

„Input of the Commissioner for Human Rights of the Republic of Poland for the Special Rapporteur’s on the human rights of migrants report on human rights violations at international borders: trends, prevention and accountability”

Answer to question 1

The Commissioner for Human Rights (Commissioner) is a constitutional body appointed to protect and supervise the observance of human and civil rights. The Commissioner’s role is performed independently of other public authorities and his powers are set out in the Constitution of the Republic of Poland as well as in the Act of 15 July 1987 on the Commissioner for Human Rights¹. The Commissioner is appointed by Sejm (lower chamber of the Parliament) with the approval of Senate (higher chamber of the Parliament) for a 5-year term of office. The Commissioner plays the roles of National Human Rights Institution (NHRI), the National Mechanism for the Prevention of Torture (visiting body for the prevention of torture and other cruel, inhuman or degrading treatment or punishment), independent equality body (referred to in the EU anti-discrimination directives) and independent body monitoring the implementation of the Convention on the rights of persons with disabilities (CRPD), according to art. 33 (2) of CRPD.

Answer to question 2

Since May 2021, the Parliament has adopted two significant amendments regarding the regulation of foreigners crossing the border into Poland and the submission and processing of applications for protection. In addition, the Minister of Interior and Administration (MIA), prior to the parliamentary amendments to the laws, introduced the possibility of returning foreigners to the state line border on the basis of amendments to the existing regulation introduced in connection with the spreading COVID-19 pandemic.

The Commissioner was concerned about the amendments to the Regulation of the MIA on temporary suspension or restriction of border traffic at certain border crossing points (hereinafter: the Regulation), introducing, as of 21 August 2021, to § 3 of the Regulation paragraphs 2a and 2b, as grounds for turning back to the state border line persons who do not belong to any of the categories of entities entitled under § 3(2) of the Regulation to cross the Polish border, and have found themselves in a border crossing where border traffic has been suspended or restricted, or outside the territorial scope of the border crossing. It is worth noting that already in its original version, the Regulation did not list persons intending to seek international protection among those entitled to enter the territory of Poland.

The new provisions, although theoretically not referring directly to persons who declare their intention to apply for international protection, legitimises turning them back to the state border line and deprives them of the chance to effectively apply for protection despite the fact that they are entitled to do so under the provisions of the Act on Granting Protection to Foreigners within the Territory of the Republic of Poland, and the guarantees of exercising this right stem from Article 56(2) of the Constitution.

¹ the Act of 15 July 1987 on the Commissioner for Human Rights (Dziennik Ustaw [Journal of Laws] of 2020, item 627 as amended)

Consequently, the Commissioner considered the procedure of returning to the border introduced in the regulation as contradictory to, inter alia, the provisions of the Geneva Convention Relating to the Status of Refugees, the Charter of Fundamental Rights of the EU, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), including also Article 4 of Protocol No. 4 to the Convention, which prohibits the collective expulsion of foreigners. The Commissioner presented² his remarks in a letter to the MIA, asking for a detailed analysis of his position and for actions to be taken in order to guarantee foreigners the right to apply for international protection in Poland. Despite the Commissioner's reaction, the criticized regulations are still in force.

In connection with the submission to the Senate for consideration of the Act on amending the Act on Foreigners and certain other acts adopted by the Polish Parliament, the Commissioner raised doubts as to the compliance of the provisions of the proposed act with the European Union law and the Convention Relating to the Status of Refugees (hereinafter: the Geneva Convention). The Commissioner stressed that international law, including EU law, takes precedence over laws in the light of Article 91 of the Constitution. At the same time, he drew attention to the difficulties existing for years in realising the right of foreigners to apply for international protection in Poland, and reminded that this right, among other freedoms and personal rights, is guaranteed to foreigners by Article 56(2) of the Constitution.

The Commissioner alarmed that the government draft amendment to the Act on Foreigners and certain other acts, which was being debated in the Senate and adopted by the Sejm, not only did not change the status quo, but contained proposals which, if implemented, would further restrict access to international protection in Poland. Bearing the above in mind, the Commissioner presented³ the Speaker of the Senate with detailed comments concerning the amendment with a request to convey them to the members of the Parliament and to take them into account in the legislative process.

The Commissioner pointed, inter alia, to the provisions allowing for leaving an application for international protection unprocessed if a foreigner is apprehended near an external EU border immediately after crossing it in violation of the law. In his letter, the Commissioner noted that such a premise has been defined in European law, but it concerns the application of the so-called accelerated procedure of examination of the application and does not give grounds to abandon the substantive examination of the application. Moreover, as the Commissioner pointed out, this provision dangerously introduces into the Polish legal system the institution of the so-called safe third country, without adequately defining it, which raises the question whether such a country may also be one that does not comply with the provisions of the ECHR.

The Commissioner also criticised the introduction into the Act on Foreigners of the instrument of a decision to leave the territory of Poland, pointing out that the provision introducing the possibility to issue such a decision is contrary to the prohibition of expulsion or return of foreigners seeking international protection expressed in the Geneva Convention. It also violates Article 4 of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits collective expulsion of foreigners.

² Letter dated 25 August 2021, marked XI.540.9.2020.AS.

³ Letter dated 3 October 2021, marked XI.543.13.2018

On 27 August 2021 the Commissioner requested the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe to issue, as a matter of urgency, an official opinion on the compliance with international standards the draft Act on amending the Act on Foreigners and the Act on Granting Protection to Foreigners within the Territory of the Republic of Poland, as well as the above-mentioned Regulation of the MIA.⁴

Answer to question 3

The changes in the law described in the section above have contributed to both controlling, reducing, and preventing migration. As an additional measure in the Polish authorities' fight against irregular migration, on August 2, 2021, a state of emergency was introduced in areas bordering Belarus. By means of a regulation, the Council of Ministers introduced restrictions on freedom of assembly, a ban on organising mass events and on people who do not live there residing in the area covered by the state of emergency, as well as restrictions on the right of access to public information. The Commissioner pointed out that the complete restriction of journalists' access to the area covered by the state of emergency and the complete exclusion of the right of access to public information raise doubts and in that case it would be reasonable to introduce a mechanism for granting passes to journalists entering border areas to ensure public safety and respect for freedom of expression standards. The authorities have not taken account of the Commissioner's recommendations in this regard⁵.

Following the expiry of the state of emergency, the Sejm amended the Law on the State Border. Under the new provisions in specified circumstances a temporary ban on staying in a specified area in the Border area adjacent to the state Border constituting the external border of the EU maybe be imposed. During the legislative work, the Commissioner submitted⁶ to the Senate a critical opinion on the draft law. The Commissioner, inter alia, was critical of the possibility given to the MIA to define in detail the principles of the ban on staying in border areas.

On 15 September 2021 the Commissioner requested ODIHR to provide an urgent legal opinion, analysing the legal acts introducing and regulating the state of emergency⁷.

On 25 August 2021 the European Court of Human Rights issued an interim order in the case of Amiri and Others v. Poland (application no. 42120/21), concerning 32 foreigners who were staying near the Polish-Belarusian border, close to the village of Usnarz Górny. The ECHR's order required the Polish government to provide the above mentioned persons, with access to food, water, clothing, adequate medical care and, if possible, temporary shelter. Poland had not provided the complainants with any kind of assistance, maintaining that the foreigners were under Belarusian jurisdiction, and that therefore the Polish services could not take any action with regard to them.

⁴ The ODIHR opinion dated 10 September 2021, marked MIG-POL /428/2021 [JB]

⁵ Letter dated 6 September 2021, marked VII.519.7.2021.MWi

⁶ Letter dated 22 November 2021, marked VII.565.23.2021.ST

⁷ The ODIHR opinion dated 15 November 2021, marked NHRI-POL/432/2021 [MA]

Subsequently, on 27 September 2021 the ECHR communicated to the Polish government a complaint in the case of R.A. and Others v. Poland (application no. 42120/21, a complaint concerning the above-mentioned group of foreigners), in which the Polish side was accused of violating, inter alia, the provision prohibiting torture and degrading treatment or punishment and provision prohibiting the collective expulsion of foreigners. The ECHR also reiterated its ruling on interim measures, extending the duration of the measure indefinitely, and furthermore, , obliged the Polish government not to return complainants to Belarus if they are on the territory of Poland and to ensure access and direct contact between the foreigners' attorneys and the complainants, either by admitting them to the complainants if they are in the territory of Poland, or by admitting them to the Polish border near the place where the complainants are located if they are outside that territory. Meanwhile, information reaching the Office of the Commissioner indicated that the applicants' attorneys who attempted to contact their clients were prevented from doing so by the Military Police and the Police. Accordingly, the Commissioner asked⁸ the MIA to comment on the above information, and to answer the question when and how the interim order of the ECHR will be implemented. The Commissioner has not received any reply in the matter.

Answer to question 4

The Polish legal regulations do not directly introduce the concept of a safe third country, however, the changes adopted in the aforementioned Act on Granting Protection to Foreigners within the Territory of the Republic of Poland, i.e. the possibility of leaving the application for granting international protection unprocessed by the Head of the Office for Foreigners, indirectly introduce this concept as a negative premise for leaving the application unprocessed. According to this exception, an application for protection will not be left unprocessed if the applicant has come directly from the territory of a country where his life or freedom would be in danger of persecution or risk of serious harm. Reading this exception a contrario: applications for international protection submitted by foreigners apprehended in the aforementioned circumstances, who came directly from a country in which there were no threats indicated in the provision, will not be examined.

The Commissioner in his critical opinion for the Senate (referred to in section 2) recalled, inter alia, that the safe third country concept derives from Article 38 of directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast, Journal of Laws.EU.L.2013.180.60), pursuant to which Member States may apply that concept only if the competent authorities have satisfied themselves that the applicant for international protection will be treated in the third country in question in accordance with the principles set out in the directive, namely, that his life and freedom would not be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, that there is no risk of 'serious harm' to him⁹, that the principle of non-refoulement in accordance with the Geneva

⁸ Letter dated 3 October 2021, marked XI.543.61.2021.PW

⁹ In accordance with the meaning given to this concept by Article 15 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons

Convention has been respected, and that the principles of non-discrimination and non-discrimination established in law are applied.

Answer to question 5

From the end of August until December 2021, every week, representatives of the Commissioner for Human Rights, including the Commissioner himself, the Deputy Commissioner, the Equal Treatment Department and the National Mechanism for the Prevention of Torture (hereinafter: the NMPT) operating at the Commissioner's Office, conducted unannounced visits to the Polish-Belarusian border. These activities were related to the ongoing humanitarian crisis at the border and the dramatic situation of foreigners, including many families with children, who were crossing the Polish-Belarusian border in an irregular manner, often forced to do so by Belarusian officers, after which, in many cases and on numerous occasions, they were returned to Belarus by the Polish border guards. Within the framework of the visits the representatives of the Commissioner of among other, controlled Border Guard posts, the places of detention of foreigners subordinate to the Border Guard, the Hospital in Hajnówka, which provided medical aid to foreigners detained by the Border Guard after crossing the border, as well as undertook interventions in places where activists operating on the border found foreigners in need of humanitarian aid, and who wanted to submit to the procedures applicable in Poland (e.g. submitting an application for international protection). The report containing detailed conclusions from the above-mentioned visits in the area of the Polish-Belarusian border was submitted to the Prime Minister of the Republic of Poland. Due to restrictions on access to public information introduced under the state of emergency, the report was classified. The NTPM thematic report on guarded centers for foreigners is to be published in the 2nd quarter of 2022.

In addition, the Commissioner, as a result of his representatives' visits to guarded centers for foreigners, on 25 January 2022 sent a letter¹⁰ to the presidents of regional courts, with jurisdiction over foreigners, asking them to sensitize judges to the possibility of imposing alternative measures to detention, especially on unaccompanied children and minors, as well as adults who have experienced torture in their countries of origin.

Attachments:

1. the Act of 15 July 1987 on the Commissioner for Human Rights,
2. selected regulations on the implementation of the state of emergency and amendments to the Act on Foreigners and the Act on Granting Protection to Foreigners within the Territory of the Republic of Poland
3. The Commissioner letter dated 3 October 2021, XI.543.13.2018
4. The ODIHR opinion dated 10 September 2021, MIG-POL /428/2021 [JB]
5. The Commissioner letter dated 6 September 2021, VII.519.7.2021.MWi

eligible for subsidiary protection, and for the content of the protection granted (Journal of Laws.UE.L.2011.337.9).

¹⁰ Letter dated 25 January 2022, marked KMP.572.1.2021.PK

6. The Commissioner letter dated 22 November 2021, VII.565.23.2021.ST
7. The ODIHR opinion dated 15 November 2021, NHRI-POL/432/2021 [MA]
8. The Commissioner letter dated 3 October 2021, XI.543.61.2021.PW