EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Poland's return of people from Chechnya to Belarus without examining requests for international protection violated the Convention

The case of **M.K. and Others v. Poland** (application nos. 40503/17, 42902/17 and 43643/17) concerned the repeated refusal of Polish border guards on the border with Belarus to admit the applicants, who had come from Chechnya and had asked for international protection.

In today's **Chamber** judgment[1] in the case, the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of torture or inhuman or degrading treatment) of the European Convention on Human Rights, **and**

a violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) to the Convention, and

a violation of Article 13 (right to an effective remedy) of the Convention, **in conjunction with Article 3 and Article 4 of Protocol No. 4.**

It also held, unanimously, that **Poland had failed to comply with its obligations under Article 34 (right to individual petition)** of the Convention.

The Court found in particular that the applicants had repeatedly arrived at the Terespol border crossing between Poland and Belarus and had made it clear, despite the Polish authorities' statements to the contrary, that they wished to seek international protection.

Instead, the border guards had returned them consistently to Belarus, without a proper review of their applications. Furthermore, the Government had ignored interim measures issued by the European Court to prevent the removal of the applicants, who had argued that they were at a real risk of chain-*refoulement* and treatment contrary to the Convention.

The Polish State had demonstrated a consistent practice of returning people to Belarus in such circumstances, a policy which amounted to collective expulsion. Given the authorities' refusal to implement the Court's interim measures, the Polish State had also failed to live up to its obligations under the Convention.

Principal facts

M.K. v. Poland, application no. 40503/17

The applicant, Mr M.K., is a Russian national.

Between July 2016 and June 2017 he travelled to the border crossing between Poland and Russia at Terespol approximately 30 times. He each time informed Polish border guards that he was from Chechnya and expressed fears for his safety in that region of Russia, expressly stating that he wished to lodge an application for international protection. He several times carried with him a written application.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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He told the guards that he had been detained many times in Chechnya without a legal basis, had been arrested and ill-treated. His Belarus visa had expired, he could not remain in that country and in practice it was impossible to find international protection there.

The border guards turned the applicant away each time on the basis of administrative decisions that he did not have any authorisation to enter Poland and he had not stated that he was at risk of persecution in his home country but that he was actually trying to emigrate for economic or personal reasons. He lodged at least one appeal against those decisions, which was upheld by the head of the National Border Guard. An appeal against the latter decision is still pending completion.

On 8 June 2017 the European Court of Human Rights, after a request from the applicant's legal representative, indicated an interim measure to the Polish Government under Rule 39 of the Rules of Court that he should not be removed to Belarus, however, he was returned the same day. He returned several times to the border and, despite the interim measure, was each time turned away.

On at least one occasion when he went to the border his legal representative sent copies of his international protection request by email, fax and a public service Internet platform to the border guards at Terespol and border guard headquarters in Warsaw. The representative also informed the Foreign Ministry department responsible for proceedings before international human rights bodies, including the Strasbourg Court and referred to the interim measure.

The Court twice rejected a Government request to end the interim measure. The applicant eventually left Belarus owing to fears of deportation to Chechnya.

M.A. and Others v. Poland, application no. 42902/17

The applicants are Mr M.A. and Mrs M.A. and their five children, who are minors. They are all Russian nationals.

The applicants travelled to the border crossing at Terespol on two occasions in April 2017, where they expressed a wish for international protection owing to fears for their safety in Chechnya.

They were both times turned away under administrative decisions owing to the absence of any authorisation to enter Poland and because they had not stated that they were at risk of persecution in their home country. The border guards' official notes stated that they were seeking to emigrate for economic or personal reasons.

In April and May 2017 they sought protection from Lithuania, a situation which was the subject of a separate Court judgment in late 2018 (M.A. and Others v. Lithuania).

On 16 June 2017 they again went to the Polish-Belarusian border, when their lawyer asked the Court for an interim measure. The Court applied Rule 39 and indicated to the Polish Government that the applicants not be removed to Belarus, nevertheless, they were returned the same day.

Several days later they returned to the border with a letter seeking international protection and a copy of the letter about the interim measure, but were turned away. Their representative also sent a copy of the first applicant's application for protection to the border guards and the Foreign Ministry.

The applicants made further unsuccessful efforts to be admitted to Poland between August and December 2017. The first applicant subsequently went to a police station in Brest in Belarus after a summons by the police in Chechnya. The whole family left Belarus and went to Smolensk in Russia, where the first applicant was detained and later transferred to Chechnya.

The second applicant returned to Belarus with the children and in January 2018 again applied for protection in Poland, which this time admitted her to a refugee reception centre. The first applicant was released from detention in Chechnya, making serious allegations of ill-treatment. He travelled back to Terespol and was ultimately admitted to the same refugee reception centre as the rest of his family.

The family travelled to Germany in in May 2018, where the authorities lodged requests for them to be transferred back to Poland, although this has not happened to date. Following the applicant's admission to Poland and them subsequently leaving that country, the Court decided to lift the interim measure in their case.

M.K. and Others v. Poland, application no. 43643/17

The applicants are Mr M.K. and Mrs Z.T. and their three children, who are minors. They are all Russian nationals.

Between September 2016 and July 2017 they travelled twelve times to the Terespol crossing, where they expressed a wish to apply for international protection owing to fears for their safety in Chechnya. They were turned away under administrative decisions that they did not have authorisation to enter Poland and had not stated they were at risk of persecution in their home country. Their reason to enter Poland was economic or personal, according to the border guards. They appealed at least once, but were unsuccessful. A further appeal is still pending a decision.

On 20 June 2017 the applicants went again to the border, when their representative lodged a request under Rule 39 for an interim measure preventing their return to Belarus. The measure was granted, but the applicants were nevertheless denied entry to Poland the same day.

Between June and September 2017 the applicants returned at least seven more times to the border, but were turned away each time. They submitted that they had had documents with them about the Court's interim measure and written applications for international protection.

The applicants left Belarus on an unspecified date in order to avoid deportation. They have remained in hiding for fear of being tracked by the Chechen authorities. The Court has rejected requests by the Government to lift the interim measure.

Complaints, procedure and composition of the Court

The applicants complained under Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) of being denied access to asylum procedures and of being exposed to a risk of treatment in Chechnya contrary to the Convention.

They also complained that they had been subjected to collective expulsion, contrary to Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) to the Convention, and under Article 13 (right to an effective remedy) that they had had no effective remedy under Polish law by which to lodge their complaints under Article 3 and Article 4 of Protocol No. 4.

They complained in addition under Article 34 (right to individual petition) of the Convention that the Polish Government had failed to comply with the Court's interim measures.

The applications were lodged on 8, 16 and 20 June 2017 respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

Ksenija **Turković** (Croatia), *President*,
Krzysztof **Wojtyczek** (Poland),
Aleš **Pejchal** (the Czech Republic),
Armen **Harutyunyan** (Armenia),
Pere **Pastor Vilanova** (Andorra),
Tim **Eicke** (the United Kingdom),
Raffaele **Sabato** (Italy),

and also Renata **Degener**, *Deputy Section Registrar.*

Decision of the Court

Article 3

Joining the applicants' cases because of their similarity, the Court noted the fundamental importance of the prohibition on inhuman and degrading treatment in Article 3 of the Convention.

Furthermore, the Court itself did not examine asylum applications, but assessed the existence of effective guarantees to protect applicants from arbitrary *refoulement*. If a Contracting State decided to remove an asylum-seeker to a third country without examining an asylum claim on the merits, it had to review whether the person would have access to an adequate asylum system in that country.

The Court first noted that the Government had disputed the argument that the applicants had actually expressed a wish to lodge applications for international protection or had expressed any fear for their own safety on their numerous visits to the border crossing.

However, the Court gave more credence to the applicants' statements, which had been corroborated by accounts collected from other witnesses by national human rights institutions, in particular the Ombudsman and the Children's Ombudsman. Those bodies' reports indicated a systemic practice of Polish border guards misrepresenting statements by asylum-seekers in their official notes. The Supreme Administrative Court had also confirmed irregularities in the questioning of foreigners at the border.

The applicants' account was also backed up by documents they had presented to the Court at every stage of the proceedings, especially copies of applications for international protection which they had had with them at the border. The Court did not find it credible that they had not handed those documents to border guards who were to decide on their admission to Poland or return to Belarus.

In any event, the applicants' requests for international protection had been made available to the Government when they had requested interim measures. The Court itself had in addition informed the State that it considered that the applicants had lodged requests for international protection.

The Court could not accept the Polish Government's argument that the applicants had not presented any evidence that they were at risk of being subjected to treatment contrary to Article 3. They had also raised arguments about why they considered that Belarus was not a safe third country and that they faced a risk of "chain-*refoulement*" there. Those arguments had been substantiated by official statistics, which showed that the asylum procedure in Belarus was not effective for Russian citizens.

The Court concluded that the applicants had made an arguable claim that their asylum applications would not be treated seriously by the Belarusian authorities and that their return to Chechnya would violate Article 3. The Polish authorities should have carried out an assessment of those claims in compliance with the procedural obligations of Article 3. Poland had also been under an obligation to ensure the applicants' safety, in particular by allowing them to stay on its territory, until their claims had been properly determined by the domestic authorities.

The Court also considered that a State could not deny access to its territory to people who alleged that they might face ill-treatment if they remained in a neighbouring State, unless adequate measures had been taken to eliminate such a risk.

The Government had argued that it had acted in line with European Union law when it had refused the applicants entry. The Court noted, however, that the non-*refoulement* principle was also found in EU law, including the Schengen Borders Code. The State could thus have met the requirements of that Code if it had accepted their applications for protection and had not returned them to Belarus.

Furthermore, the experience of the applicant in the first application highlighted the real risk of ill-treatment: he had returned to Russia, where he said he had been detained and tortured.

The Court concluded that the fact that the authorities had failed to review the applicants' applications on the 35, eight, and 19 or more occasions when they had presented themselves at the Polish border had led to a violation of Article 3. 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.

There had accordingly been a violation of Article 3.

Article 4 of Protocol No. 4

The Court first decided that the applicants had been expelled, within the meaning of the Convention. The question was whether that expulsion had been collective.

The Government had submitted that the applicants had been interviewed and given individual decisions. However, the Court noted its findings on the way border officers had disregarded the applicants' statements on international protection and found that the individual decisions in question had not properly reflected the applicants' reasons for their fears of persecution.

Furthermore, they had not been able to consult lawyers and had been denied access to them at the border. Independent reports on the situation at the border indicated that the applicants' cases exemplified a policy of refusing access to foreigners coming from Belarus, whether economic migrants or people who had expressed a fear of persecution in their countries of origin.

Those reports noted a practice of very short interviews which disregarded people's explanations for seeking international protection; of emphasis being put on arguments which allowed them to be classed as economic migrants; and of misrepresentations of foreigners' statements.

The existence of a wider State policy of refusing to review people's requests for international protection and returning them to Belarus was supported by a statement by the then Minister of the Interior and Administration, who had expressed opposition to accepting migrants from Chechnya.

The Court 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.

Article 13 in conjunction with Article 3 and Article 4 of Protocol No. 4

The Court, noting its findings so far in the case, found that the applicants' complaints had been arguable for the purposes of Article 13.

It had also held that the applicants were asylum-seekers and that an appeal against a refusal to admit them to Poland which had no automatic suspensive effect, as in their cases, and which could not have prevented them being returned to Belarus, could not be regarded as an effective remedy. Nor had the Government pointed to any other remedies which met Convention requirements.

The Court concluded that there had been a violation of Article 13 of the Convention, taken in conjunction with Article 3 and Article 4 of Protocol No. 4.

Article 34

The applicants complained that the Government had failed to comply with the interim measures.

The Court noted that the interim measures had included instructions to the authorities to refrain from returning the applicants to Belarus. In the first and second applications it had also stated that the measures should be interpreted as meaning that the applicants' applications for asylum should be received by the Border Guard service and forwarded to the appropriate body for review.

The Government had continuously questioned the possibility of complying with the interim measures on the grounds that the applicants had not actually been admitted into Poland and could

not therefore have been removed. The Government had continued to rely on its arguments against the measures even after the Court had rejected them by refusing its requests to lift them.

Furthermore, the Government had still not complied with the measures in the first and third applications and had only implemented the one in the second application after a long delay. The applicants had thus been put at risk of the kind of treatment the measures had aimed at preventing.

The Court concluded that Poland had failed to comply with its obligations under Article 34.

It also held that the interim measures in the first and third applications had to remain in force until the judgment in the applicants' cases became final or the Court took a further decision.

Just satisfaction (Article 41)

The Court held, by six votes to one, that Poland was to pay:

the applicant in application no. 40503/17 34,000 euros (EUR) in respect of non-pecuniary damage and EUR 140 in respect of costs and expenses;

the applicants in application no. 42902/17 EUR 34,000 jointly in respect of non-pecuniary damage, and EUR 39 in respect of costs and expenses; and,

the applicants in application no. 43643/17 EUR 34,000 jointly in respect of non-pecuniary damage, and EUR 140 in respect of costs and expenses.

Separate opinions

Judge Eicke expressed a dissenting opinion with reference to the question of just satisfaction. The opinion is annexed to the judgment.

The judgment is available only in English.

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