



Ministry of the Interior and Administration Republic of Poland

Undersecretary of State
Maciej Duszczyk

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Warsaw, 23 July 2024

Mr Michael O'Flaherty
Commissioner for Human Rights
Council of Europe

Dear Commissioner,

Thank you for your letter, which raises the extremely difficult issue of the consequences of instrumentalising migration through the creation of an artificial migration route by Russia and Belarus which leads, among others, through Poland. In particular I would like to thank you for the condolences included in your letter regarding the death of a Polish soldier critically wounded while protecting the state border.

I would like to assure you that an appropriate response to the actions of the Belarusian and Russian authorities, taking into account both the need for state security and respect for migrants' rights, is among the priorities of the Polish Government. I would like to point out that the practice of instrumentalisation is a phenomenon that neither international law nor Polish law could have predicted. In its essence it combines activities of the state apparatus with those of criminal organizations dealing with smuggling of migrants and is marked by ruthlessness of the perpetrators. The aim of these actions is to destabilize the internal situation not only in Poland, but also in other European Union Member States. Analysis of the current migratory situation at the border with Belarus must take into account the specificity of this phenomenon, which is an element of hybrid activities connected also to Russia's aggression against Ukraine. First of all, we cannot lose sight of the fact that the actions undertaken or initiated by the Belarusian side pose a real threat to the life and limb of Polish officers and residents of the border areas as well as to migrants transferred in numbers to the Polish-Belarusian border. The most tragic proof of the reality of this threat is the death of a Polish soldier, mentioned in your letter, who was stabbed while preventing an illegal border crossing attempt. Starting from August 2021, i.e. since instrumentalisation takes place, until 18 July this year 13 officers serving in border protection suffered permanent health damage, directly threatening their lives, as a result of an attack by foreigners at the Belarusian side.

Despite the undoubted threat to the safety of officers, the Polish Border Guard respects the principle of non-refoulement, allowing foreigners to submit applications for international protection. Every foreigner who wishes to apply for international protection in Poland has the right to do so. In the period between 1 January and 18 July this year 1,688 applications were accepted at Border Guard facilities at the border with Belarus, covering 1,927 people. In 2023 it was 621 applications and 1,187 people).

It needs to be underlined that for migrants submitting their cases to the European Court of Human Rights, Polish authorities adhere to the relevant interim measures regarding refraining from expulsion, if such measures are issued.

However, we observe that a significant number of migrants does not express their intention to apply for international protection in Poland. Instead they intend to reach other EU Member States. This finding could be indirectly supported by fact that the vast majority of initiated proceedings in cases of granting international protection are subsequently discontinued due to the implied withdrawal of the application by the applicant. Migrants who crossed the border illegally and were not detained are also apprehended, among others at the border with Germany, without expressing any intention to contact Polish authorities along the way.

Polish government has assumed "zero deaths at the border" as a principle. Since the beginning of the crisis, 1,319 immigrants who illegally crossed the Polish-Belarusian border were hospitalized in Polish hospitals. In each case of a threat to migrant's life and limb, emergency medical teams are called. As of today they have intervened 1,130 times, including 25 cases where the immigrant's life was directly threatened. The Commander of the Podlaski Border Guard Regional Unit, by decision of 13 February 2024, implementing the recommendation of the Minister of Internal Affairs and Administration, established non-permanent intervention teams whose task is to search for immigrants who have lost their orientation in forests, swamps and in hard-to-reach areas, which in some cases posed a threat to their life and limb. Non-permanent intervention teams have undertaken activities 56 times, providing assistance to 84 people.

Humanitarianism towards the victims of instrumentalisation must be go in hand with the fulfilment of the state's irrevocable duty to ensure the security of its borders and citizens. Poland unwaveringly protects the external border of the European Union, fulfilling its obligations as a Member State and a country belonging to the Schengen area. Taking into account the intention of the Belarusian authorities - to destabilize the situation in Poland and in the EU, I consider returning the migrants to the Belarusian side immediately after crossing the border as a proportionate reaction. However, this only applies to migrants who are not interested in applying for international protection. It seems important to emphasize that a large number of cases of illegal border crossings are of a mass nature and involve brutal attacks on Polish officers, using knives, branches, broken glass, stones, etc. The actions taken in these conditions constitute a repulse of an attack at the border and cannot be compared to the standard administrative actions taken with migrants after

crossing the border. I would also like to inform you that border crossings with Belarus are still open and it is possible to submit an application for international protection there.

It is worth to recall here the judgement in the case N.D. and N. T. v. Spain (complaints 8675/15 and 8697/15) in which the Grand Chamber of the European Court of Human Rights dismissed the allegation of collective expulsion in connection to the lack of individual assessment of the complainant's cases. The ECHR assessed the actions of the complainant's, who forced the Spain-Moroccan border in a group and subsequently have been immediately returned to the Moroccan side of the border (without identification or any individual assessment). Spain indicated that the complainants could have used legal ways of applying for international protection at a border crossing point or apply for a humanitarian visa in a consulate, while they did not make any effort to do so and to arrive to Spain legally. ECHR argued that states have the right not to admit persons who attempted to cross the border illegally. The Court indicated that legal pathways, including for the purpose of applying for international protection, were available and Spain provided genuine and undisturbed access to the border crossing point. Even if reaching the BCP could cause some difficulties also because of the interference of Moroccan authorities, ECHR concluded that Spain cannot take responsibility for that.

Due to the continuing migration threat on the Polish-Belarusian section of the state border and the external Schengen border, as well as the increased presence of Russian troops in Belarus and continuing hybrid attacks with the participation of illegal migrants on Polish officers and soldiers, inspired directly by representatives of the Belarusian services, on 12 June 2024, the Minister of Internal Affairs and Administration signed a regulation on the introduction of a temporary ban on staying in a specific area in the border zone adjacent to the state border with the Republic of Belarus for a period of 90 days. The buffer zone covers the length of the border at 60.67 km. On a section of approximately 44 km, the prohibited area covers 200 m from the state border line, while on a section of approximately 16 km located in the area of nature reserves, the zone is approximately 2 km.

The restrictions cover only the section of the border being most affected by the instrumentalisation phenomenon, to protect civilians against any possible threat while minimizing the negative consequences for local communities. The Act of 12 October 1990 on protecting the state border enumerates categories of persons that are excluded from the temporary restriction of movement in the border area. This catalogue includes persons with a place of permanent residence, conducting economic activity or working in farmsteads located within the restricted area, studying and taking care of person studying within the restricted area as well as first of kin of the abovementioned. Furthermore in justified cases the relevant commander of a border post can temporarily allow entry to the restricted area, in particular of journalists. In the period between 13 June and 14 July 2024, in the area covered by the Podlaski Border Guard Regional Unit 97 permits for entry

to the restricted area has been issued, both to journalists and humanitarian aid workers. The decision to prolong the restrictions in place has not been taken yet.

I would like to underline that the Border Guard cooperates with NGOs. This cooperation covers above all the delivery of humanitarian aid (water, food, clothing, shoes, basic sanitising and medical supplies and emergency blankets) as well as working together to respond to any signals of danger to migrant's life and limb and provide medical aid.

As for the Act of 12 July 2024 on amending some of the acts with the aim of improving the activities of the National Armed Forces of Poland, Police and the Border Guard in the event of a threat to state security, I would like to highlight that its goal is to solely exclude the unlawfulness of acts involving the direct use of force or firearms in response to a direct assault against interests protected by law, in particular against the life of an officer or other persons if the circumstances demand immediate action. I would like to resolve any doubts about the excessive nature of these provisions. To prevent any abuse of this regulation its scope has been limited to officers of services carrying duties related to border protection that is Border Guard, Police and Military Police. Only a member of these services who acted outside of the scope of relevant regulations in a situation of a direct assault against the integrity of the border and circumstances of this event demanded immediate action, in particular to repeal a direct and unlawful attack against life and limb or freedom, does not commit a crime. Despite the legal possibility to exclude the unlawfulness of such action, any case of direct use of force or firearms will need to be assessed against the criteria of this exclusion.

Yours sincerely,
Maciej Duszczyk
Undersecretary of State