the wired fence. Civil society actors have reported that ambulances were not willing to take asylum seekers and that requests to send ambulances were denied or made conditional on the Border Guard's presence. Moreover, after receiving treatment in the hospital, some migrants were removed back to the Belarusian part of the border by the Polish Border Guards.[38]
32. On 19 September 2021, the Polish border police announced the discovery of three male bodies, thought to be those of Iraqi nationals, along the border with Belarus. A body of an Iraqi woman was found on the Belarusian side of the border. On 24 September 2021 four people were confirmed to have died of hypothermia and exhaustion along the Poland-Belarus border, with another seven hospitalised elsewhere in the Polish border region[39]. On 25 September 2021, a 16-year-old Iraqi who was part of a group that included four children – the youngest of whom was 18 months old –was immediately removed to Belarus. Being in a critical health condition when he first crossed into Poland, volunteers stated he died as a result of not receiving the necessary medical attention[40].
33. According to several reports, at least 21 people, adults and children – including a one-year-old boy – lost their lives in the woods in 2021.[41] The identity and profiles of some of the victims have since been publicised in the media.[42]
34. In a press release from 22 October 2021, UNHCR expressed its "*concern and dismay*" on the situation in the border, recognising that "*among those stranded at the border are people with international protection needs, (…) in dire conditions and are unable to access asylum and any form of assistance on either side. They do not have proper shelter or protection from the elements, and no secure source of food or water*."[43] Likewise, several UN Special Rapporteurs have repeatedly

[38] See AIDA Country Report on Poland, 2021 update, pages 75-76.
[39] See, for example, https://www.dw.com/en/poland-4-people-found-dead-on-border-with-belarus/a-59234536; https://www.aljazeera.com/news/2021/9/20/after-four-found-dead-poland-blames-belarus-for-migrant-wave; https://www.euractiv.com/section/politics/short_news/more-deaths-at-polish-belarusian-border/; https://www.theguardian.com/world/video/2021/oct/22/freezing-to-death-the-migrants-left-to-die-on-the-poland-belarus-border-video?fbclid=IwAR2IrDYw1U2ieGNOqIQD32hdKynlY4AAqKcdJK0jFXsZLw41fGbwad7-Kys.
[40] See, https://wiadomosci.onet.pl/bialystok/16-letni-chlopiec-zmarl-na-granicy-polsko-bialoruskiej/h4temkc?utm_source=tw_wiadomosci&utm_medium=social&utm_campaign=onetsg_fb.
[41] See, https://www.msf.fr/communiques-presse/pologne-bielorussie-msf-quitte-la-region-faute-d-acces-aux-exiles-menaces-par-le-froid, https://www.theguardian.com/world/2021/nov/18/one-year-old-syrian-child-dies-in-forest-on-poland-belarus-border.
[42] Spiegel International, Mama, Pray for Us. A Chronicle of Refugee Deaths along the Border Between Poland and Belarus, 22 December 2021: https://www.spiegel.de/international/world/a-chronicle-of-refugee-deaths-along-the-border-between-poland-and-belarus-a-de0d7ace-3322-4ac9-9826-9f2774a540ee.
[43] UNHCR, Press release, UNHCR urges States to end stalemate at Belarus-EU border and avoid further loss of life, 22 October 2021: https://www.unhcr.org/news/press/2021/10/6172af254/unhcr-urges-states-end-stalemate-belarus-eu-border-avoid-further-loss-life.html. See also, UNHCR, Press release, UNHCR and IOM shocked and dismayed by deaths near Belarus-Poland border, 21 September 2021: https://www.unhcr.org/news/press/2021/9/6149dec74/unhcr-iom-shocked-dismayed-deaths-near-belarus-poland-border.html.

manifested their alarm for the people trapped at the border and insisted that their basic rights should not be compromised as a result of the increased arrival of migrants at the Polish-Belarus border. They emphasized migrants' lack of access to adequate shelter, food, clean water, sanitation facilities or medical care.[44]

35. On 9 November 2021, UNHCR and IOM issued a joint statement calling on States to ensure migrants' safety and human rights and asking for an urgent resolution of the situation and the immediate and unhindered access to humanitarian assistance.[45] The two UN agencies had already condemned migrants' inability to access any kind of assistance or basic services and had called for an investigation into the deaths, asking for "immediate access" to refugees and migrants affected, "*in order to provide lifesaving medical help, food, water and shelter, especially in light of the approaching winter.*"[46]
36. On 28 September 2021, the ECtHR repeated its demand to Poland to provide assistance to 32 Afghans who were trapped for weeks in makeshift camps at the border.[47] The Strasbourg Court had already issued interim measures on 25 August requiring Poland to provide food, water, clothing, medical care and possibly a temporary shelter to the people, but Poland has failed to act.[48] In the new order, the ECtHR highlighted that non-compliance may entail a sentence for hindering "*the right of Afghans to have recourse to the ECtHR.*"
37. On 30 September 2021, European Home Affairs Commissioner Ylva Johansson also raised "*the issue and importance of transparency*" at the border in order to make sure that "*when we protect our borders, we also protect our values and the EU acquis*".[49] The Commissioner also pushed for direct EU involvement at the border saying: "*I think it could be a good idea to invite Frontex to be part at the Polish-Belarusian border to also visibly show that this is a European protection of the border and also because we have expertise in Frontex*". However, a Frontex deployment was refused by Poland.[50]
38. Furthermore, there have been anti-migration statements form representatives of the Polish Government, representing the notion of migration in a collective sense posing an existential threat to the security of the state and/or the society and giving prominence to immigration as a security threat.[51]

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[44] UN OHCHR, UN Special Rapporteurs, Belarus and Poland: Stop sacrificing migrant lives to political dispute, 6 October 2021: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27615&LangID=E.

[45] Joint statement, IOM and UNHCR Call for Immediate De-escalation of at the Belarus-Poland Border, 9 November 2021: https://www.iom.int/news/iom-and-unhcr-call-immediate-de-escalation-belarus-poland-border. See also, https://news.un.org/en/story/2021/11/1105312.

[46] Joint Press Release, UNHCR and IOM shocked and dismayed by deaths near Belarus-Poland border, 21 September 2021: https://www.unhcr.org/neu/67731-unhcr-and-iom-shocked-and-dismayed-by-deaths-near-belarus-poland-border.html.

[47] ECtHR, Press Release, Court gives notice of "*R.A. v. Poland*" case and applies interim measures, 28 September 2021: https://twitter.com/ECHR_CEDH/status/1442787419355504643.

[48] ECtHR, Press Release, Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland, 25 August 2021: https://hudoc.echr.coe.int/eng-press?i=003-7100942-9612632.

[49] See https://twitter.com/YlvaJohansson/status/1443650293799981059; https://balkaninsight.com/2021/10/04/pressure-mounts-on-poland-over-migrant-rights-at-belarus-border/ and https://www.euractiv.com/section/politics/short_news/commissioner-johansson-failed-to-convince-poland-on-pushbacks/.

[50] See politico, "Poland faces blowback over its migrant policy", 30 September 2021, available at https://www.politico.eu/article/poland-faces-blowback-over-its-migrant-policy/.

[51] See Polskie Radio, "Migrants in fresh attempts to breach Polish border: defence minister", 10 November 2021, available at: https://www.polskieradio.pl/395/7789/Artykul/2844995,Migrants-in-fresh-attempts-to-breach-Polish-border-defence-minister; and Polsat News, "Mariusz Błaszczak: nie pozwolimy na stworzenie szlaku przerzutu migrantów przez Polskę, 23 August 2021, available at: https://www.polsatnews.pl/wiadomosc/2021-08-23/konferencja-mariusza-blaszczaka/

39. On 4 October 2021, the Polish Catholic Church also called for medical and humanitarian assistance and the launch of humanitarian corridors for refugees from Iraq, Syria and elsewhere.[52]
40. A request by 21 doctors to enter the zone to provide humanitarian assistance[53] was rejected by the Deputy Interior Minister, who said the provision of aid would play into the hands of Belarusian propaganda. NGOs and activists appealed, saying "*If the situation does not change, we will find mass graves of refugees in the forests*".[54]
41. Very recently, on 2 February 2022, the Commissioner for Human Rights stated that "*the Polish authorities' failure to provide humanitarian assistance to asylum seekers and migrants, and the restrictions put in place by Poland on access to the border zone for persons and organisations providing humanitarian assistance and legal aid, raise concerns under Article 2 and Article 3 of the [ECHR]. These actions have further aggravated the already dire humanitarian, material and sanitary situation of many asylum seekers and migrants trapped at Poland's border with Belarus. This has resulted in severe damage to health among many of them and extensive loss of life among those most unfortunate. The limited availability of humanitarian assistance and legal aid to asylum seekers and migrants trapped in the woods is further compounded by the harassment and intimidation targeting humanitarian organisations, activists and local residents providing such help, partly fuelled by the stigmatisation of migrants and refugees in the official narrative.*"[55]

42. The AIRE Centre and ECRE call on the Committee of Ministers to urge the Polish authorities to repeal regressive law and practices leading to arbitrary removals of asylum seekers from the territory of Poland contrary to their obligations as specified in the *M.K.* judgment and hindering the implementation of the general measures indicated therein.

43. The Polish authorities must also clarify how effective access to asylum procedures is guaranteed and provide detailed information on the steps they have taken to prevent acts or omissions that may lead to further violations of Poland's obligations under Article 3 and Article 4 of Protocol No. 4 of the Convention.

[52] See AP News, "Polish church urges help for migrants amid border crisis", 4 October 2021, available at: https://apnews.com/article/iraq-warsaw-middle-east-syria-belarus-b52f34354fb34f2b71fc8579eb3ebd0d.
[53] See https://twitter.com/hfhrpl/status/1441005623878066180.
[54] See Wyborcza.pl, 24 September 2021, available at: https://wyborcza.pl/7,75398,27609767,jezeli-sytuacja-sie-nie-zmieni-w-lasach-znajdziemy-masowe.html.
[55] CoE Commissioner for Human Rights, Third Party Intervention, Commissioner intervenes before the European Court of Human Rights in a case concerning the situation of asylum seekers and migrants stranded at the border between Poland and Belarus, 4 February 2022: https://www.coe.int/en/web/commissioner/-/commissioner-intervenes-before-the-european-court-of-human-rights-in-a-case-concerning-the-situation-of-asylum-seekers-and-migrants-stranded-at-the-bo#:~:text=The%20Commissioner%20considers%20that%20a,be%20entitled%20to%20international%20protection.