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Meeting: 1436<sup>th</sup> meeting (June 2022) (DH)

Communication from an NGO (19/04/2022) 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 : 1436<sup>e</sup> réunion (juin 2022) (DH)

Communication d'une ONG (19/04/2022) 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.

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19.04.2022

Submission by the Centre for Fundamental Rights at the Hertie School, Berlin, and Human Rights Centre of the University of Ghent pursuant to Rule 9.2 of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments, on the implementation of *M.K and other v. Poland* (Application No [40503/17, 42902/17, 43643/17](#))

## **EXECUTIVE SUMMARY**

1. Since the delivery of the judgment in *M.K and other v. Poland* on 23 June 2020, the situation has significantly deteriorated. The legal domestic framework adopted in August and October 2021 ([Dz.U. 2021, poz. 1536](#), [Dz.U. 2021 poz. 1918](#)) prevents claims for international protection of persons that have irregularly crossed the border.
2. The temporary prohibition of staying at designated places, facilities and areas at the Poland-Belarus border is currently extended until 30 June 2022. This makes it impossible for humanitarian workers to assist asylum seekers in submitting their applications for international protection.
3. Humanitarian workers, who attempt to assist persons to submit their claims for international protection have been detained in the border region. There has been increased harassment and intimidation of humanitarian workers at the Polish-Belarusian border, as evidenced in a call by several UN experts on 15 February 2022.<sup>1</sup>
4. The Russian invasion of Ukraine has led to an increase of automated returns of persons to Belarus without receiving application for international protection.<sup>2</sup>
5. In the light of the serious shortcomings of the Action Plan of 8 December 2021, and the deterioration of the situation, contrary to the general measures required by *M.K and others v. Poland*, the Centre for Fundamental Rights at the Hertie School, Berlin ("CFR") and the Human Rights Centre of the University of Ghent ("HRC") repeats their call in the submission from 14 January 2022 for the Committee of Ministers to:
  - continue the supervision of individual measures,
  - urge the Polish authorities to provide evidence on steps taken to eliminate the practice of automated returns of persons to Belarus without receiving applications for international protection (*M.K. and others v. Poland*, paras 208-210),
  - call on the Polish government to provide an Action Plan which addresses the full range of general measures required by *M.K. and others v. Poland*.

<sup>1</sup> [Poland: Human rights defenders face threats and intimidation at Belarus border – UN experts | OHCHR](#)

<sup>2</sup> [Number of Migrants Trying to Enter Poland from Belarus Picks Up Again | Balkan Insight](#)

Additionally, the CFR and HRC call upon the Committee of Ministers to:

- urge Polish authorities to stop harassing and intimidating human rights defenders who are assisting asylum seekers in filing claims for international protection at the Polish border with Belarus,
- schedule the case again for debate in December 2022.

## **I. MAIN POINTS FROM THE JANUARY 2022 RULE 9.2 SUBMISSION**

6. In their rule 9.2 Submission from 14 January 2022 the CFR and HRC evidenced that following the 2020 judgment in *M.K and others v. Poland* concerning the situation at the Polish-Belarus border in 2017, access possibilities to international protection procedures, to an effective remedy and to enter Polish territory have significantly deteriorated. Structural problems identified by the Court (*M.K and others v. Poland*, paras 174 – 186) for rights violations, have not been addressed. To the contrary, Polish state actors continued to carry out collective expulsions in a systematic manner (14 January 2022 Rule 9.2 submission paras 6-12).
7. The CFR and HRC highlighted the deterioration of the situation at the Polish-Belarusian border, displaying:
  - access barriers to international protection procedures and effective remedies (14 January 2022 Rule 9.2 submission paras 7-8),<sup>3</sup>
  - access barriers to territory (14 January 2022 Rule 9.2 submission para 9),
  - collective expulsions (14 January 2022 Rule 9.2 submission, para 10),
  - treatment by Polish territories at the border (14 January 2022 Rule 9.2 submission, paras 11-12).<sup>4</sup>
8. Furthermore, CFR and HRC pointed to regressive legal developments, which are contrary to the ECtHR judgment in *M.K and others v. Poland*. In particular, the Polish government introduced laws which legalize practices found in *M.K. and others v. Poland* to be violating the Convention (*M.K. and others v. Poland*, para 210). Two acts were introduced in response to the situation on the Polish-Belarusian border since August 2021 and are currently in force in parallel:
  - In August 2021 an amendment ([Dz.U. 2021, poz. 1536](#)) to an Executive Order from March 2020 ([Dz. U 2020, poz. 435](#)) was introduced, which allows for the return to the border of all persons who have crossed the Polish border and are not listed in the original Executive Order. This includes asylum seekers.
  - In October 2021, a Parliamentary Act ([Dz.U. 2021 poz. 1918](#)) came into force, according to which persons apprehended immediately after crossing an external border in violation of the law, are returned to the border. The Parliamentary Act explicitly allows for disregarding applications for international protection from people apprehended immediately after crossing an external border in breach of the law

For more details on the two frameworks and their assessment in light of *M.K and others v. Poland* see 14 January 2022 Rule 9.2 submission, paras 13-15.

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<sup>3</sup> As confirmed in the recent ECtHR judgment, *D.A. and others v. Poland* (Application No [51246/17](#))

<sup>4</sup> The life-threatening situation of asylum seekers at the border has been also recognized by the ECtHR in its interim measures, see *R.A v. Poland* case on 29 September 2021.

## II. UPDATE ON THE DOMESTIC LEGAL DEVELOPMENTS

9. On 28.03.2022 a regional court in Hajnówkę ([Sygn. Akt VII Kp 203/21](#)) decided on a case of three persons from Afghanistan who were detained in Poland in August 2021 and collectively expelled to Belarus on the basis of the Executive Order ([Dz. U 2020, poz. 435](#)). It found that the Minister of Interior and Administration adopted the Executive Order in excess of their statutory authorization and found the expulsion to be unreasonable, illegal and incorrect in the light of applicable law. The Court also noted that the three Afghan citizens themselves, and their representative on their behalf, claimed for international protection for several times during detention, but that their applications were refused by Border Guards that day and did not prevent their expulsion.<sup>5</sup> The judgment shows that Polish authorities are continuing the practice of returns of persons to Belarus without receiving applications for international protection, which was found to be in violation of the Convention in *M.K. and others v. Poland* (paras 208-211). It further shows that a domestic court has found the collective expulsions based on the Executive Order to be in violation of applicable law, as the CFR and HRC argue in this and the previous Rule 9.2 Submission.
10. Access to the border region with Belarus is severely limited since September 2021, making it very difficult for humanitarian workers to provide aid and assistance to persons wishing to file claims for international protection. Between September and November 2021 a constitutional state of emergency was in force ([Dz.U. 2021, poz. 1612](#), [Dz. U. 2021, poz. 1788](#)), and since December 2021 a temporary prohibition of staying in the border with Belarus ([Dz. U. 2021, poz 2193](#), [Dz. U. 2022, poz. 488](#)).<sup>6</sup> Both effectively prohibit staying at designated places, facilities and areas at the Polish border with Belarus.
11. In March 2022 several activists were stopped and detained while providing aid and assistance in filing international protection claims to persons crossing the border from Belarus. One of the activists - a 20-year-old woman - was detained after being found sitting in a car in the woods, outside of the region in which the temporary prohibition of stay is in effect. She was detained after a police control, taken to a police station in Sokółka, where she spent the night and the next day interrogated in handcuffs. The prosecutor asked for pre-trial detention and

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<sup>5</sup> On the judgment see for example [Wywózki \(push-backi\) są niehumanitarne, niezgodne z prawem i opierają się na nielegalnym rozporządzeniu - Stowarzyszenie Interwencji Prawnej \(interwencjaprawna.pl\)](#) and [Sąd w Hajnówce. Wyrok ws. pushbacków \(tokfm.pl\)](#)

<sup>6</sup> These restrictions are based not on the Constitution, but on a law ([Dz.U 2021, poz 2191](#)), which gives the minister in charge of interior affairs the competence to introduce a temporary prohibition of entering selected border regions. The law, and consequently the executive orders introduced on the basis of the law, are violating the Constitution procedurally and materially, see Marcin Górski, *Legalność wprowadzenia stanu wyjątkowego i ograniczeń praw obywatelskich nim nałożonych, w tym dotyczących przemieszczania się*, in [Poza Prawem. Prawna ocena działań Państwa Polskiego w reakcji na kryzys humanitarny na granicy polsko-białoruskiej](#), red. Witold Klaus, Wydawnictwo INP PAN, 2022, p. 20-22

she was accused for smuggling people.<sup>7</sup> The court dismissed the prosecutor's motions in her case, as well as in several other similar cases.<sup>8</sup>

### III. UP-DATE ON THE FACTUAL DEVELOPMENTS ON THE POLISH-BELARUS BORDER

12. Belarus could not have been considered a safe third country before August 2021, as evident from ECtHR judgments (*MK and others v Poland*, paras 177-185, *DA and others v Poland*, para 64). The situation has deteriorated due to the conduct of Belarusian authorities since August 2021, who use physical violence to force people to enter Poland.<sup>9</sup> Following the invasion of Ukraine by the Russian Federation on 24 February 2022, the factual situation on the ground further deteriorated, as the Belarussian authorities have emptied camps and forced more protection-seekers to irregularly cross into to Poland, where they are subject to increased and automated push-backs, ultimately leaving the individuals concerned in the strip of land between both borders. Furthermore, Belarus is complicit in the act of aggression against Ukraine, as it permits Russian troops to cross into Ukrainian territory and supports the movements logistically.<sup>10</sup> Due to the international response to the invasion, it is currently extremely difficult to leave Belarus. Consequently, Polish authorities are forcing people back into a country that is involved in a war and a place which they cannot leave. Persons wishing to file applications for international protection in Poland are left in a paradoxical situation, where it is more and more difficult to leave Belarus, thus prompting irregular entry into Poland, where they are increasingly subject to collective expulsions back into Belarus.

13. The increased harassment and intimidation of humanitarian workers at the Polish-Belarusian border has been evidenced in a call by several UN experts from 15 February 2022.<sup>11</sup> The UN experts called upon Poland to “investigate all allegations of harassment of human rights defenders, including media workers and interpreters at the border with Belarus, and grant access to journalists and humanitarian workers to the border area ensuring that they can work freely and safely”. The experts highlighted that most of the protection seekers do not speak Polish and “interpreters play a vital role in ensuring their human rights are protected”. This role of interpreters is also crucial in submitting applications for international protection, thus their harassment and intimidation makes it more difficult to submit such applications.

14. On 27 January 2022 the Council of European Commissioner for Human Rights submitted a [third party intervention](#) to the proceedings on *R.A. and others v Poland*, concerning 32 Afghan nationals who have been confined approximately seven weeks in a makeshift camp on the border between Poland and Belarus. The Commissioner highlighted that “the legal framework in place in Poland, and summarily returning persons who have entered irregularly across the border with Belarus – whether carried out within or outside that legal

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<sup>7</sup> [Aktywistka KIK zatrzymana na granicy: Usłyszałam, że sobie nagrabiłam i dostanę 3 miesiące aresztu tymczasowego \(oko.press\)](#). At the same time providing humanitarian aid free of charge to persons who have crossed into Poland irregularly does not fulfill the criteria for crimes under domestic law, see Witold Klaus *Karanie za pomoc, czyli czy można pociągnąć do odpowiedzialności karnej osoby pomagające przymusowym migrantom i migrantkom na pograniczu*, in [Poza Prawem. Prawna ocena działań Państwa Polskiego w reakcji na kryzys humanitarny na granicy polsko-białoruskiej](#), red. Witold Klaus, Wydawnictwo INP PAN, 2022, p. 20-22.

<sup>8</sup> [Aktywiści uniewinnieni - pomaganie migrantom to nie przestępstwo \(oko.press\)](#)

<sup>9</sup> [Migrants and refugees caught up in Belarus-EU "hybrid warfare" are freezing to death in no man's land - CBS News](#)

<sup>10</sup> [Belarus is Complicit in Russia's War of Aggression – EJIL: Talk! \(ejiltalk.org\)](#)

<sup>11</sup> [Poland: Human rights defenders face threats and intimidation at Belarus border – UN experts | OHCHR](#)

framework – raise acute concerns as to the compatibility with Poland’s obligation under Article 3 ECHR”. In this context the Commissioner noted that the ECtHR has dealt with denial of asylum application by Polish authorities in (invoking *M.K. and others v. Poland* and *D.A. and others v. Poland*), which occurred “before the recent tightening of their approach”.

#### **IV. CONCLUSIONS AND RECOMMENDATIONS TO THE COMMITTEE OF MINISTERS**

15. In the light of the above, the 2021 Executive Order and Parliamentary Act legalizing collective expulsions without examining claims for international protection, are irreconcilable with the required general measures flowing from the judgment *M.K. and others v. Poland*. The CFR and the HRC respectfully urge the Committee of Ministers to ensure that the relevant regressive measures, contrary to the general measures required by *M.K. and others v. Poland* be repealed by Poland and that Poland presents an updated Action Plan to ensure the full range of general measures required by the judgment are put in place.

16. The CFR and the HRC call on the Committee of Ministers to:

- continue the supervision of individual measures,
- urge the Polish authorities to provide evidence on steps taken to eliminate practice of returning persons to Belarus without receiving applications for international protection (*M.K. and others v. Poland*, paras 208-210),
- call on the Polish government to provide an Action Plan which addresses the full range of general measures required by *M.K. and others v. Poland*,
- urge Polish authorities to stop harassing and intimidating human rights defenders who are assisting asylum seekers in filing claims for international protection,
- schedule the case again for debate in December 2022 with a view to assess the full and effective implementation of the general measures required by *M.K. and others v. Poland*.

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