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

Information Note on the Court's case-law 242

July 2020

## *M.K. and Others v. Poland* - 40503/17, 42902/17 and 43643/17

Judgment 23.7.2020 [Section I]

# Article 3

### Expulsion

Refusal of border guards to receive asylum applications and summary removal to a third country, with a risk of *refoulement* to and ill-treatment in the country origin: *violation*

# Article 4 of Protocol No. 4

### Prohibition of collective expulsion of aliens

Refusal of border guards to receive asylum applications and summary removal to a third country, with a risk of *refoulement* to and ill-treatment in the country origin: *violation*

*Facts* – The applicants are Russian nationals of Chechen origin. In 2017 they presented themselves at border checkpoints (Terespol and Czeremca-Polowce) at the Polish-Belarussian border on several occasions. They allege that each time they wished to lodge asylum applications, but were denied that opportunity by the border guards, who refused them entry and removed them to Belarus, even though the applicants had alleged that they would not have access to an adequate asylum procedure in Belarus and that they would face torture or other forms of inhuman or degrading treatment if returned to the Russian Federation (Chechnya). According to the records of the border guards, the applicants had not expressed a wish to lodge asylum applications, whereas numerous reports by national human rights institutions, NGOs and the media stated that the border guards routinely refused to receive asylum applications. In respect of the applications, the Court indicated interim measures under Rule 39 of the Rules of Court. Nevertheless, the applicants were returned to Belarus. Thereafter the applicants arrived at the border checkpoints on further occasions, but were again turned away. In respect of some of the applicants, their asylum applications were eventually received by the Polish authorities and they were placed in a reception centre.

*Law*

Article 3 of the Convention: In determining whether or not the applicants had expressed a wish to apply for asylum when they presented themselves at the border checkpoints, the Court attaches more weight to the applicants' version of the events at the border that had been corroborated by other witnesses. The reports by the national human right institutions had indicated the existence of a systemic practice of misrepresenting the statements given by asylum-seekers in the official notes drafted by the border guards at the checkpoints between Poland and Belarus. Moreover, the irregularities in the procedure concerning the questioning of foreigners arriving at the Polish-Belarusian border at the relevant time, including the lack of a proper investigation into the reasons for which they sought entry into Poland, had been confirmed by judgments of the

Supreme Administrative Court .They had also been corroborated by a number of documents presented by them to the Court, especially by copies of the applications for international protection carried by the applicants at the border, their numerous attempts of crossing the border and their representation by Polish and Belarusian lawyers. In any event, the authorities had been aware of the applicants' fears of ill-treatment upon return, as the asylum applications had been shared with them by electronic means by their representatives as well as by the Court when it indicated interim measures under Rule 39. Accordingly, the Court could not accept the argument of the Government that the applicants had presented no evidence whatsoever that they had been at risk of being subjected to ill-treatment.

The applicants could arguably claim that there had been no guarantee that their asylum applications would be seriously examined by the Belarusian authorities and that their return to Chechnya could violate Article 3. The assessment of those claims should have been carried out by the Polish authorities. Moreover, they had been under an obligation to ensure the applicants' safety, in particular by allowing them to remain within Polish jurisdiction until such time that their claims had been properly reviewed by a competent domestic authority. The scope of that obligation had not been dependent on whether the applicants had been carrying documents authorising them to cross the Polish border or whether they had been legally admitted to Polish territory on other grounds.

The respondent Government had argued that by refusing the applicants entry into Poland, it had acted in accordance with the European Union legal obligations. However, the EU law had clearly embraced the principle of *non-refoulement*, as guaranteed by the Geneva Convention, and had also applied it to persons who had been subjected to border checks before being admitted to the territory of one of the member States. Consequently, the impugned measure taken by the Polish authorities fell outside the scope of Poland's strict international legal obligations.

In sum, the applicants had not had the benefit of effective guarantees that would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment, as well as torture. The absence of proceedings in which the applicants' applications for international protection could be reviewed had constituted a violation of Article 3. Moreover, given the situation in the neighbouring State, the Polish authorities, by failing to allow the applicants to remain on Polish territory pending the examination of their applications, had knowingly exposed them to a serious risk of chain-*refoulement* and treatment prohibited by Article 3.

*Conclusion*: violation (unanimously).

Article 4 of Protocol No. 4: If the prohibition on the collective expulsion of aliens expressed in Article 4 of Protocol No. 4 had been to be held applicable in respect of the actions of a State, the effect of which had been to prevent migrants from reaching the borders of that State, then it had been even more evident that it had applied to a situation in which the aliens had presented themselves at a land border and had been returned from there to the neighbouring country.

During the procedure at the border, the applicants' statements concerning their wish to apply for international protection had been disregarded and that even though individual decisions had been issued with respect to each applicant, they had not properly reflected the reasons given by the applicants to justify their fear of persecution. And some of the applicants had not been allowed to consult lawyers and had been denied access to them even when their lawyers had been at the border checkpoint and had demanded to be allowed to meet with their clients.

The applicants had been trying to make use of the procedure of accepting applications for international protection that should have been available to them under domestic law.

They had attempted to cross a border in a legal manner, using an official checkpoint and subjecting themselves to border checks as required by the relevant law. Hence, the fact that the State had refused to entertain their arguments concerning justification for their applications for international protection could not be attributed to their own conduct.

Moreover, the independent reports concerning the situation at checkpoints had indicated that the applicants' cases had constituted an exemplification of a wider state policy of refusing entry to foreigners coming from Belarus, regardless of whether they had been clearly economic migrants or whether they had expressed a fear of persecution in their countries of origin. Those reports had noted a consistent practice of: holding very brief interviews, during which the foreigners' statements concerning the justification for their seeking international protection had been disregarded; emphasis being placed on the arguments that had allowed them to be categorised as economic migrants; and misrepresenting the statements made by the foreigners in very brief official notes, which had constituted the sole basis for issuing refusal-of-entry decisions and returning them to Belarus, even in the event that the foreigners in question had made it clear that they had wished to apply for international protection in Poland. These conclusions had also been supported by the statement of certain authorities referred to by the applicants.

The decisions refusing entry into Poland issued in the applicants' cases had constituted a collective expulsion of aliens.

*Conclusion*: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 13 taken in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4, due to the absence of a remedy with automatic suspensive effect, and that the respondent State had failed to discharge its obligations under Article 34 of the Convention as it complied with the interim measures indicated by the Court under Rule 39 of the Rules of Court only with significant delay, or not at all.

Article 41: EUR 34,000 each to the individual applicant and to both applicant families in respect of non-pecuniary damage.

(See also *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, 23 February 2012, Information Note 149; *Ilias and Ahmed v. Hungary* [GC], 47287/15, 21 November 2019, Information Note 234; *N.D. and N.T. v. Spain* [GC], 8675/15 and 8697/15, 13 February 2020, Information Note 237; and the Factsheet on Collective expulsion of aliens)

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