

Warsaw, 20 August 2019

L.Dz~~1139~~/2019/JB

TO:

**The Secretary of the Committee of Ministers
Council of Europe
Avenue de l'Europe
F-67075 Strasbourg Cedex**

**COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
("HFHR") CONCERNING EXECUTION OF ECtHR JUDGMENT IN CASE
BISTIEVA AND OTHERS AGAINST POLAND (APPLICATION NO. 75157/14)**

To the attention of:

1. Mr. Jan Sobczak

Plenipotentiary of the Minister of Foreign Affairs for cases and procedures before
the European Court of Human Rights
Agent of Polish Government

2. Mr. Adam Bodnar

Commissioner for Human Rights

3. Mr. Mikołaj Pawlak

Commissioner for Children Rights

EXECUTIVE SUMMARY

- 10 April 2018 the Court delivered judgment in case *Bistieva and Others v. Poland*, the Court holds that there has been a violation of Article 8 of the Convention; this judgment has become final on 10 June 2019; it was the first (and so far, the only one) international body decision concerning placing of asylum-seekers in detention centres in Poland,
- the Polish government presented its observations in the Action Report of 11 June 2019, the Government stated i.a. that the alternatives to detention were introduced to Polish law and are widely used and that the employees of the asylum authority (Aliens Office) were trained about the *Bistieva* judgement, therefore, in the Government's opinion, the general measures adopted are sufficient to conclude that Poland has fulfilled its obligations under the Article 46 § 1 of the Convention,
- according to the HFHR and other NGOs as well as national human rights institutions, child's best interest principle is not observed in practice; according to the Children Rights Commissioner, between 2014 and 2017 more than 1100 children were placed in detention, there is also number of similar cases of asylum seekers families detention pending before the Court,
- therefore, according to the HFHR, there is a need to implement measures in order to prevent similar violations in the future; for this reason, this letter contains recommendations concerning actions to be taken in order to implement *Bistieva* judgment properly.

RECOMMENDATIONS

- In the opinion of the HFHR, the following actions should be taken by Polish authorities in order to fully implement the *Bistieva* judgment:
 - conduct training for judges and officers of the Border Guard on the application of the principle of the child's best interest in the detention decisions as well as on the jurisprudence of the ECtHR in this respect ,

- draft and implement practical guidelines for specific activities that the Border Guard and national courts should carry out as a part of the examination of the best interests of the child based on the international human rights law and recommendations of the UN Committee of the Rights of the Child,
 - ensure that the courts conduct the determination of the best interest of the child in every detention case, including hearing the child and providing independent psychological and/or medical examination on the impact of the detention on child's well-being,
 - ensure that the decisions on placing the family in a detention centre also contain detailed personalized justification regarding the situation of children.
- Recommendations for the Committee:
- To have a full picture of children's detention in Poland, the Committee should request the Government to provide accurate and current statistics on the number of children placed in detention centers and on the alternatives used,
 - we also request that the execution of *Bistieva v. Poland* judgment will be considered at the next Committee meeting.

1. INTRODUCTION

The Helsinki Foundation for Human Rights with its seat in Warsaw, Poland would like to respectfully present to the Committee of Ministers of the Council of Europe its communication, under the Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, regarding the execution by the Polish authorities of the European Court of Human Rights' ("ECtHR", "the Court") judgment in the case *Bistieva and Others v. Poland* (application no. 75157/14).

The HFHR is a Polish non-governmental organisation established in 1989 with a principal aim to promote human rights, the rule of law and the development of an open society in Poland and other countries. The HFHR actively disseminates the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "Convention") and is dedicated to contributing to the proper execution of ECtHR judgments. Protection of asylum-seekers, refugees and migrants rights is one of the main HFHR's activities.

In its communication, the HFHR will refer to the Government's action report containing information on measures taken to implement the judgment *Bistieva* judgment. We will focus in particular on the practical implementation of alternatives to detention and determination of child's best interest in cases of detention of the asylum-seekers in Poland. We will also provide recommendations on how to implement *Bistieva* judgment properly in order to prevent similar violations in the future.

2. BISTIEVA AND OTHERS V. POLAND JUDGMENT

The case concerned the detention of a Chechen asylum-seeking family, including three minor children. The Court held that Polish authorities had not viewed the family's administrative detention as a measure of last resort. Nor had they given due consideration to possible alternative measures. According to the ECtHR, the Polish

authorities had not considered the child's best interests in this case. The Court held that the child's best interests cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children. The Court also stated that the applicants' detention lasted five months and twenty days while the detention of minors called for greater speed and diligence on the part of the authorities. As a result, the Court held that the detention of the family constituted a violation of Article 8 of the European Convention on Human Rights.

It must be noted that it was the first (and so far, the only one) international body decision concerning placing of asylum-seekers in detention centres in Poland. Therefore, the *Bistieva* judgement should play an important role in the interpretation of the domestic detention provisions when it comes to asylum-seekers, especially in terms of the application of the best interest of the child principle.

3. GOVERNMENT'S ACTION REPORT

On 11 June 2019, the Government presented to the Committee of Ministers an Action report containing information on the measures taken to implement the judgment in the case of *Bistieva and Others against Poland*.

The Government indicated that on 1 May 2014 the new *Aliens Act* of 12 December 2013 (*Aliens Act*) came into force. The new law has introduced alternative measures to detention such as reporting duty, obligation to deposit a financial guarantee and obligation to stay in the designated place of residence. New law provides that in case where there are reasons to detain an alien applying for international protection, the Border Guard is obliged to assess in the first place whether the application of measures alternative to detention would be sufficient. *Aliens Act* also amended the provisions of the *Act on granting protection to aliens in the territory of the Republic of Poland* of 13 June 2003 (*Protection Act*) which states that the applicant is placed in the detention centre only if the application of the alternative measures is not possible. The Government stated that placement of a foreigner in the detention centre shall take place merely in cases specifically indicated in the legal provisions and shall be

applied as a measure of last resort. The national courts, when deciding on the application of detention, are also obliged to consider the best interest of the child.

The Government stated that in cases of families with children alternative measures are used in the first place. The Government provided statistical data that illustrates the prevalence of the application of alternative measures with respect to foreigners.

The Government also stated that in order to standardize the detention procedures, the *Rules of conduct of the Border Guard with respect to foreigners requiring special treatment (Zasady postępowania Straży Granicznej z cudzoziemcami wymagającymi szczególnego traktowania)* were developed and implemented in 2015. The Rules define vulnerable groups that include, among others, children, pregnant women, persons of a different sexual orientation and persons that experienced physical or mental violence. The Rules establish a vulnerability identification system and specify actions to be taken when a person with special needs is identified.

The Government stated that the *Bistieva* judgment has been translated into Polish and published on the website of the Ministry of Justice and in the HUDOC database. It was also disseminated among the employees of the asylum authority.

Therefore, the Government is of the opinion that the general measures adopted are sufficient to conclude that Poland has fulfilled its obligations under the Article 46 § 1 of the Convention.

4. OBSERVATIONS OF HFHR, OTHER NGOS AND NATIONAL HUMAN RIGHTS INSTITUTIONS ON CHILDREN DETENTION

It should be admitted that the alternatives to detention have been introduced to Polish domestic law and are being used in practice. However, the statistics presented by the Government in the Action Report do not specify the number of children detained in the presented period, therefore these data cannot be treated as fully illustrating the phenomenon of asylum-seeking children detention. It must be also noted that experience of the NGOs and national human rights institutions shows that asylum-seeking children detention is still area of concern.

- determination of the child's best interest and application of the alternatives to detention

According to the information provided by the Commissioner for Children Rights, in the period of 2014-2017, 1103 children were placed in the detention centres.¹ According to available statistics, in 2018 a total number of 248 children, both unaccompanied and with families, were detained.² According to the information provided by Polish NGO Association for Legal Intervention children constitute 25% of those placed in detention.³

In the opinion of the Commissioner for Children Rights, the number of children being placed in the detention centres is very high which raises the question whether the Polish authorities observe child's best interest principle in their practice and whether the alternative measures have priority over the detention. In the Commissioner's assessment, courts assess the possibility of applying alternative measures in a superficial way. In the number of the reviewed cases, courts *a priori* stated that the alternatives to detention cannot be implemented because the family has left Poland in an irregular manner during the asylum procedure. The Commissioner for Children Rights also observed that the national courts held very often that it was not possible to apply alternatives on the basis that asylum-seekers had no place of residence on the territory of Poland, ignoring the fact that they are entitled to stay in the reception centers for asylum-seekers for the duration of the asylum process.⁴

¹ Commissioner for Children Rights (Rzecznik Praw Dziecka), *Ruling on placing children in the guarded centres for foreigners* (Orzekanie o umieszczeniu małoletnich cudzoziemców w strzeżonych ośrodkach), available at: http://brpd.gov.pl/sites/default/files/2018_03_06_wyst_prezesa.pdf

² Asylum Information Database, Poland, *Detention of vulnerable applicants*, available at: <https://www.asylumineurope.org/reports/country/poland/detention-asylum-seekers/legal-framework-detention/detention-vulnerable>

³ Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej), *Rusza Kampania Zakładnicy Systemu*, available at: <https://interwencjaprawna.pl/detencja>

⁴ Commissioner for Children Rights, *Ruling (...)*

According to the findings of the study conducted by the HFHR for the United Nations High Commissioner for Refugees,⁵ when ruling on the detention of families with children, the national courts rarely referred to the child's situation. National authorities usually fail to treat a child as an individual party of the proceeding and thoroughly examine his/her situation. In the majority of the cases reviewed within the study, the courts have assessed only the situation of the child's parent(s), ignoring the presence of the child.

Moreover, in the clear majority of the reviewed cases, the best interest of the child was not examined or properly assessed. In these rare cases where the child's best interest was examined by the national courts, it was usually limited to the statement that placing a child in the detention centre, together with his/her parents, reflects their best interest. The experience of the Association for Legal Intervention also shows that when examining child's best interest the national courts find it sufficient that the detention facilities ensure medical and psychological aid for migrants and that the doctor providing medical aid in the detention centre issues a medical certificate confirming no obstacles for further detention.⁶

According to the Polish law provisions the Border Guard has the competence to apply alternatives to detention on its own, in which case it does not submit to the court an application for placing an applicant in a detention centre. As previously indicated, alternatives to detention are applied by the Border Guard in cases of families of asylum-seekers with children. However, the HFHR study showed that none of the Border Guard's decisions to apply non-custodial measures, refer directly to the principle of the child's best interest. Although the child's best interests may have been

⁵ HFHR, UNHCR, *Research on the applicability of the best interests of the child principle as the primary consideration in detention decisions as well as the alternatives to detention*, available at: <http://www.hfhr.pl/en/hfhrrs-study-on-immigration-detention-of-families-for-unhcr>. During the study, HFHR lawyers examined 96 court cases concerning detention of families with children as well as 84 proceedings conducted by the Border Guard with a view to applying measures alternative to detention. The study covered the cases files of the relevant proceedings conducted between 1 May 2014 and 31 July 2016.

⁶ Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej), *ALI in Action: 2018 Report* (SIP w działaniu: RAPORT 2018 r.), available at: https://interwencjaprawna.pl/wp-content/uploads/2019/05/raport_sip_w_dzialaniu_2019R.pdf

a factor in the immigration authorities' decision to apply alternative measures rather than requesting a detention order from a court, it was not reflected in the justification of any reviewed decision.

In August 2019 the United Nations Committee Against Torture ("CAT") presented its observations on the periodic report of Poland. CAT expressed its concern that families with children and unaccompanied minors over 15 years of age are placed in detention centres where conditions require improvements. Therefore CAT recommended that Poland should refrain from placing persons in need of international protection, and in particular children, in detention centres.⁷

- evidence used by the courts to assess child's best interest

According to the HFHR study, national court's assessment of the child's situation has always been based on the documents presented by the Border Guard. In none of the analysed cases did the court make use of their competence to order a medical or psychological independent examination of the child nor interviewed them in the course of the proceeding, contrary to the provisions of Article 12 of the Convention on the Rights of the Child.

According to Association for Legal Intervention, in the children detention cases the courts also disregarded independent psychological opinions confirming negative impact of detention on the well-being of a child, which were contrary to the opinions presented by the Border Guards. Only in one case known to that organisation, the Regional Court appointed its own independent psychologist to assess the impact of detention on children well-being and in consequence released the family from the detention centre.⁸

⁷ Committee against Torture, Concluding observations on the seventh periodic report of Poland, available at:
https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/POL/CAT_C_POL_CO_7_35715_E.pdf

⁸ Association for Legal Intervention, *ALI in Action...*

The Commissioner for Children Rights is of the view that in order to properly determine the best interest of the child, the independent psychologists shall be appointed by the courts, which hardly ever happens in practice.⁹

- period of stay of children in detention centres

In all the cases analyzed by HFHR within the framework of the above-mentioned study, the detention was applied for the maximum period. According to the available data in the first half of 2018, the average period of detention of a child was 115 days (while in the guarded centre of Kętrzyn even 166 days)¹⁰.

It must be noted that in the NGOs and Commissioner for Children Rights view, the administrative detention of children is never in their best interests and always violates the rights of minors. Even when applied for a short time, it may have a permanent negative effect on the mental state of a minor, affecting his/her further development.¹¹

- children detention cases pending before the ECtHR

There are currently number of cases pending before the ECtHR which concern unlawful detention of asylum-seeking families with children:

- *Bilalova v. Poland* case (No. 23685/14), communicated in 2014; the case concerns the detention of the family of Chechen asylum-seekers (single mother with five children); the applicant argued that child's best interest was never properly assessed by the national authorities, also alternatives to detention were not considered in their case; on 6 September 2018 the Polish Government submitted unilateral declaration acknowledging that there has been a violation of Article 8 of the Convention in this case,

⁹ Commissioner for Children Rights, Ruling (...)

¹⁰ Asylum Information Database, Poland, Detention of vulnerable applicants, available at: <https://www.asylumineurope.org/reports/country/poland/detention-asylum-seekers/legal-framework-detention/detention-vulnerable>

¹¹ Commissioner for Children Rights, Ruling (...), HFHR, Report 2018, Rights of persons deprived of liberty, available at: <http://www.hfhr.pl/wp-content/uploads/2018/07/Report-SPT-EN-FIN.pdf>

- joined applications *A. B. v. Poland* (No. 15845/15) and *T.K. and S.B. v. Poland* (No 56300/15), communicated in 2016; the case concerns the detention of asylum-seeking family from Chechnya (parents with a child), the applicants claim that the detention of their new-born son was clearly not in his best interests as he fell seriously ill while in detention,

- *M.Z and Others v. Poland* (No. 79752/16), communicated in 2018; the case concerns a family from Tajikistan (a mother with two infants) who was placed in the detention centre despite mother's physical and mental state indicating she had been a victim of violence and her health deteriorating as a result of detention, the applicants also pointed out that while issuing the detention order the authorities had failed to properly assess its impact on the children,

- *R.M. and Others v. Poland* (no. 11247/18), communicated in 2019; the case concerns the detention of asylum-seeking family (mother with three children) transferred to Poland under Dublin III Regulation, they complained they were detained for more than 7 months despite psychological problems of one of the children, proven by the psychologist's opinion, they have also complained about the violation of their procedural rights during detention proceedings.

- *Z.E. and Others v. Poland* (application no 4457/18, not communicated yet); the case concerns a single mother with four children aged 17, 14, 11 and 10; the applicants claim that children were victims of domestic violence , they also claim that their stay in the detention centre was extended despite presenting to the courts independent psychological opinions indicating the detention is harmful for children; eventually they were released after 10 months of stay in the detention centre when the national court decided to appoint the independent psychologist, who established that further stay in the detention centre was contrary to children's best interest.

- cases of children detention examined by the national courts

In March 2017, the Supreme Court of Poland awarded the compensation to the family of asylum-seekers (single mother with two children) for the moral damage they

suffered when unlawfully placed in the detention centre. Although the family had informed the Border Guards about the severe violence they experienced in the country of origin, they were not identified as victims of torture and other forms of serious violence. The Supreme Court, when examining the compensation case, stressed that the courts are obliged to appoint an expert when assessing the influence of detention on the mental state of a foreigner.¹²

Another case run by HFHR was a case of Chechen family (single father with children aged 4 and 6) placed in the detention centre in Biala Podlaska following their transfer to Poland under Dublin III regulation. Although their detention was prolonged few times by the courts, the best interest of children was never assessed properly. The rulings of the courts were based solely on the statements submitted by the Border Guard, which pointed to the absence to any contraindications to further detention of the children. Meanwhile, the medical records kept by the centre revealed that the children badly respond to being confined.¹³

Number of cases of detention of asylum-seekers families with children were also identified by the National Prevention Mechanism during visits in detention centres. One of the cases concerns Chechen asylum seekers family - single mother with 3 children aged 5, 8 and 9. According to the NPM women reported that she was tortured in country of origin and one of the children was also subjected to violence during the police raid on their home (the child's foot has been shot through). NPM experts stated that there were irregular scars on the child's foot. NPM also reported several other cases of detention of asylum seekers families with children where parents were identified as torture victims and suffered PTSD.¹⁴

¹² Based on information available at:
<https://www.asylumineurope.org/reports/country/poland/detention-asylum-seekers/legal-framework-detention/detention-vulnerable>

¹³ HFHR intervenes in case of detention of father with two children <http://www.hfhr.pl/en/hfhr-intervenes-in-case-of-detention-of-father-with-two-children/>

¹⁴ Commissioner for Human Rights (Rzecznik Praw Obywatelskich), Torture victims should not be placed in detention centres (Ofiary tortur nie powinny przebywać w strzeżonych ośrodkach dla cudzoziemców) , available at:

5. HFHR recommendations

Having regard to the above-mentioned argumentation, the HFHR requests that the Committee of Ministers take them into consideration during supervision of the execution of the *Bistieva* judgement.

In our opinion, the general measures taken by the Polish authorities are not sufficient to prevent further violations of the Convention similar to those found in the *Bistieva v. Poland* judgement. The experience of non-governmental organizations and national human rights institutions shows that legislative changes were not sufficient as they are not always applied in practice. Children situation is not analysed properly by the courts. They do not analyse individual situation of children treating them as “attachements” in their parents cases. The national court also neither conduct children hearings nor order their examination by independent experts. The principle of the child’s best interest is rarely applied by the national courts ruling on the detention of children. In these rare cases where the child’s best interest was examined by the national courts, it was usually limited to the statements that placing a child in the detention centre, together with his/her parents, reflects the best interests of the child. Moreover, the detention of children is not applied for the shortest period of time.

In the opinion of the HFHR, the following actions should be taken by Polish authorities in order to fully implement the *Bistieva* judgment:

- conduct training for judges and officers of the Border Guard on the application of the principle of the child’s best interest in the detention decisions as well as on the jurisprudence of the ECtHR in this respect ,
- draft and implement practical guidelines for specific activities that the Border Guard and national courts should carry out as a part of the examination of the best interests

<https://www.rpo.gov.pl/sites/default/files/Wystapienie%20Generalne%20z%20dnia%2030.06.2017%20r.%20do%20Komendanta%20Glownego%20SG.pdf>

of the child based on the international human rights law and recommendations of the UN Committee of the Rights of the Child,

- ensure that the courts conduct the determination of the best interest of the child in every detention case, including hearing the child and providing independent psychological and/or medical examination on the impact of the detention on child's well-being,
- ensure that the decisions on placing the family in a detention centre contain detailed personalized justification regarding the situation of children.

Recommendations for the Committee:


- to have a full picture of children's detention in Poland, the Committee should request the Government to provide accurate and current statistics on the number of children placed in detention centers and on the alternatives used,
- we also request that the execution of *Bistieva v. Poland* judgment will be considered at the next Committee meeting.

We believe that this written communication proves to be useful for the Committee of Ministers in performing the task defined in Article 46(2) of the Convention.


The communication was prepared by Jacek Białas, a lawyer of the Strategic Litigation Programme of the Helsinki Foundation for Human Rights.

On behalf of the Helsinki Foundation for Human Rights,

Piotr Kłodoczny, Ph.D.


Secretary of the Board

Danuta Przywara


President of the Board