

Legal Analysis of the Situation on the Polish-Belarusian Border

Situation on: 9 September 2021

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The key points presented in this analysis:

- Actions of the Border Guard officers on the Polish-Belarusian border are intended to protect the external border of the EU and as such are a part of border control under national and EU law; in doing so, EU Member State authorities are required to respect, among other things, the Charter of Fundamental Rights of the EU, international law, including the Convention Relating to the Status of Refugees, and obligations relating to access to international protection, in particular the principle of *non-refoulement*;
- The available information shows that the migrants remaining on the Polish-Belarusian border in the village of Usnarz Górny and at least some of the migrants apprehended on other sections of the border and sent back to Belarus had applied for international protection to the Polish authorities; in accordance with EU law, after making such an application, migrants should be treated as “applicants for international protection” and the authorities are obliged to enable them to submit a formal application; it also gives them the right to remain in the territory of the Member State pending the examination of said application;
- Individuals seeking international protection have the right to make an appropriate application to any State official and at any place, including outside border crossings; and such a request does not need to have any specific form;
- With respect to the migrants arriving at border crossings as well as those crossing the border in an irregular manner on other sections of the border, in the event that they do not request international protection, the following proceedings should be initiated: on the refusal of entry or the obligation to return; neither national nor EU law provide for the possibility of actually returning migrants outside the Member State’s borders without issuing a corresponding decision;
- Refusing migrants who declare their willingness to apply for international protection the right to enter Poland or sending them back from Poland may lead to a violation of the prohibition of collective expulsion of foreigners and violation of the principle of *non-refoulement*; regardless of the circumstances of crossing the border, it is the duty of the authorities to examine, within an appropriate procedure, the individual situation of the migrants and not to send them back from Poland if it leads to a violation of their rights;
- The detention of migrants on the Polish-Belarusian border in Usnarz Górny, where they have no real possibility to leave the occupied area in any direction, may constitute an unlawful deprivation of liberty.

1. Statement of facts

Since the beginning of August, a group of migrants from Afghanistan have been staying at the Polish-Belarusian border, which is also the EU's external border, in the village of Usnarz Górny. On the Belarusian side, migrants are cordoned off by the Belarusian Border Guard, which makes them unable to return to Belarus, while on the Polish side they are surrounded by a cordon of the Polish Border Guard, which prevents them from entering the territory of Poland. According to the Polish authorities, migrants are located in the territory of Belarus and have not crossed the border of Poland. However, the letter sent by the Commander of the Podlasie Border Guard Branch to the Polish Ombudsman on August 18, 2021 may prove that in fact migrants have crossed the border of Poland in the irregular manner and were afterwards returned to the Belarusian side by the Polish Border Guard.¹ This is confirmed by the fact that initially, migrants were permitted to contact, among others, a Member of the Polish Parliament, who provided them with sleeping bags and power of attorney for legal representation², employees of the Ocalenie Foundation³ and representatives of the Ombudsman Office⁴. All these visits took place on August 19, 2021.

The available information shows that each of the individuals from this group repeatedly, directly and in the presence of Polish officials, declared their willingness to apply for international protection in Poland, however, the appropriate procedures in this regard have never been initiated with regard to them.⁵ Currently, migrants are prevented from any direct contact with people on the Polish side of the border, such as employees of civic organizations, lawyers, journalists and doctors. Furthermore, they are deprived of access to food, adequate shelter and medical assistance on the Polish side, despite having reported needs in this regard.

On August 24, 2021, the place was visited by the National Mechanism for the Prevention of Torture, which determined that the conditions in which migrants are kept and the fact that they are denied the possibility to satisfy their most basic, physiological needs and access to medical, and legal assistance as well as access to asylum procedure, is deemed to constitute inhuman and degrading treatment. On August 25, 2021, the European Court of Human Rights, at the request of migrants' legal representatives, issued an interim measure obliging Polish authorities to provide migrants with food, clothing, medical assistance and, if possible, temporary shelter.⁶ Polish authorities have not complied with the interim measure to this day. According to them, it is not possible because migrants are in the territory of Belarus.

At the same time, according to the reports of journalists, activists, and employees of civic organizations, for at least several weeks on other sections of the Polish-Belarusian border the

1 Commander of the Podlasie Border Guard Branch to the Ombudsman: <https://bip.brpo.gov.pl/sites/default/files/Odpowiedz%20Komendanta%20Podlaskiego%20SG%2018.08.2021.pdf>.

2 Maciej Konieczny z pomocą uchodźcom na polsko-białoruskiej granicy (Maciej Konieczny Helps Refugees on the Polish-Belarusian Border): <https://klub-lewica.org.pl/aktualnosci/1848-maciej-konieczny-z-pomoca-uchodzcom-na-granicy-polsko-bialoruskiej>.

3 The report of the Ocalenie Foundation can be viewed at: <https://www.facebook.com/FundacjaOcalenie/posts/4576743169026209>.

4 Not accepting applications for international protection from foreign nationals staying at the border area near Usnarz is a violation of law. Statement of the Polish Ombudsman addressed to the Prime Minister, accessible at: <https://bip.brpo.gov.pl/pl/content/RPO-obywatele-afganistanu-deklaruje-zamiar-ubiegania-sie-o-ochron%C4%99-mi%C4%99dzynarodow%C4%85-na-terytorium-rp-premier>.

5 Ibidem.

6 The ECtHR press release is accessible at: <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-7100942-9612632%22%7D>.

Border Guard has been apprehending migrants crossing the border in an irregular manner and returning them to Belarus. The available information shows that no procedures are initiated against these migrants, and they are not returned to Belarus via official border crossings, but simply left in the middle of the forest in the border area. In at least some of these cases, it was documented that despite the fact that migrants declared their willingness to apply for international protection in Poland in the presence of the Polish Border Guard officials, the relevant applications were not accepted from them.⁷

According to the official announcements of the Border Guard, irregular crossings of the border by the groups of migrants (including citizens of Iraq, Afghanistan, Somalia, Syria, Tajikistan or the Democratic Republic of the Congo) are “prevented” every day. The information provided by the Border Guard does not indicate the legal basis for these actions, their methods or the border crossings via which migrants are returned to, especially in view of the fact that Belarus has suspended its readmission agreement with the EU. According to the information provided by the Podlasie Border Guard Branch, the total number of migrants attempting to cross the Polish-Belarusian border in an irregular manner amounted to 3.5 thousand in August 2021, of which 2.5 thousand attempts were prevented by Border Guard.⁸

In August 2021, two amendments of national law entered into force, affecting the situation on the Polish-Belarusian border. The first was the Regulation of August 13, 2021 amending the Regulation of the Minister of the Interior of April 24, 2015 on guarded centres and arrests for foreigners, allowing for placing migrants in accommodation cells with a floor space of 2 m² per occupant. Thereby, twice as many migrants could be placed in guarded centres than before. The second one was the Regulation of the Minister of the Interior and Administration of August 20, 2021 amending the Regulation on temporary suspension or restriction of border traffic at certain border crossings, which introduced provisions stipulating that individuals who are not authorized to enter Poland are instructed to leave the territory of the Republic of Poland immediately and are returned to the state border line.

On August 23, 2021, the Parliament received a governmental bill amending the Act on foreigners and the Act on granting protection to foreigners in the territory of the Republic of Poland. The draft provides for the introduction of a new institution: an order on illegal crossing of the border. The order is to be issued in the case of an apprehension of a migrant immediately after crossing the external border of the EU in irregular manner. These provisions give grounds for expelling a migrant from Poland, even if they apply for international protection. The draft introduces the possibility of leaving the applications for international protection without examination when submitted by migrants apprehended immediately after irregularly crossing the EU’s external border.⁹

On September 2, 2021, a state of emergency was introduced in certain parts of the Podlaskie and Lubelskie Voivodeships. The Regulation of the President of the Republic of Poland introduced restrictions with regard to staying in enlisted towns in the immediate vicinity of the border with Belarus. Journalists and employees of monitoring organizations were not excluded from these

⁷ E.g., Testigo Documentary report:

<http://testigo.pl/pushback.pdf?fbclid=IwAR0QcZ0fvIvH9rtZpgu0lM68YScGT8IDcl6YM9182uLiXzgXSn5jFnHGWh8>.

⁸ Podlasie Branch of the Border Guard, on the Polish-Belarusian border:

<https://www.podlaski.strazgraniczna.pl/pod/aktualnosci/42586.Na-polsko-bialoruskiej-granicy.html>.

⁹ The draft is accessible at:

<https://sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=CD900BBA567B12CAC12587420034332B>. See also: Bill on amendment of the acts on foreigners and on granting them protection violates the principles of EU asylum law – legal opinion of the HFFHR: <https://www.hfhr.pl/ustawa-o-cudzoziemcach-lamie-zasady-ue/>.

restrictions. The Regulation, justified by the “particular threat to the safety of citizens and the public order in relation to the ongoing situation on the Polish-Belarusian border,” also introduced a prohibition on taking photographs of specific border facilities and access to public information on activities carried out in the area under the state of emergency in relation to the protection of the state border as well as preventing and counteracting illegal migration. According to NGOs and activists providing assistance to migrants at the border, the state of emergency was introduced in order to remove them and the media from the border areas, to enable the authorities to act freely without witnesses.¹⁰

2. Legal status

2.1. Border control at the EU’s external borders

The Polish-Belarusian border is also the external border of the EU, therefore, in addition to national regulations, border control carried out at this border is subject to EU regulations, in particular the provisions of the Schengen Borders Code (SBC).¹¹ Article 2 (2) of the SBC stipulates that “external borders” mean land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders. Article 1 of the SBC indicates that it is an act that lays down the rules governing border control of persons crossing the external borders of the Member States of the EU, and therefore the activities of the Border Guard at the Polish-Belarusian border are unquestionably subject to its provisions.

In accordance with Article 2 (10) of the Schengen Borders Code, “border control” means the activity carried out at a border, in accordance with and for the purposes of the Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance. Border control consists of two elements:

1. “border checks” (Article 2 (11) of the SBC), that is the checks carried out at border crossings to ensure that persons, including their means of transport and possessions, may be authorised to enter or leave the territory of the Member States;
2. “border surveillance” (Article 2 (12) of the SBC), that is border surveillance between border crossings and surveillance of border crossings outside the fixed opening hours in order to prevent persons from circumventing border checks.

It should be emphasised that the SBC contains explicit references to human rights legislation, including that governing the situation of refugees. Article 3 stipulates that it applies to any person crossing the internal or external borders of the Member States, without prejudice to the rights of refugees and persons applying for international protection, in particular with regard to the principle of *non-refoulement*. Furthermore, Article 4 of the SBC stipulates that decisions under this Regulation shall be taken on an individual basis. That provision also provides that, when it is applied, Member States are to comply fully, among other things, with the provisions of the Charter of Fundamental Rights of the of the EU (the “Charter”), international law, including the Convention Relating to the Status of Refugees, and obligations relating to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights.

10 HFHR position on the introduction of the state of emergency: <https://www.hfhr.pl/stanowisko-hfpc-w-sprawie-wprowadzenia-stanu-wyjatkowego>

11 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

It is also worth pointing out that recital 26 of the SBC states that “Migration and the crossing of external borders by a large number of third-country nationals should not, *per se*, be considered to be a threat to public policy or internal security.”

As for the national regulations, it should first and foremost be pointed out that pursuant to Article 1 of the Act of October 12, 1990 on the protection of the state border (the Border Protection Act), the border of the Republic of Poland is the vertical surface crossing the border line, separating the territory of the Polish state from the territories of other states and from the high seas. The minister competent for the interior is responsible for border protection on land and at sea and border traffic control to the extent specified in separate regulations, and their tasks in this respect are performed by the Chief Commander of the Border Guard (pursuant to Article 7 (1) and (3) of the Border Protection Act).

Pursuant to Article 1 of the Act of October 12, 1990 on the Border Guard (hereinafter: Border Guard Act), the Border Guard is a single, uniformed and armed formation whose purpose is to protect the state border, control border traffic, and prevent and counteract illegal migration. The methods to be used by Border Guard authorities are specified in detail in the aforesaid Act. In addition to border traffic control and border surveillance, the tasks of the Border Guard also include, among others, the performance of tasks specified in the Act of December 12, 2013 on foreigners (hereinafter: the Foreigners Act) and the performance of tasks specified in other acts (Article 1 (2) (14) of the Border Guard Act). On this basis, the Border Guard is also obliged to perform the tasks specified in the Act of June 13, 2003 on granting protection to foreigners in the territory of the Republic of Poland (the Foreigners Protection Act). Furthermore, pursuant to Article 1 (2b) of the Border Guard Act, the Border Guard shall carry out tasks resulting from the provisions of European Union law and international agreements and arrangements on the terms and within the scope specified therein. At the same time, the Act indicates that in the course of performing all official activities, officers of this formation are obliged to respect the dignity and human and civil rights and freedoms (Article 9 (5) of the Border Guard Act).

There is no legal definition of the term “border control” in Polish national law. With respect to the conditions for carrying out border control, taking into account, among other things, the forms and methods of its execution national law refers to the EU law, and more specifically, the Schengen Borders Code. This results directly from §1 (2) of the Regulation of the Minister of the Interior and Administration of July 2, 2019 on border control, as well as from Article 15 (1) of the Border Protection Act, which provides that persons crossing the state border that constitutes external border within the meaning of the Schengen Borders Code are obliged to submit to border control within the scope defined in the Schengen Borders Code and other separate regulations, performed by the Border Guard.

2.2. Proceedings carried out with respect to migrants under border control

As indicated above, Border Guard activities carried out at the border are undertaken as part of border control, which includes border surveillance. In accordance with Article 13 (1) of the SBC, the main objective of border control is preventing unauthorised crossing of the border, counteracting cross-border criminal activity and taking measures against persons crossing the border illegally. This provision clearly states that a “person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC” (the Return Directive).

The Return Directive defines the standards and procedures applied by Member States with respect to the return of third-country nationals illegally staying in their territory. These standards should

be applied in accordance with fundamental rights, including the obligations related to human rights and refugee protection (Article 1 of the Directive). According to Article 4 (2), the Directive is without prejudice to EU asylum provisions, which may be more favourable to the third-country nationals. The Directive contains a number of specific conditions to be met by Member States when expelling migrants. Recital 6 of that Directive indicates that Member States should ensure in a fair and transparent procedure for ending of the illegal stay of third-country nationals, and decisions in this regard should be taken on an individual basis in accordance with the general principles of EU law, taking into account objective criteria, therefore the sole fact of illegal stay cannot be taken into consideration exclusively. To this end, the Directive provides for a number of safeguards that are available to the persons who are subject to the return procedure, including the right to obtain a written decision with the statement of reasons on which it is based and instructions with regard to remedies (Article 12 (1)), the right to voluntary departure (Article 7 (1)), the right to postponement of removal in the event of a risk of *non-refoulement* (Article 9 (1) (a)) and the right to effective remedy (Article 13 (1)).

In the case of a migrant who tries to cross the EU's external border without fulfilling all the entry conditions laid down in the SBC, a decision of refusal of entry is issued. This decision must be substantiated, i.e. by indicating the precise reasons for the refusal, and is immediately enforceable (Article 14 of the SBC). However, the Code clearly states that this provision is without prejudice to the application of specific provisions on the right to asylum and international protection. Furthermore, the SBC, by way of derogation from the general requirements of entry, enables foreign nationals to obtain an authorisation of a Member State to enter its territory on humanitarian grounds, on account of national interest or due to international obligations (Article 6 (5) (c)).

Polish national regulations also require that one of two administrative decisions should be issued with respect to migrants who do not have the right to enter or stay in the territory of Poland: a decision on the refusal of entry (Article 28 (1) of the Foreigners Act) or a decision on obligation to return (Article 302 (1) of the Foreigners Act). Both decisions are issued by the relevant authorities of the Border Guard. The first decision applies in a situation where a migrant tries to enter Poland without fulfilling the conditions of entry, and the second one is issued with respect to migrants who stay in the territory of Poland and there are grounds for their expulsion, such as having no right to legally stay in the territory of Poland, among other things. Both decisions are issued based on the provisions of the administrative procedure.

At the same time, the provisions of national law provide that if the migrant submits an application for international protection, the decision on refusal of entry is not issued (Article 28 (2) (2) of the Foreigners Act). Also, the proceedings concerning the obligation to return cannot be initiated if the proceedings for granting international protection are pending with regard to the given person (Article 303 (4) of the Foreigners Act). Additionally, if a migrant submits an application for international protection during the ongoing return proceedings, these proceedings are suspended (Article 305 (1) of the Foreigners Act). Furthermore, the regulations stipulate that the authority conducting the proceedings on the obligation to return with respect to a migrant shall instruct them about the possibility of submitting an application for international protection (Article 304 of the Foreigners Act).

2.3. Proceedings for granting international protection

Article 18 of the Charter guarantees the right to asylum in accordance with the principles of the Geneva Convention Relating to the Status of Refugees and EU Treaties. The Treaty on the Functioning of the EU ("TFEU") states that it is the policy of the Union to grant protection to

any third-country national who requires it. It also provides the basis for adopting detailed rules on the procedures for applying for international protection (Article 78 (1) and (2) TFEU). These procedures are regulated in Directive 2013/32/EU, the so-called Procedures Directive.¹²

According to the Procedures Directive, the application for international protection in the EU consists of three stages:

(a) making the application

According to recital 27 and Article 2 (c) of the Directive, an applicant is considered to be a third-country national or stateless person who has made an application for international protection (they *have applied* for international protection). According to EU law and case law, a request can be made in any form and any place: at the border, in the territory of the state and in the transit zone (Article 3 (1) of the Procedures Directive, CJEU judgement in Case C-808/18 European Commission v. Hungary, paragraphs 95 to 104). This is also indicated in the Schengen Handbook.¹³ It should be emphasised that from the moment of *making* the request, the foreign national has a number of rights, including the right to remain in the territory of the given Member State (Article 9 (1) of the Procedures Directive). From that moment onwards, applicants are also subject to the so-called Reception Conditions Directive, which grants them¹⁴, among other things, the right to free movement within the territory of the given State (Article 7 (1)), and material benefits and health care (Article 17).

b) lodging the application

Under the Procedures Directive, it is the responsibility of a Member State to ensure that any person who has made an application for international protection has an effective opportunity to *lodge* an actual application in this regard. States may require such applications to be made in person or at a specified place. An application for international protection shall be deemed to have been lodged once the form submitted by the applicant is received by the competent authorities of the given Member States (Article 6 (2) to (4) of the Directive).

Although the Directive makes it possible to introduce an obligation to lodge an application for international protection at a designated place (Article 6 (3) of the Directive), national law (the Foreigners Protection Act) does not provide for such an obligation. The Polish legislation should therefore be considered more favourable in this respect, which is in line with Article 5 of the Directive. Moreover, States may restrict only *lodging* of the applications to specific locations; they may not restrict the action of *making* such applications (see Paragraph 96 of the CJEU judgement in Case C-808/18). This confirms that migrants can make an application for international protection forward and express the will to do so in the presence of the authorities of the given State in any place.

c) registration of the application

12 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.

13 Commission Recommendation establishing a common “Practical Handbook for Border Guards (Schengen Handbook) to be used by Member States” competent authorities when carrying out the border control of persons:” <https://data.consilium.europa.eu/doc/document/ST-15010-2006-INIT/pl/pdf>

14 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

The Procedures Directive stipulates that the *registration* of an application for international protection should take place no later than three working days after the application is made. If the application for international protection is made to other authorities which is likely to receive such applications, and which are not competent for the registration thereof under national law, then the registration of the application should take place no later than six working days after the application is made (Article 6 (1) of the Directive).

The distinction of these three stages is important because the simply making an application for international protection (i.e. the first stage of applying for protection) cannot be associated with the obligation to fulfil any specific requirements on the part of the migrant. This was emphasised by the Court of Justice of the EU (CJEU) in its judgement in Case C-808/18, stating that “Such an application (...) deemed to have been made as soon as the person concerned has declared, to one of the authorities referred to in Article 6(1) of Directive 2013/32, his or her wish to receive international protection, without the declaration of that wish being subject to any administrative formality whatsoever (see, to that effect, judgment of 25 June 2020, Ministerio Fiscal (Authority likely to receive an application for international protection), C-36/20 PPU, EU:C:2020:495, paragraphs 93 and 94).”

Pursuant to national law, in order to initiate the procedure for granting international protection, migrants submit an application for international protection in person (Article 26 (1) of the Foreigners Protection Act) to the indicated Border Guard authority, i.e. the Commander of the Border Guard branch or the Commander of the Border Guard station competent for their whereabouts. The same authority shall register the application (Articles 24 (1) and 28 (3) of the Foreigners Protection Act). In accordance with Article 5a of the Border Guard Act, branch, station and squadron commanders perform their tasks with the help of their subordinate offices – branch headquarters, stations and squadrons. On the other hand, a Branch Commander of the Border Guard may authorise subordinate officers serving the particular territory within the branch or employees to complete tasks on their behalf within a specified scope (Article 5aa of the Border Guard Act). In order to carry out the tasks referred to in Article 1 (2) of the Border Guard Act, Border Guard officers may be appointed to perform the relevant functions of border representatives (Article 9 (6) of the Border Guard Act).

Referring to EU law, it should be noted that even if individual Border Guard officers are not authorised to receive applications for international protection, they are at least responsible for forwarding them to the authorities competent to register them under the second subparagraph of Article 6 (1) of the Procedures Directive. This issue has been resolved by the CJEU, which in one case determined that an examining judge who, under Spanish law, is not an authority authorised to receive asylum applications, should have forwarded such an application made by a migrant during a hearing to the competent authorities. Furthermore, they should have advised undocumented migrants about the possible methods of making an application for international protection. In its judgment, the CJEU stated that “referring to the concept of ‘other authorities which are likely to receive such applications [for international protection], but not competent for the registration under national law’, the second subparagraph of Article 6 (1) of that directive makes no reference to national law and therefore does not require Member States to designate those ‘other authorities’ (Judgement in Case C-36/20 PPU, paragraph 56).” Therefore, the fact that Border Guard officers who are not authorised to receive applications are not listed in Polish national law as “other bodies that are likely to receive such applications,” does not exclude that they are considered to be such authorities under EU law. Especially since the third subparagraph of Article 6 (1) lists border guards in an sample list of such “other authorities”.

2.4. Prohibition of collective expulsions of foreigners and the principle of non-refoulement in the light of international law applicable in Poland

Analysing the situation on the Polish-Belarusian border, one should also refer to the international law applicable in Poland, in particular to the Convention for the Protection of Human Rights and Fundamental Freedoms with the Protocols signed in Rome on November 4, 1950 (“European Convention on Human Rights” or “ECHR”) and the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the Status of Refugees (the “Geneva Convention”).

Article 1 of the ECHR provides that the rights and freedoms set out therein are to be enjoyed by every person under the jurisdiction of the given State. Due to the fact that Border Guard officers, when exercising border control over migrants, perform official activities in relation to them that affect their legal situation, it should be considered that they exercise jurisdiction over them. It is therefore beyond doubt that Poland has jurisdiction over the persons on the Polish-Belarusian border (see the judgment of the European Court of Human Rights (Grand Chamber) in the case of *Hirsi Jamaa and Others v. Italy*, application no. 27765/09, para. 81-82, where migrants on an Italian ship offshore were found to be under Italian jurisdiction, or the judgement in the case of *M.K. and Others v. Poland*, applications nos. 40503/17, 42902/17 and 43643/17, para. 130-132, where the ECtHR found Poland guilty of sending refugees back from Polish borders, despite the fact that they were not formally admitted to its territory).

In the absence of identification and individual consideration of each of the cases of migrants staying at the border or crossing it, there is a risk of violation of Article 4 of Protocol 4 to the Convention, that is of collective expulsion of foreigners. According to the interpretation of the ECtHR, expulsion should be understood not only as the deportation of a foreigner present in the territory of a given country, but also as the refusal to allow him or her to enter that territory. This prohibition is violated when the State removes migrants from its territory as a group without taking measures to examine each of their cases in a rational and objective manner (see, for example, the decisions in the cases of *Becker v. Denmark*, application no. 7011/75 and *Andric v. Sweden*, application no. 45917/99).

When examining whether collective expulsion has occurred, the Court takes into account certain factors, including whether the migrants were given the opportunity to effectively apply for asylum before being returned, whether the decisions on returning the applicants made reference to their applications for protection, whether the applicants had the opportunity to contact a lawyer, and whether the relevant political authorities had announced such operations (*M.K.*, para. 198-203). The ECtHR has repeatedly stressed that the purpose of Article 4 of Protocol 4 to the Convention is to ensure that every migrant has the right to have their reasons against expulsion examined by the State that is bound by the provisions of the Convention, especially in order to avoid potential violations of the prohibition of torture (*Khlaifia and Others v. Italy*, application no. 16483/12, para. 238; *N.A. and N.T. v. Spain*, application no. 8675/15 and 8697/15, para. 171). According to the ECtHR, the individual examination of the case of each of the expelled migrants and ensuring that they have the opportunity to present arguments against expulsion is a condition for respecting the principle of *non-refoulement* (*N.A. and N.T.*, para. 198-199). This principle, which is a fundamental principle of international refugee law, is enshrined in Article 33 (1) of the Geneva Convention. It is also reiterated in Article 19 (2) of the Charter. Due to the importance of these guarantees, the ECtHR requires States to be proactive in this respect. States should refrain from expelling a migrant in any situation where the state to which he or she is to be returned is known for systematic violation of human rights. In such a situation, it is not even necessary for the migrant to ask for asylum by himself or herself (*Hirsi Jamaa*, para. 133 and the case law cited).

As indicated above, in matters concerning the collective expulsion of foreigners, the political motivations behind such decisions are also important. In the cases of *M.K.* (para. 209), *Čonka v. Belgium* (application no. 51564/99) and *Georgia (I) v. Russia* (application no. 13255/07), the ECtHR concluded that the decision regarding the conduct of state authorities with respect to a specific group of migrants was politically motivated, which indirectly confirmed the unlawful practice. Regardless of whether this decision was made officially, as in the *Čonka* case, or unofficially, as in the *M.K.* case, it may be of a great importance for the assessment of a potential violation of the prohibition of collective expulsions.

3. Legal situation of migrants on the Polish-Belarusian border

3.1. Legal status of migrants staying in Usnarz Górny

The situation in Usnarz Górny constitutes an actual refusal of entry to the territory of Poland, and therefore to the territory of the EU. The actions taken by the Polish Border Guard, in response to the intention or action of crossing the border by migrants constitute “border control” within the meaning of the SBC. In this context, it does not matter whether the migrants have formally found themselves in the territory of Poland, or whether they are staying in the territory of Belarus. Since they are beyond the border crossing, the actions of the Border Guard consist of “border surveillance” within the meaning of Article 2 (12) of the SBC, as part of border control. In the course of these activities, migrants have the right to apply for international protection.

The documented sources and reports of the representatives of the Polish Ombudsman¹⁵ show that the migrants declared their willingness to apply for international protection in the presence of Polish officers, i.e. they made an asylum application. They must therefore be regarded as “applicants” within the meaning of the Procedures Directive. This gives rise to certain obligations on the part of the Polish authorities, primarily with respect to enabling these persons to enter the territory of the Republic of Poland and allowing them to formally lodge the applications, register them and forward them to the Head of the Office for Foreigners. Those persons should also be provided with the social benefits set out in Directive 2013/33/EU (including accommodation, food and medical assistance).

In accordance with the above-mentioned provisions of the SBC, appropriate administrative proceedings should also be initiated with respect to migrants subject to border control. Meanwhile, according to publicly available information, neither decisions on refusal of entry (Article 28 (1) of the Foreigners Act) nor with decisions obliging them to return (Article 302 (1) of the Foreigners Act) were issued with respect to them. The provisions on transfer to a third country on the basis of an international agreement, in accordance with Article 303 (1) (9) in conjunction with Article 303 (7) of the Foreigners Act, could not be applied to them due to the suspension of the readmission agreement with the EU by Belarus. Therefore, the conduct of the Border Guard towards the group of migrants in Usnarz Górny, that is preventing them from entering Poland, has no basis in the form of an appropriate administrative decision.

In conclusion, for at least four weeks the Border Guard has been neglecting the duty to initiate appropriate administrative procedures and accept applications for international protection from migrants in Usnarz Górny in connection with their declaration of will to do so. The refusal to accept such requests or the inaction of the authorities in this respect does not affect the legal status

¹⁵ Not accepting applications for international protection from foreign nationals staying at the border area near Usnarz is a violation of law. Statement of the Polish Ombudsman addressed to the Prime Minister: <https://bip.brpo.gov.pl/pl/content/RPO-obywatele-afganistanu-deklaruje-zamiar-ubiegania-sie-o-ochron%C4%99-mi%C4%99dzynarodow%C4%85-na-terytorium-rp-premier>.

of these persons, and only leads to the liability of the Polish state for failure to comply with the obligations arising from EU law. In accordance with national and EU law, the Border Guard has no right to take actions that consist in preventing migrants from entering Poland without initiating appropriate administrative procedures aimed at returning migrants from the territory of Poland. In accordance with the provisions of the SBC, the activities of the Border Guard constitute border control, which should result in issuing appropriate decisions towards migrants and enabling them to lodge applications for international protection.

The actions of the Polish authorities may also lead to a violation of international refugee law, in particular the principle of *non-refoulement* and the prohibition of collective expulsions of foreigners. None of the migrants staying on the Polish-Belarusian border in Usnarz Górny was individually identified by the state authorities and no individual proceedings were initiated against them. Migrants are prevented from entering Poland as a group, in a collective manner. In such a situation, it is not possible for the Polish authorities to reject the argument about a potential violation of the procedural aspect of the prohibition of torture or the principle of *non-refoulement*, since the authorities are unaware of the individual stories of those persons. Meanwhile, public sources show that Afghanistan, which is the country of origin of migrants, cannot be considered a safe country. There are grounds for considering that Belarus is not a safe country either. In its case law, the ECtHR concluded that Belarus does not have an effective asylum system (M.K., para. 116-117), while press reports show that Belarusian authorities force migrants to cross the border and prevent them from returning to Belarus.¹⁶

Furthermore, taking into account the statements of representatives of the Polish government in the media and the introduced or planned amendments to the law, it can be assumed that the actions in Usnarz Górny are part of a policy of not allowing refugees into Poland, which is quite openly pursued by the current government. It should be emphasised that the recent statements of the Polish authorities with regard to the situation at the border are analogous to those that led the ECtHR to consider that Poland had violated the prohibition of collective expulsions in previous cases¹⁷.

As a side note, it is worth pointing out that the situation in Usnarz Górny may also be treated as a *de facto* deprivation of liberty of migrants. They do not have any actual possibility of movement: neither to the Belarusian nor to the Polish side of the border. In this context, it is important that migrants have applied for international protection in Poland. Directive 2013/33/EU provides that the mere fact of being an applicant does not constitute grounds for deprivation of liberty (Articles 8-11 of the Directive). Permissible cases of deprivation of liberty of applicants are listed in the Directive. The Directive also requires that the deprivation of liberty of migrants should always be based on a decision that should be subject to judicial review. In addition, detention should be as short as possible and appropriate conditions should be provided. National regulations concerning the deprivation of liberty of migrants who apply for international protection are provided in Chapter 6 of the Foreigners Protection Act.

16 Imigranci utknęli na granicy Polski z Białorusią (Immigrants Stuck on the Polish-Belarusian Border): <https://www.bankier.pl/wiadomosc/Imigranci-utkneli-na-granicy-Polski-z-Bialorusia-8172542.html>; Pat na polsko-białoruskiej granicy. Około 50 osób nie ma dokąd się udać (Stalemate at the Polish-Belarusian Border. More than 50 People Have Nowhere to Go): <https://www.euractiv.pl/section/migracje/news/bialorus-migranci-granica-polska-lukaszenka/>.

17 Among others, Mariusz Błaszczak: nie pozwolimy na stworzenie szlaku przerzutu migrantów przez Polskę (Mariusz Błaszczak: We Will Not Allow For a Migration Route through Poland), accessible at: <https://www.polsatnews.pl/wiadomosc/2021-08-23/konferencja-mariusza-blaszczaka/>.

In the view of the CJEU, “the detention of an applicant for international protection, within the meaning of Article 2(h) of Directive 2013/33, constitutes a coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter.” (Judgment in Cases C-924/19 PPU and C-925/19 PPU). Additionally, the necessity for the migrants to remain in restricted and closed perimeter, with no possibility of leaving lawfully at will in any direction, constitutes deprivation of liberty, characteristic of a “detention centre” or “detention,” as defined in Directive 2013/33. Article 5 (1) (f) of the European Convention on Human Rights, in turn, refers to the exclusive grounds for depriving migrants of their liberty. These include preventing illegal entry and securing removal proceedings. According to the case law of the ECtHR, if national law (and in the present case also EU law) allows a migrant who has applied for international protection to stay in the territory of that State, then the first of these conditions does not apply (ECtHR judgment in the case of Suso Musa v. Malta, application no. 42337/12, para. 97).

Taking into account the situation in Usnarz Górny, it should be stated that migrants staying there, who applied for international protection in Poland, are actually deprived of liberty. They do not have the opportunity to return to Belarus, and they are prohibited from entering Poland at the same time. In the absence of an appropriate court decision and examination of conditions regarding deprivation of liberty, and failure to provide them with appropriate conditions, it should be considered that the deprivation of liberty of these migrants is unlawful.

3.2. The situation of other groups of migrants crossing the Poland’s border in an irregular manner and being returned to Belarus by the Polish Border Guard

Information provided by journalists, employees of NGOs and activists shows that other groups of migrants crossing the border of Poland in an irregular manner are also sent back to Belarus on other sections of the Polish-Belarusian border.¹⁸ The procedures provided by law are not initiated against them and these activities are most often carried out in concealment, resulting in migrants being left in the forests of the border zone. The available recordings and reports of people monitoring the situation at the scene show that these activities are also carried out in situations where migrants applied for international protection in Poland in the presence of Border Guard officers. In official communications, the Border Guard refers to “prevented” attempts by groups of migrants irregularly crossing the border, but this information does not indicate the legal basis for these actions.

In this situation, the actions of the Border Guard, which are in essence a response to the act of irregular border crossing, should be considered border surveillance as part of border control, as defined in Article 2 (10) of the SBC, under which the authorities should issue individual decisions on refusal of entry or obligation to return. The individuals who irregularly crossed the Polish-Belarusian border and who do not have the right to stay in the territory of Poland should be apprehended and undergo procedures consistent with the requirements of the Return Directive. It is clear from Articles 6 (1) and 8 of the Directive that the actual expulsion can only take place if a return decision has been issued beforehand. At the same time, it cannot be deemed that it is currently possible to transfer the migrants to Belarus on the basis of Article 303 (1) (9) in conjunction with Article 303 (7) of the Foreigners Act, since Belarus has announced the suspension of the readmission agreement with the EU.

¹⁸ Uchodźcy nadal przekraczają granicę. „Byli zmarznięci, część nie miała butów” (Refugees are still crossing the border. They were cold, some of them shoeless): <https://www.onet.pl/informacje/onetwiadomosci/stan-wyjatkowy-uchodzcy-nadal-przekraczaja-granice-byli-zmarznienci/t9fmgcd,79cfc278>.

The actions of the Border Guard that consist of returning those migrants to Belarus without issuing a decision on obligation to return not only violate the law in itself, but also deprive the migrants of the guarantees arising from the Return Directive. In the course of return proceedings, foreign nationals should be advised of the possibility of submitting an application for international protection (Article 305 of the Foreigners Act), and any such application should be accepted and registered. They also have the right to have their cases examined on an individual basis, to obtain a statement of reasons for the decision, to file an appeal, etc. It should also be emphasised that Article 5 of the Directive explicitly states that Member States must duly consider the principle of *non-refoulement*, and recital 9 stresses that a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State for as long as the decision to reject the asylum application or to withdraw their right to stay as an asylum seeker has not entered into force. Making an application for protection therefore means that such a migrant cannot be expelled in the course of these proceedings.

As in the case of the group of migrants staying in Usnarz Górny, also in this case, the actions of the Polish authorities on other sections of the Polish-Belarusian border pose a risk of violating the principle of *non-refoulement* and the prohibition of collective expulsion of foreigners.

3.3. The impact of the provisions introduced in connection with the COVID-19 pandemic on the situation on the Polish-Belarusian border

On March 13, 2020, the Minister of the Interior and Administration, pursuant to the Regulation on temporary suspension or restriction of border traffic at certain border crossings, restricted the traffic on the Poland's borders on the inbound direction to the groups of foreigners listed in the Regulation. This list included, among others, spouses of Polish citizens, foreign employees and persons holding residence permits. However, persons seeking international protection are not included on this list. The Ombudsman¹⁹ and non-governmental organisations drew attention to this gap multiple times, requesting the Minister to include this category of travellers in the wording of the Regulation, in accordance with Article 56 (2) of the Polish Constitution, the applicable laws and the international agreements ratified by Poland. Despite the fact that the Regulation has been amended multiple times by adding further groups of migrants to the list of persons authorised to enter the country, persons seeking protection have not been directly referred to this day.

On August 20, 2021, the Regulation of the Minister of the Interior and Administration amended the Regulation on temporary suspension or restriction of border traffic at certain border crossings, which entered into force on the following day. Under this Regulation, provisions were introduced according to which persons who do not belong to the categories of persons listed in the Regulation as persons entitled to enter Poland are instructed to immediately leave the territory of the Republic of Poland. In addition, in the event that such persons are found at a border crossing where border traffic has been suspended or restricted, or outside the boundary of the border crossing, such persons are to be returned to the state border line.

The provisions introduced by the Regulation of August 20, 2021 should be considered not only as incompatible with international law, in particular the principle of *non-refoulement*²⁰, but also with EU

¹⁹ Ombudsman to the Minister of the Interior and Administration:

<https://bip.brpo.gov.pl/sites/default/files/Wystapienie%20do%20MSWiA%20ws%20sytuacji%20na%20granicach,%2012.05.2020.pdf>

²⁰ Amendments to the Regulation temporary suspension or restriction of border traffic are contrary to the Geneva Convention and the Constitution of the Republic of Poland. General Statement of the Polish Ombudsman addressed to the Ministry of the Interior and Administration: <https://bip.brpo.gov.pl/pl/content/rpo-mswia-granice-azyl-ochrona-cudzoziemcy>

law. It is apparent from the provisions of the Schengen Borders Code that, where a migrant is found to have crossed a border illegally, they must undergo appropriate administrative procedures aimed at obligating them to return in accordance with the guarantees provided for in Directive 2008/115/EC. However, if the migrant arrives at the border control point at a designated border crossing and they do not satisfy the conditions to enter the country, a decision on refusal of entry should be issued with respect to them. In both these cases, the migrant has the opportunity to make an application for international protection, which should result in suspension, discontinuation or withdrawal from the initiated procedures, acceptance of the application from the migrant and enabling them to enter Poland in order to take part in the asylum proceedings. The Schengen Borders Code does not provide for the possibility of returning a migrant to the state border line without initiating formal proceedings with respect to them with merely an instruction, which is provided for by the Regulation.

Therefore, the Regulation – as inconsistent with directly applicable EU law – should not be applied. The obligation to disapply the provisions of the Regulation in this case rests with the officers of the Border Guard. As the CJEU states in its judgement in Cases C-924/19 PPU and C-925/19 PPU, “[t]he duty to disapply, if necessary, national legislation that is contrary to a provision of EU law which has direct effect is owed not only by the national courts but also by all organs of the State, including the administrative authorities, called on, in the exercise of their respective powers, to apply EU law (see, to that effect, judgments of 22 June 1989, Costanzo, 103/88, EU:C:1989:256, paragraphs 30 and 31; of 4 December 2018, Minister for Justice and Equality and Commissioner of An Garda Síochána, C-378/17 EU:C:2018:979, paragraph 38; and of 21 January 2020, Banco de Santander, C-274/14, EU:C:2020:17, paragraph 78)” (para. 183).

4. Conclusion

The available information shows that both in the case of the group of migrants in Usnarz Górny and the migrants apprehended on other sections of the Polish-Belarusian border, Border Guard authorities fail to perform basic duties under the law, i.e. they do not conduct proceedings on a case-by-case basis with respect to each of the migrant crossing the border of Poland, which is also the external border of the EU. Sending migrants back to Belarus without initiating appropriate proceedings with regard to them and issuing decisions that can be challenged under Polish law makes it impossible to assess the situation of each or them on an individual basis and deprives the migrants of procedural guarantees, including the most important one – the right to apply for international protection.

People who declared the willingness to apply for international protection in the presence of Polish officials must be treated as “applicants” in accordance with EU law. From that moment onward they have a number of related rights, including the right to have their applications accepted and registered, and to remain in the territory of Poland for the duration of the procedure. Such applications may be made anywhere, and therefore also outside the official border crossings. In this respect, the Border Guard is required to disapply the national provisions that are incompatible with EU law that limit the possibility of applying for international protection, in particular the provisions of the Regulation of the Minister of the Interior and Administration of March 13, 2020 on temporary suspension or restriction of border traffic at certain border crossings.

Finally, it should be pointed out that the practice of deliberately denying migrants access to asylum procedures was condemned by the CJEU in Case C-808/18. In that judgment, the CJEU stressed that “Member States are, generally, obliged to register any application for international protection made by a third-country national or a stateless person to the national authorities and that they must

then ensure that the persons concerned have an effective opportunity to lodge their application as soon as possible.” (para. 93).