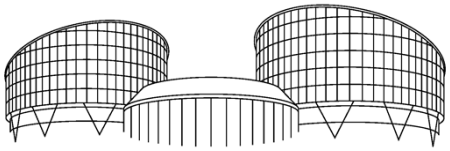

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF M.K. AND OTHERS v. POLAND

(Applications nos. 40503/17, 42902/17 and 43643/17)

JUDGMENT

Art 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 of origin • Systemic practice of misrepresenting statements given by asylum-seekers • Lack of a proper investigation into the reasons for which the applicants sought entry • State's obligation to ensure the applicants' safety, in particular by allowing them to remain within its jurisdiction, pending examination of their application for international protection Art 4 P4 • Collective expulsion of aliens • Wider State policy of refusing entry to foreigners coming from Belarus • Applicants' attempt to cross a border in a legal manner, using an official checkpoint and subjecting themselves to border checks Art 13 (+ Art 3 and Art 4 P4) • Lack of effective remedy with suspensive effect Art 34 • Hinder the exercise of the right of application • Non-compliance or delayed compliance with interim measures under Rule 39

STRASBOURG

23 July 2020

FINAL

14/12/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.K. and Others v. Poland,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ksenija Turković, *President*,
Krzysztof Wojtyczek,
Aleš Pejchal,
Armen Harutyunyan,
Pere Pastor Vilanova,
Tim Eicke,
Raffaele Sabato, *judges*,

and Renata Degener, *Deputy Section Registrar*,

Having deliberated in private on 4 June 2019, 15 April and 9 June 2020,

Delivers the following judgment, which was adopted on that last date:

PROCEDURE

1. The case originated in three applications (nos. 40503/17, 42902/17 and 43643/17) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by thirteen Russian nationals comprising (i) Mr M.K., (ii) Mr M.A., Mrs M.A. and five minor children, and (iii) Mr M.K., Mrs Z.T. and three minor children ("the applicants"), on 8 June, 16 June and 20 June 2017 respectively. The President of the Section acceded to the applicants' request for their names not to be disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant in case no. 40503/17 was represented by Ms S. Gregorczyk-Abram, Ms M.J. Radziejowska and Mr J. Białas, lawyers practising in Warsaw. The applicants in case no. 42902/17 were represented by Mr M. Matsiushchankau, a Belarusian human-rights defender who was granted leave to represent the applicants pursuant to Rule 36 § 4 (a) of the Rules of Court. The applicants in case no. 43643/17 were represented by Ms M.K. Dębska-Koniecek, a lawyer practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska, and subsequently by Mr J. Sobczak, of the Ministry of Foreign Affairs.

3. On 8, 16 and 20 June 2017 respectively, the Court (the duty judge) indicated to the Government interim measures under Rule 39 of the Rules of Court, namely not to return the applicants to Belarus (see paragraphs 16, 33 and 59 below). The interim measure indicated in case no. 42902/17 was lifted on 29 August 2018 (see paragraph 51 below), the interim measures indicated in cases nos. 40503/17 and 43643/17 remain in force.

4. The applicants alleged that the Polish authorities had repeatedly denied them the possibility of lodging an application for international protection, in breach of Article 3 of the Convention. They also invoked

Article 4 of Protocol No. 4 to the Convention, alleging that their situation had not been reviewed individually and that they were victims of a general policy that was followed by the Polish authorities with the aim of reducing the number of asylum applications registered in Poland. The applicants stated that, under Article 13 in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention, lodging an appeal against a decision denying someone entry into Poland did not constitute an effective remedy as it would not be examined quickly enough, would have no suspensive effect and would not be examined by an independent body. Moreover, the applicants complained that the Polish authorities had not complied with the interim measures granted to them by the Court, in breach of Article 34 of the Convention.

5. On 13 July, 3 August and 21 July 2017 respectively, the applications were communicated to the Government. Having regard to the Court's findings in *I v. Sweden* (no. 61204/09, §§ 40-46, 5 September 2013), it was decided that Russia would not be given notice of the present application.

6. The Government and the applicants filed written observations on the admissibility and merits of the case.

7. In addition, written comments concerning case no. 42902/17 were received from the Centre for Advice on Individual Rights in Europe, the Dutch Council for Refugees, the European Council on Refugees and Exiles and the International Commission of Jurists (acting jointly – "the third-party interveners"), the President of the Section having given them leave to do so (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The facts of the cases, as submitted by the parties, may be summarised as follows.

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

1. The applicant's situation prior to the application for an interim measure

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

10. In the period from July 2016 until 8 June 2017 he travelled to the Polish-Belarusian border crossing at Terespol on approximately thirty occasions. He submitted that each time that he had visited that border crossing he had expressly stated a wish to lodge an application for international protection; on at least several of those occasions, he had presented that application in written form (a copy of this document was submitted to the Court).

11. The applicant also submitted that on one occasion (on 17 March 2017) his representative had also been at the border checkpoint at Terespol but had not been allowed to meet with the applicant or be present at his questioning by the border guards. The presence of the applicant's lawyer at the border was a part of a wider effort to provide legal assistance to asylum-seekers organised by a group of lawyers from the Warsaw Bar Association. On the same day fifty-one persons – mainly of Chechen origin – presented themselves at the border checkpoint at Terespol. At the same time fourteen lawyers carrying powers of attorney from those persons were at the border and requested to be allowed to assist their clients during the second stage of the border-control process. Their request was refused. All those represented by the lawyers in question were returned to Belarus without the possibility of meeting with their representatives.

12. According to the applicant, when talking to the border guards he expressed fears for his safety. He told the guards that he was from Chechnya and that before leaving that region he had been detained numerous times without any legal basis. He told them that on one occasion, while being questioned by the Chechen police, he had been tortured and forced to sign a statement agreeing to serve as an informant for the police; subsequently, the police had tried to find and arrest him. He presented to the border guards documents confirming that after being tortured he had developed post-traumatic stress disorder. He also told the border guards that he could not remain in Belarus as his visa had expired and that in practice it would be impossible for him to obtain international protection there. The border guards then summarily turned him away, sending him back to Belarus.

13. On each occasion that the applicant presented himself at the border crossing at Terespol administrative decisions were issued turning him away from the Polish border on the grounds that he did not have any documents authorising his entry into Poland and that he had not stated that he had been at risk of persecution in his home country but was in fact trying to emigrate for economic or personal reasons. The official notes prepared by the officers of the Border Guard reported that the applicant had indicated, *inter alia*: his desire to live and work in Poland or Germany, his desire to find a wife and start a family in Poland, his lack of any family in Chechnya, his wish to travel to join friends residing in Europe, his lack of employment and money, his refusal to denounce his friends to the authorities, and his wish to escape from the Chechen justice system in order to avoid responsibility for an accident in which someone had died.

14. The applicant appealed against at least one of those administrative decisions (that decision had been issued on 17 March 2017). On 12 June 2017 the head of the National Border Guard (*Komendant Główny Straży Granicznej*) upheld the decision in question. The applicant lodged an appeal with the Warsaw Regional Administrative Court (*Wojewódzki Sąd*

Administracyjny w Warszawie). The proceedings before that court are pending.

2. Interim measure indicated by the Court

15. On 8 June 2017, when the applicant presented himself at the border crossing at Terespol, his representative lodged a request under Rule 39 of the Rules of Court asking the Court to prevent the applicant from being removed to Belarus. She indicated that, as a Russian citizen, the applicant had no genuine possibility of applying for international protection in Belarus and was at constant risk of expulsion to Chechnya, where he would face the threat of torture or of other forms of inhuman and degrading treatment.

16. On 8 June 2017, at 10.52 a.m., the Court (the duty judge) decided to apply Rule 39 of the Rules of Court, indicating to the Polish Government that the applicant should not be removed to Belarus until 23 June 2017. The Government were informed of the interim measure before the planned time of expulsion. Nevertheless, the applicant was returned to Belarus at 11.25 a.m. He appealed against that decision.

17. On 1 September 2017 the head of the National Border Guard upheld that decision. He stated, *inter alia*, that under domestic law, an interview with a foreigner who did not have documents allowing him to cross the Polish border was to be held by an officer of the Border Guard without the participation of other persons, including the lawyer representing that foreigner. The head of the National Border Guard added that the applicant had not expressed any wish to apply for international protection, as had he lodged such an application, the border guards would have received it. According to the head of the National Border Guard, the applicant had not substantiated that he had indeed tried to lodge such an application. Instead, the official note prepared by the Border Guard officer who had interviewed him stated that the applicant had expressed a wish to escape the judicial authorities in Chechnya and to travel to meet with friends to Germany. When referring to the interim measure indicated by the Court, the head of the National Border Guard stated that it was impossible to remove from Polish territory a person who had not legally crossed a border in the first place and that domestic law provided no basis for allowing the applicant to enter Poland.

18. The applicant appealed to the Warsaw Regional Administrative Court. The proceedings before this court are still pending.

3. Developments following the application of an interim measure

19. On 9 June 2017 the applicant returned to the border checkpoint at Terespol, carrying with him a copy of a letter informing his representative of the Court's decision concerning the interim measure. The applicant

submitted that he had been searched by border guards and questioned about the people who had helped him and who had secured him legal representation and how this representation had been paid for. The applicant also alleged that his copy of the letter from the Court had been confiscated from him. The Government maintained that neither any such search nor any seizure of that document had taken place. They also stated that the applicant had not been questioned regarding his legal representation. They furthermore stated that during his conversation with the officers of the Border Guard the applicant had not expressed any need for international protection; rather, he had declared that he wished to go to Germany, where his family lived.

20. On the same day the Government requested that the Court lift the interim measure indicated under Rule 39 of the Rules of Court. They argued that the applicant had never requested international protection, and nor had he given any reasons for the need for such protection. They also maintained that as the applicant had not been admitted to Poland by the border guards, he had not been legally in Poland and could therefore not be removed. In the Government's view the applicant had abused the interim measure in order to pressurise the Polish Border Guard officers into giving him permission to enter Poland.

21. On 14 June 2017 the Court (the duty judge) decided not to lift the interim measure, but rather to prolong it until further notice and to indicate to the Government that in the light of the submissions made to the Court (especially the applicant's written application and his submissions, copies of which had been forwarded to the Government), the Court considered that the applicant had lodged a request for international protection. The Court clarified that the indication, made to the Government on 8 June 2017, that the applicant should not be removed to Belarus should be understood in such a way that when he presented himself at a Polish border checkpoint his application for asylum would be received and registered by the Border Guard and forwarded for examination by the competent authorities. Pending examination of the asylum application, the applicant should not be sent back to Belarus.

22. The applicant arrived at the border checkpoint at Terespol on at least three more occasions. On each occasion he was turned away. The official notes made by the officers of the Border Guard state that on those three occasions he had indicated that he wished to enter Poland because he had not had any employment in Chechnya and he wished to live and work in Poland and to visit his friends in Germany; he also stated that he had a sister who lived either in Germany or in France. The Government also submitted that during one of the interviews with the officers of the Border Guard the applicant had stated that he had been helped by Belarusian non-governmental organisations but that he did not know any Polish lawyers and that he had never talked to the psychologist who had signed

a psychological report that he was carrying. The applicant contested those allegations. He submitted to the Court that he had indeed been subjected to a psychological examination (organised by a non-governmental organisation on 5 and 7 June 2017), the results of which he had presented in his submissions to the Court and to the Border Guard officers. He also submitted that he had declared to the officers of the Border Guard that he was in contact with his representative and that he was able to contact her by telephone at any time.

23. On at least one of the occasions on which the applicant went to the Terespol border checkpoint (on 19 June 2017) his representative sent a copy of his application for international protection via email, fax and ePUAP (the Internet platform that enables individuals to contact the public administrative authorities) to the Border Guard at Terespol and to the Polish Border Guard Headquarters in Warsaw. She also informed of that fact the department of the Ministry of Foreign Affairs in charge of dealing with proceedings before international human rights bodies (where the agent of the Polish Government in charge of dealing with the Court is based). In her letter she also referred to the interim measure indicated by the Court under Rule 39 of the Rules of Court. On 22 June 2017 the Deputy Director of the Department for Aliens at the National Border Guard headquarters (*Zastępca Dyrektora Zarządu do Spraw Cudzoziemców Komendy Głównej Straży Granicznej*) replied to the applicant's representative, indicating to her that an application for international protection might be submitted only at the Polish border by the applicant in person.

24. On 8 September 2017, when submitting their observations on the admissibility and merits of the case, the Government again requested that the Court lift the interim measure indicated under Rule 39 of the Rules of Court. They cited the same reasons as those cited in their previous request. On 13 November 2017 the President of the Section refused their request.

25. On an unspecified date the applicant left Belarus, stating that he was afraid of deportation to Chechnya. He is currently residing in Siberia, Russia.

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

1. The applicants' situation prior to the application for an interim measure

26. The applicants, Mr M.A. ("the first applicant") and Mrs M.A. ("the second applicant") are Russian nationals. They are married. The other five applicants are their minor children, who were travelling with them.

27. In April 2017 the applicants travelled to the Polish-Belarusian border crossing at Terespol on two occasions. According to them, on each occasion they expressed a wish to lodge an application for international protection.

28. According to the applicants, when talking to the border guards, they expressed fears for their safety. They told the border guards that they were from Chechnya. The first applicant submitted that in 2005 he had started to have problems with officers of the special services because his relatives had participated in the second Chechen war. Police officers had come to his home and taken him for questioning to a police station. His home had been raided by armed people wearing masks. Subsequently, he had decided to leave the Chechen Republic and had applied for international protection in Poland. Later, he had moved to Austria. In 2010 he had returned to Chechnya and had started working at the Department for Protection (participating in some counter-terrorist operations and provided security to governmental officials). He had quit that job, but before doing so, he had been asked if he was planning to join any illegal armed groups in Syria. The first applicant submitted that on one occasion he had been taken to the headquarters of the Department for Protection. He had been asked to become an informant for the Chechen security services but had refused to do so. On another occasion police officers had come to his home and forcibly taken him to a police station. He had again been asked to become an informant, but he had refused. He submitted that afterwards he had been tortured with electric shocks and by being beaten in his lumbar region (lower back), head and other parts of his body. After that he, together with the second applicant and their children, had left their home and had travelled to Belarus, with the aim of travelling onwards to Poland. They had told the border guards that they could not continue their stay in Belarus, as their visas had expired and that in practice it would be impossible for them to obtain international protection there. The border guards had then summarily turned them away, sending them back to Belarus.

29. On both occasions on which the applicants presented themselves at the border crossing at Terespol, administrative decisions were issued turning them away from the Polish border on the grounds that they did not have any documents authorising their entry into Poland and that they had not stated that they were at risk of persecution in their home country but that they were simply trying to emigrate for economic or personal reasons. The official notes prepared by the officers of the Border Guard observed that the applicants had cited (i) their desire to seek a better life in Europe for their big family and to join family members in Germany and obtain social benefits there, and (ii) the lack of employment opportunities in Chechnya.

30. The applicants did not appeal against the administrative decisions issued on those occasions.

31. At the same time, in April and May 2017, they also tried to enter Lithuania and – according to their statements to the Court – lodge an application for international protection there. The proceedings before the Lithuanian authorities were the subject of a separate application concluded

by a judgment of the Court delivered in late 2018 (see *M.A. and Others v. Lithuania*, no. 59793/17, 11 December 2018).

2. Interim measure indicated by the Court

32. On 16 June 2017, when the applicants presented themselves at the border crossing at Terespol, their representative lodged a request under Rule 39 of the Rules of Court, asking the Court to prevent the applicants from being removed to Belarus. He indicated that, as Russian citizens, they had no genuine possibility of applying for international protection in Belarus and were at constant risk of expulsion to Chechnya, where the first applicant would face the threat of torture or other forms of inhuman and degrading treatment.

33. At 10.48 a.m. on 16 June 2017 the Court (the duty judge) decided to apply Rule 39 of the Rules of Court, indicating to the Polish Government that the applicants should not be removed to Belarus until 30 June 2017. The Court clarified that the indication that the applicants should not be removed to Belarus should be understood in such a way that when they presented themselves at a Polish border checkpoint their application for asylum should be received and registered by the Border Guard and forwarded for examination to the competent authorities. Pending examination of the asylum application, the applicants should not be sent back to Belarus. The Government were informed of the interim measure before the planned time of expulsion. Nevertheless, the applicants were returned to Belarus at 11.25 a.m. The official note prepared by border guards on this occasion stated that, when at the border, the applicants had expressed the wish to enter Poland in order to settle and raise their children there.

3. Developments following the application of the interim measure

34. On 20 June 2017 the applicants returned to the border checkpoint at Terespol, carrying with them an application for international protection and a copy of a letter informing their representative of the Court's decision concerning the interim measure. Again, they were turned away and sent back to Belarus. The Government submitted that in the course of their conversation with the officers of the Border Guard the applicants had not expressed any need for international protection; rather, they had declared that they wished to settle in Europe owing to the lack of adequate employment opportunities in Chechnya.

35. While the applicants were trying to apply for asylum, a Polish lawyer cooperating with the applicants' representative sent a copy of the first applicant's application for international protection via email, fax and ePUAP to the Border Guard at Terespol and to the Polish Border Guard headquarters in Warsaw. She also informed (by letter) of that fact the

department of the Ministry of Foreign Affairs in charge of dealing with proceedings before international human-rights bodies (where the agent of the Polish Government in charge of dealing with the Court is based). In her letter she also made reference to the interim measure indicated by the Court on 16 June 2017 under Rule 39 of the Rules of Court (see paragraph 33 above). On 22 June 2017 the Deputy Director of the Department for Aliens at the Polish Border Guards' headquarters answered the letter from the lawyer in question, indicating to her that an application for international protection could be submitted only at the Polish border by the applicant in person.

36. On 23 June 2017 the Government requested that the Court lift the interim measure indicated under Rule 39 of the Rules of Court. They argued that the applicants had never requested international protection, and nor had they given any reasons for such protection. They also maintained that as the applicants had not been admitted to Poland by the country's border guards, they had never been legally in Poland in the first place and could therefore not be removed. The Government stated that, in their opinion, the applicants had abused the interim measure in order to pressurise the Polish Border Guard officers into giving them permission to enter Poland. A similar approach was presented by the Government in their letter dated 28 June 2017.

37. On 30 June 2017 the Court (the duty judge) decided not to lift the interim measure but to extend it until 21 July 2017, and indicated to the Government that in the light of the submissions made to the Court, it considered that the applicants had lodged a request for international protection. At the same time the Court expressed concern as regards the Government's refusal to register the applicants' asylum applications. On 19 July 2017 the Court (the duty judge) extended the interim measure until 3 August 2017. On 3 August 2017 the duty judge extended the interim measure until further notice.

38. In the period between 3 August and 11 December 2017 the applicants arrived at the border checkpoint at Terespol on at least three more occasions. They were turned away. The Government submitted that on one of those occasions the applicants had presented a document entitled "Request for international protection" prepared by their representative in Polish, but stated that they had not understood its contents as they did not speak Polish. The Government also alleged that while being interviewed by the border guards the applicants had made statements that contradicted the account of their history given in the document. The applicants also submitted to the Court a Russian-language version of the first applicant's application for international protection (dated May 2017 and addressed to the Lithuanian authorities). The text of this document corresponds to the statements submitted in Polish.

39. On 20 September 2017, when submitting observations on the admissibility and merits of the case, the Government again requested that the Court lift the interim measure indicated under Rule 39 of the Rules of Court. They cited the same reasons as those cited in their previous application. On 6 December 2017 the President of the Section refused their request.

4. A request for a new interim measure concerning the second applicant

40. On 13 December 2017 the applicants' representative informed the Court that the previous day (12 December 2017) the applicants had again tried to lodge an application for international protection at the border checkpoint at Terespol. Again, decisions denying them entry had been issued. However, when on their way to catch the train that was to take them back to the city of Brest, in Belarus, the second applicant, who was at the time seven or eight months pregnant, had slipped and fallen. The applicants' representative submitted that she had been taken to the hospital in Biała Podlaska, Poland and remained under the supervision of border guards. He also stated that she had been carrying a written application for international protection and had attempted to submit it to the officers of the Border Guard.

41. Referring to the above information, the applicants' representative lodged a fresh request under Rule 39 of the Rules of Court, asking the Court to indicate to the Government: 1) not to return the second applicant to Belarus, 2) not to obstruct the lodging of an asylum application by the second applicant and 3) to make sure that the second applicant and her foetus were properly examined by a qualified doctor and that they had access to the best available medical services.

42. On 14 December 2017 the Court (the duty judge) decided to refuse the request in respect of point 3. With reference to points 1 and 2 of the request the Court reminded the Government that the interim measure indicated on 16 June 2017 and prolonged until further notice on 3 August 2017 was still in force.

43. On the same day the second applicant was released from hospital and returned to Belarus. She lodged an appeal against the decision of 12 December 2017 (see paragraph 40 above) denying her entry into Poland. According to the information submitted to the Court, the proceedings concerning her appeal are still pending before the head of the National Border Guard.

5. The disappearance of the first applicant and the procedure concerning the second applicant and her children

44. During the period between October and December 2017 the applicants' relatives residing in Chechnya received a number of summonses for the first applicant to appear before the police. In December 2017 those summonses were delivered to Brest, Belarus, where the applicants were residing. The first applicant was summoned to the police station in Brest and informed that he and his family had to leave Belarus. Otherwise, they would be deported and banned from entering the country again.

45. The applicants left Belarus and travelled to Smolensk, Russia, where the first applicant was immediately detained by the police and – according to the information his wife received from their relatives in Chechnya – transferred to the town of Grozny in the Chechen Republic.

46. The second applicant decided to return with her children to Belarus and to try again to lodge an application for international protection. After one unsuccessful attempt, on 7 January 2018 the border guards at Terespol received her application and forwarded it for review by the head of the Aliens Office (*Szef Urzędu do Spraw Cudzoziemców*). The second applicant and her children were placed in a refugee reception centre.

6. The further whereabouts of the first applicant and his application for international protection

47. On 20 May 2018 the applicants' representative informed the Court that in February 2018 the first applicant had been released from detention in the Chechen Republic. According to the representative, the applicant had no knowledge as to where he had been detained. He alleged that he had been beaten by the personnel of the detention facility and provided photos of significant bruises on his body.

48. In March 2018 the first applicant left Chechnya again and travelled to Belarus. On 20 March 2018 he travelled to Terespol and lodged an application for international protection. He was admitted to Poland and joined the second applicant and their children in a refugee reception centre.

7. The applicants' departure from Poland

49. On 18 May 2018 the applicants voluntarily left the refugee reception centre and travelled to Germany. Owing to their departure the proceedings concerning their applications for international protection were discontinued (on 30 May 2018 with respect to the second applicant and her children and on 4 June 2018 with respect to the first applicant).

50. On 7 June 2018 the German authorities lodged requests for the applicants to be transferred back to Poland under Regulation EU No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member

State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ("the Dublin III Regulation"). On 14 June 2018 the head of the Aliens Office agreed to examine the applicants' applications for international protection. According to the information submitted to the Court, the applicants have not yet been transferred to Poland.

51. On 29 August 2018, the President of the Section, following an application lodged by the Government, decided to lift the interim measure indicated to the Government in the applicants' case.

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

1. The applicants' situation prior to the application for an interim measure

52. The applicants Mr M.K. ("the first applicant") and Mrs Z.T. ("the second applicant") are Russian nationals. They are married. The remaining applicants are their three minor children.

53. In the period from September 2016 to July 2017 the applicants travelled to the border crossing at Terespol on twelve occasions. According to the applicants, on each occasion they expressed a wish to lodge an application for international protection; on at least one occasion they were carrying that application in written form (a copy of the relevant document was submitted to the Court).

54. According to the applicants, on one occasion (on 17 March 2017) their representative was also at the border checkpoint at Terespol, but was not allowed to meet them or be present during their questioning by the border guards. Their representative's presence at the border was related to the events that were described above with respect to case no. 40503/17 (see paragraph 11 above).

55. According to the applicants, when talking to the border guards, they expressed fears for their safety. The first applicant told the border guards that in the Chechen Republic he had been kidnapped, detained and tortured by people he did not know because of his alleged participation in the disappearance of an officer (or collaborator) of the local office of the Department for Combatting Organised Crime who had been a relative of people close to Ramzan Kadyrov, the head of the Chechen Republic. Later, the applicants and their children had gone to Poland and then to Austria. From Austria, where they had unsuccessfully applied for international protection, they had been deported to Russia. The first applicant had gone into hiding and the second applicant had gone back to her family village in Chechnya with their children. She stated that upon her return she had been harassed, threatened and questioned about her husband. On one occasion she had been kidnapped and detained for around twenty-four hours, during which time she had been interrogated and threatened with sexual violence.

She had been asked about the whereabouts of her husband. The applicants presented to the border guards documents confirming that, as torture victims, they had developed post-traumatic stress disorder. They also stated that they could not continue their stay in Belarus, as their visas had expired and that in practice it was impossible for them to obtain international protection there. The border guards then summarily turned them away, sending them back to Belarus.

56. On each occasion that the applicants presented themselves at the border crossing at Terespol, administrative decisions were issued turning them away from the Polish border on the grounds that they did not have any documents authorising their entry into Poland and that they had not stated that they were at risk of persecution in their home country but were in fact trying to emigrate for economic or personal reasons. The official notes prepared by the officers of the Border Guard reported that the applicants had indicated, *inter alia*, their lack of money, together with their wish to: live in Poland, receive financial support, seek a better life in Europe, travel to Austria to join a family member residing there, settle and work in Germany, and educate their children in Europe.

57. The applicants appealed at least once against the decisions issued on 17 March 2017 refusing entry. On 12 June 2017 the head of the National Border Guard upheld those decisions. The applicants appealed to the Warsaw Regional Administrative Court. The proceedings before that court are pending.

2. Interim measure indicated by the Court

58. On 20 June 2017, when the applicants presented themselves at the border crossing at Terespol, their representative lodged a request under Rule 39 of the Rules of Court, asking the Court to prevent the applicants from being removed to Belarus. She indicated that, as Russian citizens, the applicants had no genuine possibility of applying for international protection in Belarus and were at constant risk of expulsion to Chechnya, where they would face the threat of torture and other inhuman and degrading treatment.

59. At 10.14 a.m. on 20 June 2017 the Court (the duty judge) decided to apply Rule 39 of the Rules of Court, indicating to the Polish Government that the applicants should not be removed to Belarus until 4 July 2017. The Government were informed of the interim measure before the planned time of expulsion. The applicants were nevertheless returned to Belarus at 11.25 a.m. The official note prepared by the border guards on this occasion stated that, when at the border, the applicants had expressed the wish to enter Poland because they had not been able to find employment in Chechnya and because they wished to raise their children in Europe.

3. Developments following the application of an interim measure

60. On 27 June 2017 the Government requested the Court to lift the interim measure indicated under Rule 39 of the Rules of Court. They argued that the applicants had never requested international protection, nor given any reasons to justify such protection. The Government stated that, in their opinion, the applicants had abused the interim measure in order to pressurise the Polish Border Guard officers into giving them permission to enter Poland.

61. On 4 July 2017 the Court (the duty judge) decided not to lift the interim measure but to extend it until 21 July 2017, and indicated to the Government that – in the light of the submissions made to the Court (especially the documents attached to the request for an interim measure and the applicants' submissions to the Court, copies of which had been sent to the Government) – it appeared that the applicants had tried to submit a request for international protection. On 21 July 2017 the duty judge extended the interim measure until further notice.

62. In the period between 22 June and 6 September 2017 the applicants returned to the border checkpoint at Terespol at least seven further times. On one occasion they also tried to lodge an application for international protection at another border checkpoint (at Czeremcha-Połowce). Each time they were turned away. On two of those occasions they appealed against the decisions refusing entry. According to the information provided to the Court, the proceedings in respect of those cases are still pending before the head of the National Border Guard.

63. The applicants submitted that on all those occasions they were carrying (i) a copy of a letter informing their representative of the Court's decision concerning the interim measure and (ii) written applications for international protection. They had also clearly expressed a wish to lodge those applications. The Government alleged that the applicants had never expressed such a wish. The official notes prepared by the officers of the Border Guard stated that during their questioning the applicants had expressed a wish to live and work in Poland and to send their children to school there.

64. On at least three of the occasions on which the applicants arrived at the Terespol and Czeremcha-Połowce border checkpoints, their representative sent a copy of their application for international protection via email and fax to the relevant units of the Border Guard. In her letter she also made a reference to the interim measure indicated by the Court under Rule 39 of the Rules of Court.

65. On 11 September 2017, when submitting observations on the admissibility and merits of the case, the Government again requested that the Court lift the interim measure indicated under Rule 39 of the Rules of Court. On 13 November 2017 the President of the Section refused their request.

66. On an unspecified date the applicants left Belarus in order to avoid deportation. They indicated that they were travelling within an undisclosed region. They submitted that they remained in hiding for fear of being tracked by the Chechen authorities.

II. RELEVANT DOMESTIC LAW

A. Constitutional provisions

67. The 1997 Constitution contains the following provisions relating to the rights of foreigners:

Article 37

"1. Anyone under the jurisdiction of the Polish State shall enjoy the freedoms and rights ensured by the Constitution.

2. Exemptions from this principle with respect to foreigners shall be specified by statute."

Article 56

"1. Foreigners shall have the right of asylum in the Republic of Poland, in accordance with principles specified by statute.

2. Foreigners who, in the Republic of Poland, seek protection from persecution, may be granted the status of a refugee, in accordance with international agreements to which the Republic of Poland is a party."

B. The Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland

68. The procedure for granting refugee status and "tolerated stays" (*pobyt tolerowany*) to foreigners and their expulsion is regulated by the Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland (*Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej* – "the 2003 Act"). The 2003 Act was amended on multiple occasions, in particular in order to transpose into Polish law Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted and 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 (see paragraphs 85-91 below).

69. The grounds and conditions for granting refugee status or supplementary international protection are set out in sections 13-22 of the

2003 Act. The procedure for granting protection is set out in sections 23-54f of that Act.

70. Under sections 24 and 29 of the 2003 Act the Border Guard is obliged to provide a foreigner who expresses a wish to apply for international protection in Poland with the possibility to lodge such an application and to facilitate it, *inter alia*, by ensuring the assistance of a translator and by giving – at the foreigner's request or with their consent – access to representatives of international or non-governmental organisations assisting refugees. A person who has lodged an application for international protection is obliged to report to the reception centre indicated by the border guards (section 30(1) (5i) of the 2003 Act). That application for international protection will then be forwarded for examination to the head of the Aliens Office, who should decide on it within six months (section 34(1) of the 2003 Act).

71. The foreigner in question can lodge an appeal against a decision issued by the head of the Aliens Office with the Refugee Board (*Rada do Spraw Uchodźców*). A decision issued by the Refugee Board can be appealed against by lodging an appeal with the Warsaw Regional Administrative Court and – as a last resort – a cassation appeal with the Supreme Administrative Court (*Naczelny Sąd Administracyjny*).

72. If an application for international protection and an appeal against a decision of the head of the Aliens Office have been lodged, the enforcement of the return procedure is not initiated and any procedure that has already been initiated is suspended. An appeal lodged with an administrative court does not have automatic suspensive effect.

C. The Aliens Act of 12 December 2013

73. In the event that a foreigner who presents himself or herself at a border checkpoint does not express a wish to lodge an application for international protection and does not have a valid document allowing him or her to enter Poland, the border guards must instigate a refusal-of-entry procedure, which is regulated by sections 33 and 34 of the Aliens Act of 12 December 2013 (*Ustawa o cudzoziemcach* – "the 2013 Act").

74. Under those provisions a decision refusing entry is issued by the head of the relevant unit of the Border Guard (*Komendant placówki Straży Granicznej*) and is executed immediately. A person who has been denied entry into Poland can appeal against that decision to the head of the National Border Guard and, subsequently, lodge an appeal with the Warsaw Regional Administrative Court and a cassation appeal with the Supreme Administrative Court. None of those remedies has suspensive effect.

75. Under section 33, subsection 1, of the 2013 Act, the proceedings prior to the issuance of a refusal-of-entry decision are limited to hearing the foreigner in question and the persons travelling with him or her, a review of

the documents in his or her possession, verifying the relevant registries and obtaining necessary information from other State institutions and relevant entities. Subsection 2 of this section provides that in cases in which there is no doubt that the foreigner does not comply with the conditions of crossing the border, the proceedings may be limited only to a review of the documents in his or her possession.

76. On 17 May 2018, in one of the cases concerning appeals against the refusal-of-entry decisions issued by the head of the Border Guard Unit at Terespol (namely case no. II OSK 2766/17), the Supreme Administrative Court held that the situation provided in subsection 2 of section 33 of the 2013 Act was to be treated as extraordinary and that it did not arise in situations in which the foreigner in question raised any claims concerning a need for international protection. The administrative court indicated that the fact that the foreigner in the case before it had raised in her appeal the fact that she was an asylum-seeker proved that her case raised some doubts and that the administrative body should have investigated it further. The Supreme Administrative Court also indicated that if the administrative body had decided to question the foreigner, it could not have limited itself to drafting a brief official note, but would have been obliged to prepare a record of the questioning.

77. Furthermore, on 26 July 2018 (case no. II OSK 1752/18) the Supreme Administrative Court stressed that the fact that the foreigner had attempted to enter Poland numerous times and that he or she had demanded to be heard in the presence of his or her lawyer should have resulted in a more detailed examination of his or her case by the Border Guard. It also stressed that the interpretation of the 2013 Act had to take into consideration the principle of *non-refoulement*, which constituted a starting point for the interpretation of the rights and obligations of foreigners presenting themselves at the border and of the authorities responsible for border control.

III. EUROPEAN UNION LAW

A. The Treaty on the Functioning of the European Union

78. Article 78 § 1 of the Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon, which came into force on 1 December 2009, provides:

> "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."

B. The Charter of Fundamental Rights of the European Union

79. The Charter of Fundamental Rights, which has formed part of the primary law of the European Union since the entry into force of the Treaty of Lisbon, contains an express provision guaranteeing the right to asylum. Article 18 of the Charter provides:

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')."

80. Article 19 of the Charter provides:

> **Protection in the event of removal, expulsion or extradition**
>
> "1. Collective expulsions are prohibited.
>
> 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

C. The 1985 Schengen Agreement

81. Article 17 of the Agreement provides:

> "In regard to the movement of persons, the Parties shall endeavour to abolish the controls at the common frontiers and transfer them to their external frontiers. To that end, they shall endeavour to harmonise in advance, where necessary, the laws and administrative provisions concerning the prohibitions and restrictions which form the basis for the controls and to take complementary measures to safeguard security and combat illegal immigration by nationals of States that are not members of the European Communities."

82. Article 20 of the Agreement provides:

> "The Parties shall endeavour to harmonise their visa policies and the conditions for entry onto their territories. In so far as is necessary, they shall also prepare the harmonisation of their rules governing certain aspects of the law on aliens in regard to nationals of States that are not members of the European Communities."

D. 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)

83. Article 3 of Regulation (EU) 2016/399 provides:

> "This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to:
>
> ..."

(b) the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*."

84. Article 4 of the Regulation stipulates:

"When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ('the Charter'), relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ('the Geneva Convention'), obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis."

E. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

85. The Directive sets detailed standards for recognising third-country nationals and stateless persons as refugees.

86. Article 2 (d) defines a refugee as

"... a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it ..."

87. Article 2 (h) of the Directive clarifies that

"'application for international protection' means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately"

88. Article 21 § 1 of the Directive stipulates:

"Member States shall respect the principle of *non-refoulement* in accordance with their international obligations."

F. 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

89. Article 3 § 1 of Directive 2013/32/EU provides:

"This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection."

90. Article 8 of the Directive stipulates:

"1. Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.

2. Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible."

91. Article 9 of the Directive regulates the right of a person who has lodged an application for international protection to remain in the member State in which he or she lodged the application. It provides:

"1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit.

2. Member States may make an exception only where a person makes a subsequent application referred to in Article 41 or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country or to international criminal courts or tribunals.

3. A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect *refoulement* in violation of the international and Union obligations of that Member State."

IV. RELEVANT INTERNATIONAL LAW

A. The 1951 Geneva Convention relating to the Status of Refugees ("the Geneva Convention")

92. Article 1 A and Article 33 § 1 of the Geneva Convention provide:

Article 1 A

"For the purposes of the present Convention, the term 'refugee' shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Article 33 § 1

"No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

93. In its Note on International Protection of 13 September 2001 (A/AC.96/951, § 16), the Office of the United Nations High Commissioner for Refugees (UNHCR), which has the task of monitoring the manner in which the States Parties apply the Geneva Convention, indicated that the principle of *non-refoulement* laid down in Article 33, was:

"... [A] cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human-rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to *refoule* is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx."

94. In its Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol adopted on 26 January 2007, the UNHCR stipulated:

"7. The prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "renditions", and non-admission at the border in the circumstances described below. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return (*refoulement*) "in any manner whatsoever" ... It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk.

8. ...As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.

9. ... the obligation under Article 33(1) of the 1951 Convention not to send a refugee or asylum-seeker to a country where he or she may be at risk of persecution is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction. ...

24. ... the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be [at] risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State."

B. Other UN materials

95. The General Assembly of the United Nations stated in Article 3 of its Declaration on Territorial Asylum, adopted on 14 December 1967 (A/RES/2312 (XXII)), that:

"No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

96. On 19 September 2016, the General Assembly of the United Nations adopted the New York Declarations for Refugees and Migrants, in which it stated:

"24. ... We will ensure that public officials and law enforcement officers who work in border areas are trained to uphold the human rights of all persons crossing, or seeking to cross, international borders ... We reaffirm that, in line with the principle of *non-refoulement*, individuals must not be returned at borders.

...

33. Reaffirming that all individuals who have crossed or are seeking to cross international borders are entitled to due process in the assessment of their legal status, entry and stay, we will consider reviewing policies that criminalize cross-border movements.

...

65. We reaffirm the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto as the foundation of the international refugee protection regime. ..."

C. Council of Europe materials

97. Section X of the Guidelines on human-rights protection in the context of accelerated asylum procedures (adopted by the Committee of Ministers of the Council of Europe on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies) reads:

"1. Asylum seekers whose applications are rejected shall have the right to have the decision reviewed by a means constituting an effective remedy.

2. Where asylum seekers submit an arguable claim that the execution of a removal decision could lead to a real risk of persecution or the death penalty, torture or inhuman or degrading treatment or punishment, the remedy against the removal decision shall have suspensive effect."

V. MATERIAL DESCRIBING SITUATION AT THE BORDER CHECKPOINT IN TERESPOL

A. The Ombudsman's visits

98. On 11 August 2016 representatives of the Polish Ombudsman (*Rzecznik Praw Obywatelskich*) visited the border checkpoint at Terespol and conducted an unannounced inspection. The representatives were allowed to observe interviews conducted by officers of the Border Guard with foreigners who had arrived at the border without valid visas or other documents allowing them to enter Poland.

99. The representatives of the Ombudsman observed seventy-nine interviews. They noted that the interviews had been conducted at four stands, three of which had been placed at such a short distance from each other that interviews could have been easily overheard by third parties (such as other foreigners). The interviews had been conducted in Russian and had lasted, on average, between one and four minutes.

100. The representatives of the Ombudsman noted that during sixty-two of the interviews observed by them, the individuals interviewed had not expressed any intention of applying for international protection in Poland, and nor had they provided information that could have suggested that they had come to Poland with such an intention. During five interviews the representatives of the families in question had explicitly declared to the border guards their intention of lodging an application for international protection. Only one of those families had been allowed to lodge such an application. During a further twelve interviews, the foreigners had given reasons for leaving their country that – according to the representatives of the Ombudsman – could have indicated that they had experienced persecution within the meaning of the Geneva Convention or had been in risk of their lives, personal freedom or safety. Furthermore, of this group, only one family had been given an opportunity to lodge an application for international protection.

101. The report (which was published in English) contained the following description of the observed interviews:

"In each case, whenever foreigners' answers mentioned risks persisting in the country of origin, officers asked several additional questions about, among other things, specific incidents that could prove such risks and the fact whether such incidents were reported, for example, to law enforcement agencies. In the view of inspectors, although that is a subjective opinion, officers did not attach much importance to information provided in such cases by foreigners and they were focusing more on proving that the reason for leaving the country was of [an]

> economic nature. After questions about possible risks, they very often moved on to ask further about a profession performed in the country and the intention to find employment in Poland. The declaration of such an intention itself, although again that is the subjective opinion of inspectors, in many cases sufficed for an officer to assume that a given foreigner came to Poland for economic reasons, despite his/her concerns of other nature."

102. The representatives of the Ombudsman also referred to the way in which the course of the interviews had been documented by the officers of the Border Guard. They stated (in English):

> "The course of each interview is documented in the form of an entry in a log that an officer maintains ... Such an entry contains only information concerning foreigners' personal details and details of other members of family who accompany him/her, the country of origin, passport numbers and, what is most important, the purpose that the foreigner gives for coming to Poland. The last piece of information is recorded in the form of laconic statements, such as *going to Germany; doesn't want to live with her husband; has no money; wants to live in Poland.* In case the interview results in the refusal to enter the territory of Poland, identical information concerning the purpose of arrival is included in the memo [the official note]. The memo is attached to the files of the administrative proceedings in which the decision is issued to refuse the right of entry. This way of documenting interviews which have paramount importance for a possible recognition of a foreigner as a person seeking protection against persecution in the country of origin should be deemed highly insufficient. Firstly, based on an entry made by an officer, it is not possible to reconstruct, even roughly, the course of the interview. Secondly, a foreigner has no chance to inspect the entry, and hence cannot in any way refer to it or set the information right."

103. The report of the inspection concluded that interviews aimed at determining the purpose of each foreigner's arrival in Poland were conducted in conditions which did not provide at least a minimum degree of privacy. It reiterated that if during an interview a foreigner referred to circumstances indicating an intention to apply for international protection in Poland, the relevant application should be accepted from them for review and that, under domestic law, officers of the Border Guard did not have the authority to perform any preliminary verification of data provided by the foreigners in this respect. The report explicitly stated that the inspection had revealed certain cases when Border Guard officers had not allowed foreigners to lodge an application for international protection even though they had either directly declared such an intention during their respective interview or had mentioned circumstances that may have indicated that they had been persecuted in their country of origin.

104. On 15 May 2018 a second visit by the representatives of the Polish Ombudsman took place at the border checkpoint at Terespol. The employees of the Ombudsman's office were present during eight interviews concerning eighteen foreigners out of a total of thirty-two persons who arrived at the Terespol border crossing on that day without carrying a valid visa or other documentation allowing them to enter Poland. They noted that during six of those interviews (concerning sixteen persons),

the foreigners in question had expressed a wish to lodge an application for international protection and that in all the cases they had been allowed to lodge applications and had been admitted to Poland. In one case, this had happened only after the Ombudsman's representatives had indicated to the officers of the Border Guard their doubts concerning the course of the respective interview; the interview had then been repeated. Those sixteen persons had all been foreigners who had lodged applications for international protection on that day. No application had been lodged by any of the persons interviewed at the counter at which no representative of the Ombudsman had been present.

105. The report of the Ombudsman's office also noted that a number of applications for international protection were accepted for review on 15 May 2018 – a significantly higher than on any other day in the two-week period preceding the visit. According to official data submitted by the Border Guard, in the period between 1 and 14 May 2018, the maximum number of applications lodged on one day was two (concerning between one and six persons per day).

B. Visit by representatives of the Children's Ombudsman

106. On 10 January 2017 the Terespol border crossing was inspected by representatives of the Children's Ombudsman (*Rzecznik Praw Dziecka*).

107. The representatives of the Children's Ombudsman were allowed to observe interviews conducted with ten families who did not have documents allowing them to enter Poland. They noted that the conditions in which the interviews were conducted had improved since the inspection by the representatives of the Ombudsman. Conversations with the border guards now took place in a separate room with three desks, at which interviews were carried out simultaneously. The desks were separated from each other by screens.

108. The inspectors noted that members of six families interviewed in their presence had explicitly stated that they wanted to apply for international protection in Poland. All of them had been afforded that possibility. Their applications had been accepted for review and the families were allowed to enter Poland. The other four families had not expressed any wish to apply for international protection, either directly or indirectly. As discovered later by the inspectors, only the six families that had expressed a wish to apply for international protection in their presence and one person travelling alone were permitted to lodge such applications on that day.

109. The representatives of the Children's Ombudsman talked also to a dozen or so other families who had been interviewed by the officers of the Border Guard on that day, but not in the presence of the inspectors. The members of six of those families told the inspectors that they had tried to lodge an application for international protection numerous times but had

been unsuccessful. They described cases of torture, threats and other forms of persecution that, according to the inspectors, should have justified the acceptance of such applications from them for review. All those families claimed that they had given the same account of their circumstances to the border guards.

110. The representatives of the Children's Ombudsman asked the head of the Terespol Border Guard Unit for copies of the official notes prepared during the interviews with those families and compared the content of those notes with the statements that the foreigners gave them just minutes after being interviewed by the border guards. In all cases they found significant discrepancies between the statements given to them by the foreigners and the content of the notes drafted by the border guards. For instance, a woman (called "Z.K." in the report) told the representatives of the Children's Ombudsman that her husband had been killed by police officers and that her son had been detained and tortured numerous times. The official notes – drafted when she had, on several occasions, presented herself at the border – recorded that she had indicated that she had had problems looking after her family since the death of her husband, that she wished to raise and educate her children in Poland and that she had no prospects in her own country. Another woman (who had tried to cross the border on the same day) told the representatives of the Children's Ombudsman that her husband had been abducted and accused of being a follower of Wahhabism, whereas the official notes concerning her arrivals at the Polish-Belarusian border stated that she had told the border guards that she had had no employment or money in Chechnya, that she wished to provide her child with better living conditions and education, and that she wanted to join her sisters, who resided in Germany.

111. The report concluded its account of the above-mentioned conversations by indicating:

> "Although it is obvious that by no means in all cases would the reasons for applying for international protection cited by the foreigners in fact justify the granting of such protection (which could depend on a number of factors, including the possibility of obtaining legal protection in the country of origin or the possibility of relocating within this country), it is unquestionable that before the representatives of the Children's Ombudsman those foreigners indicated a threat to their personal security. This kind of circumstances, if declared in front of the officers of the Border Guard, should result in the acceptance [for review] of applications for international protection from those foreigners."

It furthermore stated that:

> "In this context it should be emphasised that it seems incomprehensible and contrary to the principles of logic and life experience that the foreigners who presented themselves for border control numerous times would not have indicated such circumstances to the officers of the Border Guard (on whose decision depended the question of whether their applications for international protection would be received [for review] and whether they would be allowed to enter the territory of Poland), if

> they were capable of expressing them freely, a dozen or so minutes after leaving the border control, in front of the representatives of the Children's Ombudsman present at the border crossing on [that day]."

112. Moreover, after the applications for international protection were accepted for review from the six families mentioned above, the representatives of the Children's Ombudsman talked to members of four of those families. All of them stated that they had been at the Terespol border checkpoint numerous times and that on all of those occasions they had indicated a wish to apply for international protection. Until that day, they had been denied such a possibility. They stated that the statements given by them on those previous occasions had not differed from the ones made that day in the presence of the inspectors.

113. The representatives of the Children's Ombudsman asked the head of the Terespol Border Guard Unit for copies of the official notes prepared on the previous occasions on which those families had presented themselves at the Polish-Belarusian border and compared them with the statements that the foreigners had given on 10 January 2017 and that had been recorded in their applications for international protection submitted on that day. They found that there were significant differences between the content of those documents and the statements made on the latter date. For instance, one of the men who had applied for international protection on 10 January 2017 had stated that he had asked for refugee status, as he could not return to his country of origin. He had submitted that he had been a taxi driver and had been accused of transporting militants. He said that two of his brothers had been killed and that he was wanted by the Chechen authorities. He had expressed fear for the security of his children and family. The official notes drafted during his previous interviews reported that before 10 January 2017 he had declared to the officers of the Border Guard that he lacked money and that he wanted to work, live and educate his children in Poland.

114. In the conclusion of its report on the inspection the Office of the Children's Ombudsman stated that the inspection had not directly confirmed that foreigners at the Terespol border checkpoint had been denied the possibility to lodge an application for international protection (as all of the interviews conducted in the presence of the inspectors had been conducted correctly). The report did however, indicate that the results of the conversations conducted with the foreigners in the interviews in which the inspectors had not participated – given comparison that decisions denying them entry had been issued – raised the highest concern. The Children's Ombudsman indicated, *inter alia*, that it was advisable to change the form in which interviews with foreigners were documented from that of official notes to that of more detailed minutes, which would have to be read to the foreigner and signed by him or her.

C. Statement given by the Minister of the Interior and Administration on 31 August 2016

115. On 31 August 2016 the Polish Minister of the Interior and Administration was interviewed in a television programme in which he was asked about the situation at the Terespol border checkpoint. He told the journalist interviewing him that the policy of the Polish government was aimed at protecting Polish citizens against an influx of Muslim refugees and that the government would not be pressured by those who wanted to bring the migration crisis onto Polish territory. When asked specifically about the claims of those at the Terespol border checkpoint that they were fleeing the dangers of a totalitarian regime, the Minister indicated that there was no ongoing war in Chechnya and that they were people heading to Western Europe. He stated that the Chechens at the Polish-Belarusian border at that time would not be accepted into Poland.

VI. MATERIAL DESCRIBING ASYLUM PROCEDURE IN BELARUS

116. In its annual report on the state of the world's human rights in 2017, Amnesty International stated that Belarus lacked a functioning asylum system and repeatedly handed over individuals seeking international protection to the authorities of countries where they were at real risk of torture or other ill-treatment.

117. In its annual report on the human-rights situation in 2017, Human Rights Watch stated:

> "Belarus failed to provide meaningful protection to hundreds of asylum-seekers, mostly from the Russian republic of Chechnya, who arrived in Belarus with the aim of crossing the border into Poland and requesting asylum. Belarus lacks a functioning asylum system. During 2017 it returned at least two asylum-seekers from Chechnya back to Russia, which authorities view as a safe country of origin, putting them at grave risk of ill-treatment."

THE LAW

I. JOINDER OF THE APPLICATIONS

118. In accordance with Rule 42 § 1 of the Rules of Court, the Court decides to join the applications, given that they concern similar facts and raise identical legal issues under the Convention.

II. ADMISSIBILITY

A. The issue of jurisdiction under Article 1 of the Convention

119. Article 1 of the Convention provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

1. The parties' submissions

(a) The Government

120. In their submissions to the Court, the Government pointed out that the present cases were of a specific character as they involved decisions to refuse entry into Poland issued by the border authorities at the border checkpoints on the Polish-Belarusian border. The Government indicated that the applicants had been on Polish territory only briefly and had not been legally admitted to this territory. As a result, the jurisdiction of the Polish authorities over them had been limited to the issuance of the decisions refusing them entry.

121. The Government submitted that in this respect the present cases were different from a number of previous cases examined by the Court (*Khlaifia and Others v. Italy* [GC], no. 16483/12, 15 December 2016; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012; *Louled Massoud v. Malta*, no. 24340/08, 27 July 2010; *Suso Musa v. Malta*, no. 42337/12, 23 July 2013; and *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, ECHR 2007-II) in which the applicants were under the territorial jurisdiction of the Contracting States for an extended amount of time and – particularly in cases concerning irregular migration by sea – were at imminent risk of losing their life or health if returned to the sea or the maritime border.

(b) The applicants

122. The applicants submitted that under Article 1, the Convention applied to all persons under a Contracting Party's jurisdiction, which was not limited to its territory. They argued that the Convention applied in all situations in which the effective control by the authorities of the Contracting Party was exercised.

123. The applicants pointed out that the Terespol border checkpoint, where they had been subjected to border checks, was situated 2,600 metres into Polish territory and that the officers of the Border Guard, who conducted the border control of foreigners, exercised full authority over foreigners seeking entry into Poland.

124. Moreover, the applicants submitted that under both international law (including the Geneva Convention) and under European Union law

(including Directive 2013/32/EU and Regulation (EU) 2016/399 ("the Schengen Borders Code")) it was clear that the principle of *non-refoulement* protected persons who were subjected to border checks even before they were allowed entry into a State by its border authorities.

(c) Third-party interveners

125. The third-party interveners submitted that where the State exercised effective authority or control over persons, it also exercised jurisdiction – thus triggering the protective obligations of the State under the Convention.

2. The Court's assessment

(a) General principles governing jurisdiction within the meaning of Article 1 of the Convention

126. Under Article 1 of the Convention, the Contracting States undertake to "secure" to everyone within their "jurisdiction" the rights and freedoms defined in Section I of the Convention (see *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 66, ECHR 2001-XII). The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it that give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII).

127. The jurisdiction of a State, within the meaning of Article 1, is essentially territorial (see *Banković and Others*, §§ 61 and 67, and *Ilaşcu and Others*, § 312, both cited above). It is presumed to be exercised normally throughout the State's territory (see *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II, and *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 103, 13 February 2020).

128. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention (see *Drozd and Janousek v. France and Spain*, 26 June 1992, § 91, Series A no. 240; *Bankoviç and Others*, cited above, § 67; and *Ilaşcu and Others*, cited above, § 314). It has established, in particular, that whenever a State, through its agents operating outside its territory, exercises control and authority over an individual, and thus jurisdiction, it is under an obligation to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to his or her situation (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 133-37, ECHR 2011; *Hirsi Jamaa and Others*, cited above, § 74; *Hassan v. the United Kingdom* [GC], no. 29750/09, § 74,

ECHR 2014; and *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, §§ 102-09 and 120, 5 March 2020).

(b) Application of the above principles to the present case

129. It is not disputed before the Court that the events in issue occurred at the railway border checkpoint at Terespol and – on one occasion – the road border checkpoint at Czeremcha-Połowce. Both checkpoints are located at the border with the neighbouring State and are operated by the relevant units of the Polish Border Guard. In consequence, the presumption of the jurisdiction of the Polish State applies to all actions taken with respect to the applicants presenting themselves at those checkpoints.

130. Moreover, the events in question concern the procedure followed in respect of border checks, granting or refusing the applicants entry into Poland, and accepting for review their applications for international protection. All those procedures were conducted exclusively by the officials of the Polish State and were regulated by domestic and EU law. It is therefore evident that the actions complained of by the applicants were attributable to Poland and thereby fell within its jurisdiction within the meaning of Article 1 of the Convention (see *M.A. and Others v. Lithuania*, no. 59793/17, § 70, 11 December 2018).

131. In addition, Poland cannot circumvent its "jurisdiction" under the Convention by pointing out that the decisions concerning the refusal of entry into Poland were taken within a few hours of the applicants' arrival on Polish territory and, in consequence, that the control process in respect of the applicants was of relatively short duration (see paragraph 120 above).

132. Accordingly, the Court concludes that the events giving rise to the alleged violations fall within Poland's "jurisdiction", within the meaning of Article 1 of the Convention.

B. Exhaustion of domestic remedies

133. The Government submitted that the applications were inadmissible due to the non-exhaustion of domestic remedies.

1. The parties' submissions

(a) The Government

134. The Government submitted that the applicants had failed to appeal against most of the decisions refusing them entry into Poland. They indicated that the option of appealing against those decisions to the head of the National Border Guard had been available to the applicants and would have resulted in the re-examination of the applicants' cases. Moreover, in the event that the head of the National Border Guard upheld the decisions, the applicants could have lodged an appeal with the administrative court.

135. The Government indicated that in respect of a small number of instances in which the applicants had appealed against the refusal to grant them entry, the relevant proceedings were still pending before either the head of the National Border Guard (see paragraphs 43 and 62 above) or before the Warsaw Regional Administrative Court (see paragraphs 14, 18 and 57 above). Therefore, in the Government's opinion, all three applications were premature.

136. The Government also referred to examples of judgments of the Warsaw Regional Administrative Court in which decisions concerning refusal of entry to Poland had been quashed. They submitted that the existence of such judgments proved that an appeal to the administrative court could have constituted an effective remedy in cases similar to the situation of the applicants.

137. Referring to the Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures adopted by the Committee of Ministers (see paragraph 97 above), the Government argued that in the present cases the applicants had not presented any arguable claim that they would have faced a risk of persecution or inhuman and degrading treatment in Belarus or Russia and that the lack of suspensive effect of an appeal against the decision on the refusal of entry therefore did not render this remedy ineffective for the purposes of Article 35 § 1 of the Convention.

(b) The applicants

138. The applicants submitted that the right to lodge an appeal against the decision refusing them entry did not constitute an effective remedy and that no other effective remedy was available to them. They indicated that an appeal to the head of the National Border Guard would not provide them with an independent and timely review of their cases that would protect them from being exposed to treatment that was in breach of Article 3 of the Convention.

139. In the first place, the applicants stressed that decisions concerning the refusal to grant them entry were immediately enforceable and that an appeal against them would not have suspensive effect. Moreover, such an examination would take considerable time. The applicants submitted that in all cases in which they had appealed, the head of the National Border Guard had upheld the decisions issued at first instance, and the proceedings were pending before the administrative courts. Such proceedings could take a few years to reach a conclusion. Given that they had been returned to Belarus, during this period the applicants would be deprived of protection from treatment that was in breach of Article 3 of the Convention. Moreover, as they had exceeded their ninety-day visa-free period of residence in Belarus, they were under constant threat of being deported to Russia, where they risked being subjected to torture and inhuman and degrading treatment.

140. In addition, they submitted that the National Border Guard was a hierarchical formation, subordinate to and supervised by the Minister of the Interior and Administration and as such implemented a wider governmental policy of not accepting for review applications for international protection submitted by refugees presenting themselves at the Polish border. Therefore, in the applicants' opinion, any review executed by the head of the National Border Guard would not be independent.

141. The applicants also alleged that when they had been at the border checkpoints at Terespol and Czeremcha-Połowce they had not been duly informed of their right to appeal against the decisions of the officers of the Border Guard. They also submitted that the fact that they had been returned to Belarus had hindered the possibility of their lodging an appeal. They added that it was only thanks to the assistance of Polish lawyers that they had been able to lodge appeals against some of the decisions issued in their cases.

2. The Court's assessment

(a) General principles

142. The Court has indicated numerous times that the rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation (see *A.E.A. v. Greece*, no. 39034/12, § 47, 15 March 2018). Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies, depending on the nature of the applicant's complaint. However, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of the Convention does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; however, if it is not, its powers and the guarantees that it affords are relevant in determining whether the remedy before it is effective (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI, and *Gebremedhin [Gaberamadhien]*, cited above, § 53).

143. In view of the importance that the Court attaches to Article 3 of the Convention and the irreversible nature of the damage that may result if a risk of torture or ill-treatment materialises, it has already held that the effectiveness of a remedy available to an applicant who alleges that his or

her removal to a third State would expose him or her to treatment prohibited under Article 3 of the Convention imperatively requires close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment breaching Article 3 (see *Jabari v. Turkey*, no. 40035/98, § 50, ECHR 2000-VIII), and a particularly prompt response (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts)); it also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Čonka v. Belgium*, no. 51564/99, §§ 81-83, ECHR 2002-I; *Gebremedhin [Gaberamadhien]*, cited above, § 66; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 293, ECHR 2011; and *A.E.A. v. Greece*, cited above, § 69).

144. The Court has reached a similar conclusion in relation to complaints made under Article 4 of Protocol No. 4 to the Convention, stating that a remedy against an alleged violation of this provision does not meet the requirements of effectiveness if it does not have suspensive effect. The notion of an effective remedy under the Convention requires that the remedy be capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (see *Čonka*, § 79, and *Hirsi Jamaa and Others*, § 199, both cited above).

(b) Application of the above principles to the present case

145. The Court observes that all the complaints raised by the applicants in the present cases (whether made under Article 3 of the Convention, Article 4 of Protocol No. 4 to the Convention, Article 13 of the Convention in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4 or under Article 34 of the Convention) relate to the same circumstances, namely the fact that the applicants were returned from the Polish border and sent back to Belarus without an asylum procedure being instigated. Therefore, the effectiveness of the remedy available to them has to be examined with regard to the execution of this measure, jointly for all of the complaints.

146. The Court notes that the applicants had the possibility of lodging an appeal against each of the decisions concerning refusal of entry within fourteen days of being informed of those decisions. However, there is no dispute that under Polish law such appeals would not have had suspensive effect on the return process (see paragraph 74 above). It follows that the applicants did not have access to a procedure by which their personal circumstances could be independently and rigorously assessed by any domestic authority before they were returned to Belarus (see *M.A. and Others v. Lithuania*, cited above, § 84).

147. In the instant case the applicants' complaints concerned allegations that their return to Belarus would expose them to a real risk of suffering

treatment contrary to Article 3 of the Convention. Therefore, the Court considers that the sole fact that an appeal against the decision on refusal of entry would not have had suspensive effect (and, in consequence, could not have prevented the applicants from being turned away to Belarus) is sufficient to establish that such an appeal – and any further appeals to the administrative court that could have been brought subsequently to it – did not constitute an effective remedy within the meaning of the Convention (see paragraph 143 above). Consequently, the Court does not deem it necessary to consider the remainder of the applicants' arguments concerning the lack of adequate information and legal assistance in the appeal procedure, the lack of independence of the head of the National Border Guard, the potential length of the proceedings before the administrative courts, or the obstacles resulting from the need to lodge such an appeal from abroad.

148. Accordingly, the Court dismisses the Government's objection concerning the non-exhaustion of domestic remedies.

C. Conclusion on admissibility

149. The Court further notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. They are not inadmissible on any other grounds and must therefore be declared admissible.

III. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

150. The applicants complained that they had been exposed to the risk of torture or inhuman or degrading treatment in Chechnya as a result of having been returned to Belarus, from where they would probably be sent back to Russia, and that their treatment by the Polish authorities had amounted to degrading treatment. They relied on Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

151. The Court observes that the applicants' arguments focus on two different aspects of the alleged violation of Article 3 of the Convention: firstly, the risk that they would suffer inhuman and degrading treatment when sent back to Belarus and, subsequently, to Russia, and the fact that despite that risk the Polish authorities sent them back to Belarus without having properly reviewed their claims; and, secondly, the treatment of the applicants by the Polish authorities during the so-called "second line" border-control procedure. With respect to the latter aspect of this complaint, the applicants argued that the whole situation – that is to say, the fact that the statements they made at the border were bluntly disregarded and the fact

that they were denied the procedure to which they were entitled under the law and instead returned to Belarus – constituted degrading treatment.

A. Alleged violation of Article 3 of the Convention on account of the applicants being denied access to the asylum procedure and exposed to a risk of inhuman and degrading treatment and torture in Chechnya

1. The parties' submissions

(a) The applicants

152. The applicants did not contest the Government's submission that the Polish authorities were bound by both the domestic legislation and EU law regulating border checks (see paragraph 158 below). They noted, however, that all the legislation cited by the Government provided the protection of fundamental rights – particularly in respect of the *non-refoulement* principle. They submitted that the actions taken at the border checkpoints at Terespol and Czeremcha-Połowce had violated those provisions.

153. The applicants reiterated that each time that they had been interviewed at the second line of border control, they had expressed their wish to apply for international protection and had presented their respective accounts of undergoing persecution in Chechnya. In their opinion, the officers of the Border Guard had been bound to treat them as persons in search of international protection whose claims under Article 3 of the Convention should have been heard by the relevant domestic authority. Instead, the border guards had disregarded their statements and – in some cases – written applications for international protection. The applicants submitted that such a practice had been routine at the Polish-Belarusian border crossing at Terespol.

154. The applicants also argued that the official notes drafted by the officers of the Border Guard did not accurately reflect the content of the statements given by them and should not be regarded as constituting valid evidence of those statements. They noted that the official notes had been drafted in Polish (a language that the applicants did not understand) and had not been signed by them. They cited the decision of the Warsaw Regional Administrative Court of 2 June 2017 (case no. IV SA/Wa 3021/16), in which the domestic court had held that owing to its significance for the decision to refuse entry, each interview conducted at the border should have been recorded in the form of minutes signed by both the officer of the Border Guard and the foreigner interviewed.

155. The applicants alleged that their return to Belarus had put them at risk of being deported to Chechnya owing to the fact that Belarus was not a safe country for refugees from Russia. They cited official statistics

according to which all applications for international protection made by Russian citizens in Belarus since 2004 had been refused. They also cited a few instances in which Russian citizens who had applied for international protection in Belarus (or had unsuccessfully tried to apply for it at Polish-Belarusian border crossings and had returned to Belarus) had been deported to Russia or handed over directly to the Russian authorities. They stressed that in many of those cases the procedural rights of the persons deported or handed over to the Russian authorities had been disregarded.

156. The applicants submitted that they all had a history of being persecuted in Chechnya and had presented the border authorities with written statements concerning those facts, as well as – in respect of the applicant in case no. 40503/17 and the first and second applicants in case no. 43643/17 – psychologists' opinions indicating that they were suffering the psychological consequences of being torture victims. The applicants relied on a number of reports describing the general situation in Chechnya as comprising extrajudicial executions, forced disappearances, the widespread use of torture, mistreatment and illegal detention. They indicated that instances of serious human rights abuses were not properly investigated by the Russian authorities. In the applicants' opinion, those reports supported their claims related to their fear of being persecuted if returned to the Chechen Republic.

157. In addition, the applicants, relying on *I.K. v. Austria* (no. 2964/12, 28 March 2013), stated that according to the Court's case-law, the sole fact that Russia was a Party to the Convention did not automatically mean that the expulsion of asylum-seekers to Russia could not be considered to constitute a violation of Article 3 of the Convention.

(b) The Government

158. The Government noted that the Polish-Belarusian border was at the same time the external border of the European Union. In consequence, the authorities that conducted border checks were bound by both domestic legislation and European Union law (*inter alia*, the Schengen Borders Code). The Government also emphasised the main responsibilities of the Border Guard – namely, border protection and border traffic control, as well as the prevention of illegal migration and the entry into State territory of foreigners not fulfilling the conditions required.

159. The Government explained that all foreigners who presented themselves at the Polish-Belarusian border were subjected to the same procedure, which was regulated by Polish legislation and EU law. At the first line of border control their documents (travel documents and visas) were checked. If they did not fulfil the conditions for entry, they were directed to the second line of border control, at which detailed interviews were carried out by officers of the Border Guard. This interview, during which only an officer of the Border Guard and the foreigner in question

were present, was a crucial element of this part of the border checks, and the statements given by a foreigner on that occasion would have been the only element allowing him or her to be identified as someone seeking international protection. In the event that it was evident from the statements made by the foreigner that he or she was seeking such protection, the application in this regard was accepted and forwarded to the relevant authority for review within forty-eight hours and the foreigner was directed to the Biała Podlaska Centre for Aliens. However, in the event that the foreigners in question expressed other reasons for their attempt to enter Poland (economic or personal, for example) a decision refusing entry was issued and immediately executed.

160. The Government emphasised that the above-mentioned procedure had its basis in the Schengen Borders Code and that the fact that the officers of the Border Guard complied with it resulted from Poland's membership of the European Union. They stated that, when applying this procedure, the domestic authorities remained bound by the obligations they had entered into upon acceding to the Convention in the light of the presumption of the equivalence of the protection of EU law and the Convention, as established in the case-law of the Court. They invoked in particular the judgments in the cases of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98, ECHR 2005-VI) and *Avotiņš v. Latvia* ([GC], no. 17502/07, 23 May 2016).

161. Referring to the circumstances of the present cases, the Government stated that on all occasions on which the applicants had arrived at the border checkpoints at Terespol and (in respect of the applicants in case no. 43643/17) at Czeremcha-Połowce they had been subjected to the second line of border control and interviewed by officers of the Border Guard. The Government submitted that at no point had any of the applicants given reasons that would have justified the granting of international protection. As a result, no applications had been forwarded to the head of the Aliens Office.

162. The Government stressed that all the applicants had arrived in Belarus some time before lodging their applications with the Court (almost a year with respect to the applicant in case no. 40503/17; four months with respect to the applicants in case no. 42902/17; and five months with respect to the applicants in case no. 43643/17). The applicants had not, in their oral statements given to the border guards, referred to any treatment that had been in breach of Article 3 of the Convention or any risk of their receiving such treatment while staying in Belarus. The Government submitted that the mere fact that the applicants were staying in Belarus illegally (as their visas had expired) did not automatically mean that they would run the risk of ill-treatment, even if forced by the Belarusian authorities to return to Russia. In this connection the Government noted that Russia was a Contracting

Party to the Convention and had undertaken to secure the fundamental rights guaranteed by the Convention.

163. With regard to the applicant in case no. 40503/17, the Government also noted that the statements given by him on two occasions to the officers of the Border Guard contradicted the content of the documents that he had been carrying with him (see paragraph 22 above). In the Government's opinion, this undermined the credibility of that applicant and the accounts of his situation.

164. Accordingly, the Government submitted that in the present cases there was no evidence that the applicants were at risk of being subjected to treatment violating Article 3 of the Convention.

(c) Third-party interveners

165. The third-party interveners submitted that it was prohibited for a Contracting Party to the Convention to refuse entry or to return a person to face a serious violation of human rights – including a violation of the prohibition on torture and inhuman or degrading treatment. They emphasised the special vulnerability of children in respect of asylum procedures and noted that children were particularly affected by being disoriented owing to the loss of familiar surroundings and relationships.

2. The Court's assessment

(a) General principles

166. As the Court has stated on many occasions, the prohibition of inhuman or degrading treatment, enshrined in Article 3 of the Convention, is one of the most fundamental values of democratic societies. It is also a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention (see *Khlaifia and Others*, cited above, § 158, and *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 124, 21 November 2019). Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocol No. 1 and Protocol No. 4, Article 3 makes no provision for exceptions, and no derogation from it is permissible under Article 15 § 2 – even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and *Assenov and Others v. Bulgaria*, 28 October 1998, § 93, *Reports of Judgments and Decisions* 1998-VIII). The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports* 1996-V, and *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

167. The Court has on many occasions acknowledged the importance of the principle of *non-refoulement* (see, for example, *M.S.S. v. Belgium and Greece*, cited above, § 286, and *M.A. v. Cyprus*, no. 41872/10, § 133, ECHR 2013 (extracts)). The Court's main concern in cases concerning the expulsion of asylum-seekers is "whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled" (see, among other authorities, *M.S.S. v. Belgium and Greece*, cited above, § 286; *Müslim v. Turkey*, no. 53566/99, §§ 72-76, 26 April 2005; and *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III).

168. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, among other authorities, *Hirsi Jamaa and Others*, cited above, § 113, and *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment breaching Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to return the person in question to that country (see *Saadi v. Italy* [GC], no. 37201/06, §§ 124-25, ECHR 2008; *F.G. v. Sweden* [GC], no. 43611/11, §§ 110-11, 23 March 2016; and *Ilias and Ahmed*, cited above, § 126). Since protection against the treatment prohibited by Article 3 is absolute, there can be no derogation from that rule (see *Saadi*, cited above, § 138).

169. In cases concerning the return of asylum-seekers, the Court has observed that it does not itself examine actual asylum applications. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled (see, for example, *M.S.S. v. Belgium and Greece*, cited above, § 286). The Court's assessment of the existence of a real risk must necessarily be a rigorous one (see, for example, *F.G. v. Sweden*, cited above, § 113) and inevitably involves an examination by the competent national authorities and later by the Court of the conditions in the receiving country against the standards of Article 3 (see *Ilias and Ahmed*, cited above, § 127).

170. It is in principle for the person seeking international protection in a Contracting State to submit, as soon as possible, his or her claim for asylum, together with reasons in support of it, and to adduce evidence capable of proving that there are substantial grounds for believing that deportation to his or her home country would entail a real and concrete risk of treatment in breach of Article 3 (see *F.G. v. Sweden*, cited above, § 125). However, the

Court acknowledges that, owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof (ibid., § 113). That assessment must focus on the foreseeable consequences of the applicant's return to the country of destination, in the light of the general situation there and of his or her personal circumstances (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 108, Series A no. 215).

171. Moreover, the Court has noted that the exact content of the expelling State's duties under the Convention may differ depending on whether it removes applicants to their country of origin or to a third country (see *Ilias and Ahmed*, cited above, § 128). In cases where the authorities choose to remove asylum-seekers to a third country, the Court has stated that this leaves the responsibility of the Contracting State intact with regard to its duty not to deport them if substantial grounds have been shown for believing that such action would expose them, directly (that is to say in that third country) or indirectly (for example, in the country of origin or another country), to treatment contrary to, in particular, Article 3 (see *M.S.S. v. Belgium and Greece*, cited above, §§ 342-43 and 362-68).

172. Consequently, the Court has indicated that where a Contracting State seeks to remove an asylum-seeker to a third country without examining the asylum request on the merits, the main issue before the expelling authorities is whether or not the individual will have access to an adequate asylum procedure in the receiving third country. This is because the removing country acts on the basis that it would be for the receiving third country to examine the asylum request on the merits, if such a request is made to the relevant authorities of that country (see *Ilias and Ahmed*, cited above, § 131).

173. The Court has further clarified that in all cases of removal of an asylum-seeker from a Contracting State to a third intermediary country without examination of the asylum request on the merits, regardless of whether or not the receiving third country is an EU member State or a State Party to the Convention, it is the duty of the removing State to examine thoroughly the question of whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against *refoulement*. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum-seeker should not be removed to the third country concerned (ibid., § 134).

(b) Application of the above principles to the present case

174. The Court notes first of all that the Government disputed whether the applicants, when presenting themselves on numerous occasions at the Polish border, expressed a wish to lodge applications for international

protection or communicated any fear for their own safety. The Government submitted that the applicants did not raise any claims in that respect and – in consequence – could not be considered asylum-seekers. The Court attaches more weight to the applicants' version of the events at the border because it is corroborated by a large number of accounts collected from other witnesses by the national human rights institutions (in particular by the Children's Ombudsman – see paragraphs 109-114 above). The reports by those bodies indicate the existence of a systemic practice of misrepresenting the statements given by asylum-seekers in the official notes drafted by the officers of the Border Guard serving at the border 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, were confirmed by judgments of the Supreme Administrative Court (see paragraphs 76-77 above).

175. The applicants' account of the statements that they gave at the border is also corroborated by a number of documents presented by them to the Court at all stages of the proceedings, especially by copies of the applications for international protection carried by the applicants at the time when they presented themselves at the border. The Court does not find it credible that the applicants possessed those documents (which they submitted to the Court – specifically when requesting that interim measures be indicated in their cases) but failed to hand them to the officers of the Border Guard who were about to decide whether to admit them into Poland or to return them to Belarus. Moreover, the applicants' version of events in this respect is also supported by the fact that they made numerous attempts to cross the border and sought representation by Polish and Belarusian lawyers, who assisted them with drafting their statements, and who – in the case of the applicants in cases nos. 40503/17 and 43643/17 – on one occasion were present at the border in order to provide representation to the applicants, but were not allowed to meet with them (see paragraphs 11 and 54 above).

176. In any event, the Court points to the fact that the applicants' applications for international protection, which comprised at least a general account of the reasons for their fear of persecution, and the documents provided by them in support of their claims were sent to the Government at the times when they were informed by the Court of the application of the interim measures in the applicants' cases – namely, on 8, 16 and 20 June 2017 respectively (see paragraphs 16, 33 and 59 above). Furthermore, on 14 and 30 June and 4 July 2017 respectively, the Court (the duty judge) informed the Government that in the light of the fact that those documents had been transferred to the Government, it considered that the applicants had lodged requests for international protection (see paragraphs 21, 37 and

61 above). Information about the applicants' claims was also subsequently submitted by electronic means directly to the Border Guard by the applicants' representatives (see paragraphs 23, 35 and 64 above). It follows that, from those dates onwards, the Government were aware of the applications made by the applicants and of the existence of the documents substantiating them and were obliged to take those materials into account when assessing each applicant's situation.

177. Accordingly, the Court cannot accept the argument of the Polish Government that the applicants had presented no evidence whatsoever that they were at risk of being subjected to treatment violating Article 3. The applicants indicated individual circumstances that – in their opinion – substantiated their applications for international protection and produced a number of documents (their testimony concerning a history of torture or threats, psychologists' opinions, and official documents) substantiating their claims. They also raised arguments concerning the reasons for not considering Belarus to be a safe third country for them and why, in their opinion, returning them to Belarus would put them at risk of "chain *refoulement*". Those arguments were substantiated by the official statistics, which indicated that the asylum procedure in Belarus was not effective as far as Russian citizens were concerned.

178. The Court is therefore satisfied that the applicants could arguably claim that there was no guarantee that their asylum applications would be seriously examined by the Belarusian authorities and that their return to Chechnya could violate Article 3 of the Convention. The assessment of those claims should have been carried out by the Polish authorities acting in compliance with their procedural obligations under Article 3 of the Convention. Moreover, the Polish State was under an obligation to ensure the applicants' safety, in particular by allowing them to remain within Polish jurisdiction until such time as their claims had been properly reviewed by a competent domestic authority. Taking into account the absolute nature of the right guaranteed under Article 3, the scope of that obligation was not 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.

179. Moreover, in the Court's view, in order for the State's obligation under Article 3 of the Convention to be effectively fulfilled, a person seeking international protection must be provided with safeguards against having to return to his or her country of origin before such time as his or her allegations are thoroughly examined. Therefore, the Court considers that, pending an application for international protection, a State cannot deny access to its territory to a person presenting himself or herself at a border checkpoint who alleges that he or she may be subjected to ill-treatment if he or she remains on the territory of the neighbouring State, unless adequate measures are taken to eliminate such a risk.

180. The Court furthermore notes the Government's argument that by refusing the applicants entry into Poland, the respondent State had acted in accordance with the legal obligations incumbent on it arising from Poland's membership of the European Union.

181. The Court indicates, however, that the provisions of European Union law, including the Schengen Borders Code and Directive 2013/32/EU, clearly embrace the principle of *non-refoulement*, as guaranteed by the Geneva Convention, and also apply it to persons who are subjected to border checks before being admitted to the territory of one of the member States (see paragraphs 78-84 above). Those provisions (i) are clearly aimed at providing all asylum-seekers with effective access to the proper procedure by which their claims for international protection may be reviewed (see also *Sharifi and Others v. Italy and Greece*, no. 16643/09, § 169, 21 October 2014), and (ii) oblige the State to ensure that individuals who lodge applications for international protection are allowed to remain in the State in question until their applications are reviewed (see paragraph 91 above).

182. The Court thus notes that, under the Schengen Borders Code, the Polish authorities could have refrained from sending the applicants back to Belarus if they had accepted their application for international protection for review by the relevant authorities. Consequently, the Court considers that the impugned measure taken by the Polish authorities fell outside the scope of Poland's strict international legal obligations (see, for a similar outcome, *M.S.S. v. Belgium and Greece*, § 340, and *Ilias and Ahmed*, § 97, both cited above).

183. The Court also notes that the very real character of the risk of ill-treatment in the present cases is illustrated by the alleged events following the return of the first applicant in case no. 42902/17 to Belarus and, subsequently, to Russia, where he claims to have been captured, detained and tortured (see paragraphs 44-45 and 47 above).

184. In the light of the foregoing, the Court considers that the applicants did not have 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.

185. The fact that no proceedings in which the applicants' applications for international protection could be reviewed were initiated on the thirty-five, eight and nineteen or more occasions when the respective applicants were at the Polish border crossings constituted a violation of Article 3 of the Convention. Moreover, given the situation in the neighbouring State, as described above, the Polish authorities, by failing to allow the applicants to remain on Polish territory pending the examination of their applications, knowingly exposed them to a serious risk of chain *refoulement* and treatment prohibited by Article 3 of the Convention.

186. There has accordingly been a violation of Article 3 of the Convention.

B. Alleged violation of Article 3 of the Convention on account of the applicants' treatment by the Polish authorities during border checks

187. The applicants also argued that there had been a violation of the prohibition of degrading treatment on account of the manner in which they had been treated during border checks at the Terespol and Czeremcha-Połowce border checkpoints (see paragraph 151 above). In that respect, they submitted that they had been placed in a situation in which statements made by them at the border had been bluntly disregarded by the border guards and that they had been denied the procedure to which they were entitled under the domestic law. The Court notes that those arguments are closely related to the issue of the applicants' lack of access to the asylum procedure. Consequently, having regard to the finding of a violation of Article 3 on account of the applicants' exposure to the risk of inhuman and degrading treatment, as well as torture, in Chechnya and their lack of access to the asylum procedure (see paragraph 186 above), the Court considers that it is not necessary to examine whether there has been a violation of Article 3 with respect to the way in which the applicants were treated during the border checks.

IV. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION

188. The applicants furthermore complained that they had been subjected to a collective expulsion of aliens. They relied on Article 4 of Protocol No. 4 to the Convention, which provides:

> "Collective expulsion of aliens is prohibited."

A. The parties' submissions

1. The applicants

189. The applicants submitted that various human rights organisations had reported an increase in the number of allegations made by individuals (mostly of Chechen origin) that despite their repeated and clearly formulated statements at the Polish-Belarusian border indicating a wish to lodge an application for international protection, they had been denied such a possibility. They referred, *inter alia*, to the above-mentioned report by the Polish Ombudsman, indicating that it proved that the interviews carried out by the officers of the Border Guard had not been aimed at establishing the individual situation of foreigners arriving at the Polish border but at

demonstrating that the reasons such foreigners sought entry into Poland were mainly of an economic nature (see paragraphs 98-105 above). They noted that foreigners, even if they directly expressed their fear of torture or other forms of persecution, were still asked in detail about their economic, professional and personal situation and not about their experiences relating to any fears that they had expressed. Statements lodged by foreigners expressing the intention to lodge applications for international protection and the reasons indicated therefor were ignored.

190. The applicants also referred to the statements given to the press by the Polish Minister of the Interior and Administration on 31 August 2016 (see paragraph 115 above). The applicants also submitted that the statistics presented by the Government showed that in 2017 there had been a significant decrease in the number of applications for international protection being received at the Polish-Belarusian border (particularly at the Terespol border checkpoint). According to the applicants, this decrease had resulted from the execution by the Polish Border Guard of a policy adopted by the Government of pushing back refugees.

191. The applicants furthermore argued that the collective nature of the policy of expelling foreigners was well illustrated by the events that had taken place on 17 March 2017, when a number of persons seeking entry into Poland (including the applicants in cases nos. 40503/17 and 43643/17) had been returned to Belarus without the possibility of meeting with their representatives (see paragraphs 11 and 54 above).

192. The applicants also submitted that as a matter of general practice neither lawyers nor representatives of non-governmental organisations or representatives of the UNHCR were allowed to observe or take part in interviews conducted at the second line of border control. In their opinion, the lack of any possibility for those being interviewed to consult a lawyer or a member of an organisation assisting refugees demonstrated the lack of transparency of the actions taken by the Border Guard. It was also one of the elements supporting the conclusion that the applicants had not been provided with the possibility to have their cases reviewed individually and, in consequence, that their expulsion had been of a collective nature.

2. The Government

193. The Government submitted that every decision refusing entry into Poland issued with respect to the applicants had been based on an individual assessment of their situation and, in consequence, had not involved the collective expulsion of aliens.

194. Firstly, the Government reiterated that as the applicants had not had valid visas to enter Poland they had been directed to the second line of border control, at which individual interviews had been carried out in a language understood by the applicants. Those interviews had been aimed at obtaining full knowledge of the reasons for which the applicants had arrived

at the border without the necessary documents. Each adult applicant had been interviewed separately; the minor applicants had not been interviewed – instead, the decisions issued in respect of their parents had also applied to them. Secondly, the Government submitted that each interview had been recorded in the form of an official note detailing the reasons given by each of the applicants for seeking entry into Poland and – if necessary – any other circumstances in respect of their cases. Thirdly, the Government indicated that the decisions denying entry had been prepared as separate documents in respect of each of the adult applicants (that is to say, on an individual basis) after a careful examination of his or her respective situation. All the applicants had been presented with the decisions. In some cases the applicants had refused to sign the respective decision and accept a copy thereof. Fourthly, the Government emphasised the fact that the number of attempts a foreigner had made to cross the border did not influence the decisions taken by the border guards.

195. The Government stated that the decisions concerning refusal of entry had been issued on the standardised form and – in the light of that fact – might have seemed similar to each other; however, they had in each instance been issued on the basis of an individual assessment of the situation of each of the applicants.

196. The Government also stressed that the fact that the decisions concerning refusal of entry had been taken on the basis of an individual assessment of each foreigner's individual situation was corroborated by the relevant statistics. They submitted that in 2016 at the Terespol border checkpoint applications from 8,313 persons had been received and forwarded to the head of the Aliens Office for review, whereas in the first half of 2017 the applications of 1,212 persons had been received.

B. The Court's assessment

1. General principles

197. According to the Court's case-law, collective expulsion is to be understood as "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group" (see *Sultani v. France*, no. 45223/05, § 81, ECHR 2007-IV (extracts), and *Georgia v. Russia (I)* [GC], no. 13255/07, § 167, ECHR 2014 (extracts)). This does not mean, however, that where the latter condition is satisfied the background to the execution of an expulsion order plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4 (see *Čonka*, § 59, and *Khlaifia and Others*, § 237, both cited above).

198. The Court has previously held that the notion of expulsion used in Article 4 of Protocol No. 4 should be interpreted in the generic meaning in

current use (that is to say "to drive away from a place") (see *Hirsi Jamaa and Others*, cited above, § 174) and should be applied to all measures that may be characterised as constituting a formal act or conduct attributable to a State by which a foreigner is compelled to leave the territory of that State, even if under domestic law such measures are classified differently (for instance as the "refusal of entry with removal" rather than "expulsion" or "deportation" – see, in particular, *Khlaifia and Others*, cited above, § 243). This understanding of the notion of expulsion has been recently confirmed by the Grand Chamber in *N.D. and N.T. v. Spain* (cited above, § 185).

199. With regard to the scope of the application of Article 4 of Protocol No. 4, the Court notes that the wording of this provision, unlike Article 2 of Protocol No. 4 and Article 1 of Protocol No. 7, does not refer to the legal situation of the persons concerned. Moreover, it can be seen from the commentary on the draft of Protocol No. 4 that, according to the Committee of Experts, the aliens to whom Article 4 refers are not only those lawfully residing within a State's territory, but also "all those who have no actual right to nationality in a State, whether they are merely passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality" (see Article 4 of the Committee's final draft, p. 505, § 34; see also *Georgia v. Russia (I)*, cited above, § 168).

200. In accordance with that interpretation, the Court has applied Article 4 of Protocol No. 4 not only to persons who were residing within the territory of a State but also to persons who arrived at the territory of the respondent State and were stopped and returned to the originating State (see *Čonka*, § 63, and *Sultani*, §§ 81-84, both cited above), irrespective of whether or not they arrived in the respondent State legally (see, among other authorities, *Sharifi and Others*, §§ 210-13, and *Georgia v. Russia (I)*, § 170, both cited above). The Court has also applied Article 4 of Protocol No. 4 to persons who were intercepted on the high seas while trying to reach the territory of a respondent State and were stopped and returned to the originating State (see *Hirsi Jamaa and Others*, cited above, § 182), as well as to persons who were apprehended in an attempt to cross a national border by land and were immediately removed from a State's territory by border guards (see *N.D. and N.T. v. Spain*, cited above, § 187).

201. The purpose of Article 4 of Protocol No. 4 is to prevent States from being able to return a certain number of foreigners without examining their personal circumstances and therefore without enabling them to put forward their arguments against the measure taken by the relevant authority (see *Sharifi and Others*, § 210, and *Hirsi Jamaa and Others*, § 177, both cited above). In order to determine whether there has been a sufficiently individualised examination, it is necessary to consider the circumstances of each such case and to verify whether a decision to return a foreigner took into consideration the specific situation of the individuals concerned (see

Hirsi Jamaa and Others, cited above, § 183). Regard must also be had to the particular circumstances of the expulsion and to the "general context at the material time" (see *Georgia v. Russia (I)*, cited above, § 171).

202. As the Court has previously observed, the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there has been a collective expulsion if each person concerned has been given the opportunity to put arguments against his or her expulsion to the relevant authorities on an individual basis (see, among other authorities, *M.A. v. Cyprus*, §§ 246 and 254, and *Khlaifia and Others*, § 239, both cited above). In the past, when assessing the collective nature of expulsion, the Court has taken into consideration certain factors such as the fact that the decisions concerning the return of the applicants made no reference to their asylum request (even though the asylum procedure had not yet been completed), that the actions aimed at the return of foreigners had taken place in conditions that made it very difficult for the applicants to contact a lawyer, and that the relevant political bodies had announced that there would be operations of that kind (see *Čonka*, cited above, §§ 60-63). The Court has also considered whether, before being subjected to "automatic returns", applicants have had any effective possibility of seeking asylum (see *Sharifi and Others*, cited above, §§ 214-25).

203. In addition, the Court has taken the applicants' own conduct into consideration when assessing the protection to be afforded under Article 4 of Protocol No. 4. According to the Court's well-established case-law, there is no violation of Article 4 of Protocol No. 4 if the absence of an individual expulsion decision can be attributed to the applicant's own culpable conduct (see *Khlaifia and Others*, cited above, § 240). The Court has held, in particular, that a lack of active cooperation on the part of applicants with the available procedure for conducting an individual examination of their circumstances or recourse to unauthorised and clearly disruptive means of attempting to enter the State's territory despite the existence of a genuine and effective access to means of legal entry might prompt the Court to find that the Government cannot be held responsible for the fact that the applicants' circumstances were not individually examined (see *N.D. and N.T. v. Spain*, cited above, § 200).

2. Application of the above principles to the present case

204. The Court must first address whether the decisions to refuse the applicants entry into Poland issued at the border checkpoints constituted an "expulsion" within the meaning of Article 4 of Protocol No. 4. In this context, the Court notes that in the case of *Hirsi Jamaa and Others* it held that Article 4 of Protocol No. 4 applied to migrants intercepted by the authorities of a State on the high seas and their removal to their countries of transit or origin (cited above, § 180). Given that the prohibition on the collective expulsion of aliens expressed in that provision was held to be

applicable in respect of the actions of a State, the effect of which was to prevent migrants from reaching the borders of that State, then it is even more evident that it applies to a situation in which the aliens present themselves at a land border and are returned from there to the neighbouring country (see also *N.D. and N.T. v. Spain*, cited above, § 187).

205. Furthermore, as held above (see paragraphs 129-132 above), when subjected to border checks, the applicants were under the territorial jurisdiction of the Polish authorities. As a result of the decisions refusing them entry into Poland they were sent back, against their will, to Belarus, where they alleged that they remained at risk of being returned to Russia. The Court therefore concludes that they were expelled within the meaning of this provision (see *Khlaifia and Others*, cited above, § 243). It remains to be established whether that expulsion was "collective" in nature.

206. In this context the Court notes the Government's argument that each time the applicants presented themselves at the Polish border, they were interviewed by the officers of the Border Guard and received individual decisions concerning the refusal to allow them entry into Poland. However, the Court has already indicated that it considers that during this procedure the applicants' statements concerning their wish to apply for international protection were disregarded (see paragraph 174 above) and that even though individual decisions were issued with respect to each applicant, they did not properly reflect the reasons given by the applicants to justify their fear of persecution. The Court also points to the fact that the applicants were not allowed to consult lawyers and were denied access to them even when – in respect of the applicants in cases nos. 40503/17 and 43643/17 – their lawyers were at the border checkpoint and demanded to be allowed to meet with their clients (see paragraphs 11 and 54 above).

207. The Court further stresses that the applicants in the present case were trying to make use of the procedure of lodging applications for international protection that should have been available to them under domestic law. They attempted to cross the 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 refused to entertain their arguments concerning the justification for their applications for international protection cannot be attributed to their own conduct (compare *N.D. and N.T. v. Spain*, cited above, § 231).

208. Moreover, the independent reports concerning the situation (in particular regarding the border checkpoint at Terespol) indicate that the applicants' cases constituted an exemplification of a wider State policy of refusing entry to foreigners coming from Belarus, regardless of whether they were clearly economic migrants or whether they expressed a fear of persecution in their countries of origin. Those reports noted a consistent practice of: holding very brief interviews, during which the foreigners' statements concerning the justification for their seeking international

protection were disregarded; emphasis being placed on the arguments that allowed them to be categorised as economic migrants; and misrepresenting the statements made by the foreigners in very brief official notes, which 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 wished to apply for international protection in Poland (see paragraphs 98-114 above).

209. The conclusion concerning the existence of a wider State policy of not accepting for review applications for international protection and of returning individuals seeking such protection to Belarus is also supported by the statement of the then Minister of the Interior and Administration referred to by the applicants (see paragraphs 115 and 190 above). The statement in question, formulated by the Minister, who at the time oversaw the Border Guard, clearly expressed opposition towards accepting migrants from the Chechen Republic (see, *mutatis mutandis*, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 163, ECHR 2012).

210. The Court concludes that the decisions refusing entry into Poland issued in the applicants' cases were not taken with proper regard to the individual situation of each of the applicants and were part of a wider policy of not receiving applications for international protection from persons presenting themselves at the Polish-Belarusian border and of returning those persons to Belarus, in violation of domestic and international law. Those decisions constituted a collective expulsion of aliens within the meaning of Article 4 of Protocol No. 4.

211. Accordingly, the Court considers that in the present case there has been a violation of Article 4 of Protocol No. 4 to the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 3 OF THE CONVENTION AND ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION

212. The applicants furthermore complained that they had not been afforded an effective remedy under Polish law by which to lodge with the domestic authorities their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4. They relied on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

1. The applicants

213. The applicants stressed that they had presented substantial grounds for believing that if they were returned to Belarus they would face the risk of a violation of Article 3. In consequence, they should have had access to a remedy with automatic suspensive effect. However, the decisions concerning refusal of entry had been enforceable immediately and the lodging of appeals against those decisions would not have suspended their execution.

214. The applicants reiterated that, in their opinion, the head of the National Border Guard (who acted as the second-instance administrative authority in respect of cases of refusal of entry) could not be considered to constitute an independent body. In addition, the applicants submitted that the relevant statistics demonstrated that there was no genuine chance of their receiving a positive decision from the head of the National Border Guard, given the fact that in the period from 1 January 2016 until 15 September 2017 that body had received 203 appeals against decisions refusing entry into Poland. All decisions appealed against in this period had been upheld.

215. The applicants acknowledged that in the event of the head of the National Border Guard issuing a negative decision they could have lodged an appeal with the administrative courts, but they argued that proceedings before that court could take up to three years in total. In their view that rendered such an appeal ineffective, given the circumstances of their cases.

2. The Government

216. The Government submitted that the applicants had had at their disposal an effective remedy – namely an appeal to the head of the National Border Guard against the decisions concerning refusal of entry. The Government acknowledged that an appeal did not have suspensive effect, but they argued that the domestic provisions were in this respect in accordance with European Union law, which obliged them to ensure that a third-country national who had been refused entry into a member State did not enter the territory of that State. The Government emphasised that the lack of suspensive effect of the appeal in question resulted from the special character of the decision on refusal of entry. They argued that if a foreigner did not fulfil the conditions for entry into Poland, the decision on refusal of entry had to be executed immediately, as there would be no grounds for the foreigner in question to remain on the territory of Poland. The Government also pointed out that in the event that the head of the National Border Guard issued a negative decision, domestic law provided the possibility of lodging a complaint with the administrative court.

217. The Government noted that in each of the three cases, the applicants had only appealed against some of the decisions concerning the refusal to allow them entry and that in respect of all the cases, proceedings were still pending.

218. Moreover, the Government argued that the decisions to refuse the applicants entry had been taken individually by officers of the Border Guard after taking into account the conditions existing at the moment when the decision had been taken. They stressed that although proceedings concerning the applicants' appeals were pending, nothing was stopping them from coming to the border checkpoint again and – in the event that they fulfilled the conditions for entry – being admitted to the territory of Poland.

B. The Court's assessment

219. The Court has already concluded that the return of the applicants to Belarus amounted to a violation of Article 3 of the Convention and Article 4 of Protocol No. 4 (see paragraphs 186 and 211 above). The complaints lodged by the applicants on these points are therefore "arguable" for the purposes of Article 13 (see, in particular, *Hirsi Jamaa and Others*, cited above, § 201). Furthermore, the Court has ruled that the applicants in the present cases were to be treated as asylum-seekers (see paragraph 174 above); it has also established that their claims concerning the risk that they would be subjected to treatment in breach of Article 3 if returned to Belarus were disregarded by the authorities responsible for border control and that their personal situation was not taken into account (see paragraph 210 above).

220. In addition, the Court has already held that an appeal against a refusal of entry and a further appeal to the administrative courts were not effective remedies within the meaning of the Convention because they did not have automatic suspensive effect (see paragraph 147 above). The Government did not indicate any other remedies which might satisfy the criteria under Article 13 of the Convention. Accordingly, the Court finds that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

221. Lastly, the applicants complained that the Government had failed to comply with the interim measures indicated by the Court in the applicants' cases. They relied on Article 34 of the Convention, which provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of

the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

Rule 39 of the Rules of Court provides:

"1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.

2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.

3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.

4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures."

A. The parties' submissions

1. The applicants

222. The applicants argued that the failure by the Government to comply with the interim measures indicated by the Court in respect of their cases constituted a violation of Article 34. They indicated that they had provided the Court with sufficient information in support of their requests for interim measures, which had resulted in those measures being granted. The applicants stressed that according to the Court's case-law, it was not open to a Contracting State to substitute its own judgment for that of the Court. Therefore, for as long as the measure was in place, the Government in question were bound by it. The applicants pointed out that in respect of their cases the Government had contested the interim measures from the very day on which they had been indicated to them, and had deliberately failed to comply with them.

223. The applicants reiterated that the period during which they could stay in Belarus without a visa had expired and that they were at risk of being returned to Russia, where they faced the danger of treatment breaching Article 3 of the Convention. They also indicated that, after the Government's non-compliance with the interim measures, the applicants in all three cases had decided to leave Belarus for fear of being deported and had continued to flee in fear for their security.

224. Moreover, the applicants pointed out that the fact that they were represented by lawyers who had lodged applications on their behalf was irrelevant for the purposes of an assessment of the alleged violation of Article 34 of the Convention with regard to the Government's

non-compliance with the above-mentioned interim measure. The applicants in cases nos. 40503/17 and 43643/17, who were represented by lawyers practicing in Poland, also noted that the fact that they could not enter Poland made contact with their lawyers more difficult and deprived them of the possibility to directly participate in the proceedings concerning their appeals against the decisions concerning refusal of entry that were pending before the domestic authorities.

2. The Government

225. The Government argued that the respondent State had created no hindrance to the effective exercise of the applicants' right of application. The Government stated in particular that their not executing the interim measures indicated by the Court on 8 and 16 June and 20 July 2017 respectively had not breached – in the circumstances of the present cases – Article 34 of the Convention. They indicated that the applicants' right provided by this provision remained effective and had been exercised by the applicants. They also indicated that the required conditions for the imposition of the interim measures had not been met and that the measures ought therefore to be lifted.

226. The Government pointed out that Rule 39 of the Rules of Court could be applied only in restricted circumstances, when there was an imminent risk of irreparable damage. In the Government's opinion, in the applicants' cases no imminent risk of irreversible harm to any of the rights guaranteed by the Convention had occurred. The applicants had remained on the territory of Belarus for a significant period of time (almost a year in respect of the applicant in case no. 40503/17; four months in respect of the applicants in case no. 42902/17; and five months in respect of the applicants in case no. 43643/17) before they had submitted their applications for interim measures. According to the Government, they had not faced any real risk of harm; nor had they proved that continuing to stay in Belarus would give rise to such a risk.

227. Moreover, the Government submitted that the applicants' stay in Belarus had in no way hindered their communications with the Court and had not negatively impacted their right to lodge and pursue their applications, especially as they had been represented at all stages of the proceedings before the Court. The Government also emphasised that the possibility for the applicants to lodge an application against Poland was not dependent on their presence on Polish territory and stressed that the Convention did not create an obligation for the respondent State to allow unauthorised entry onto its territory to anyone who lodged an application against it with the Court.

3. Third-party interveners

228. The third-party interveners submitted that the very nature and function of interim measures necessitated that they have binding effect. They argued that full compliance with an interim measure required the State to rigorously apply and enforce the measure indicated by the Court. They also stressed that the binding force of interim measures on all international authorities was based on the necessity to preserve the facts pending adjudication of the case and to prevent irreparable damage to the interests of one of the parties before human rights courts and tribunals; it also served to preserve the capacity of a court or tribunal to provide real and effective protection of the human rights guaranteed by the governing treaty. The third-party interveners referred, *inter alia*, to interim measures that could be indicated in proceedings before the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights or the UN Human Rights Committee.

B. The Court's assessment

1. General principles

229. The Court reiterates that, pursuant to Article 34 of the Convention, Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of the right of individual application, and this has been consistently reaffirmed as a cornerstone of the Convention system (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 102, ECHR 2005-I). Although the object of Article 34 is essentially that of protecting an individual against any arbitrary interference by the authorities, it does not merely compel States to abstain from such interference. There are positive obligations inherent in Article 34 requiring the authorities to furnish all necessary facilities to make possible the proper and effective examination of applications. Such an obligation will arise in particular in situations where applicants are particularly vulnerable (see *Iulian Popescu v. Romania*, no. 24999/04, § 33, 4 June 2013, and *Amirov v. Russia*, no. 51857/13, § 65, 27 November 2014).

230. According to the Court's established case-law, since interim measures provided for by Rule 39 are indicated by the Court for the purpose of ensuring the effectiveness of the right of individual petition, a respondent State's failure to comply with such measures entails a violation of the right of individual application (see *Mamatkulov and Askarov*, cited above, § 125; *Abdulkhakov v. Russia*, no. 14743/11, § 222, 2 October 2012; and *Paladi v. Moldova* [GC], no. 39806/05, § 88, 10 March 2009).

231. The crucial significance of interim measures is highlighted by the fact that the Court issues them, as a matter of principle, only in exceptional cases and on the basis of a rigorous examination of all the relevant

circumstances. In most such cases, the applicants face a genuine threat to life and limb, with the ensuing real risk of grave, irreversible harm, in breach of the core provisions of the Convention. The vital role played by interim measures in the Convention system not only underpins their binding legal effect on the States concerned, as upheld by the established case-law, but also commands that the utmost importance be attached to the question of the States Parties' compliance with the Court's indications in that regard. Any laxity on this question would unacceptably weaken the protection of the core rights in the Convention and would not be compatible with its values and spirit (see *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161; *Mamatkulov and Askarov*, cited above, §§ 100 and 125; and *Amirov*, cited above, § 67).

232. Furthermore, the Court would stress that it follows from the very nature of interim measures that a decision on whether they should be indicated in a given case will often have to be made within a very short space of time, with a view to preventing imminent potential harm from being done. Consequently, the full facts of the case will often remain undetermined until the Court's judgment on the merits of the complaint to which the measure is related. It is precisely for the purpose of preserving the Court's ability to render such a judgment after an effective examination of the complaint that such measures are indicated. Until that time, it may be unavoidable for the Court to indicate interim measures on the basis of facts which, despite making a prima facie case in favour of such measures, are subsequently added to or challenged to the point of calling into question the measures' justification (see *Paladi*, cited above, § 89).

233. Consequently, it is not open to a Contracting State to substitute its own judgment for that of the Court in verifying whether or not there existed a real risk of immediate and irreparable damage to an applicant at the time when the interim measure was indicated. It is for the Court to verify compliance with the interim measure, while a State which considers that it is in possession of material capable of convincing the Court to annul the interim measure should inform the Court accordingly (see, *mutatis mutandis*, *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 131, ECHR 1999-IV, and *Paladi*, cited above, § 90). At the same time a High Contracting Party may lodge at any time a request to lift an interim measure.

234. The point of departure for verifying whether a respondent State has complied with the measure is the formulation of the interim measure itself. The Court will therefore examine whether the respondent State complied with the letter and the spirit of the interim measure indicated to it. Article 34 will be breached if the authorities of a Contracting State fail to take all steps that could reasonably have been taken in order to comply with the measure indicated by the Court. It is for the Government to demonstrate to the Court that the interim measure was complied with (or, exceptionally, that there was an objective impediment which prevented compliance), and that the

Government took all reasonable steps to remove that impediment and to keep the Court informed about the situation. In examining a complaint under Article 34 concerning the alleged failure of a Contracting State to comply with an interim measure, the Court will not, however, re-examine whether its decision to apply that interim measure was correct (see, *mutatis mutandis*, *Aleksanyan v. Russia*, no. 46468/06, §§ 228-32, 22 December 2008, and *Paladi*, cited above, §§ 91-92).

2. Application of the above principles to the present case

235. The Court notes, firstly, that the interim measures indicated in respect of the applicants' cases on 8 and 16 June and 20 July 2017, respectively, included instructions to the authorities to refrain from returning the applicants to Belarus. In cases nos. 40503/17 and 42902/17, the Court furthermore specified that the measures in question should be interpreted in such a way that – when the applicants presented themselves at a Polish border checkpoint – their applications for asylum should be received and registered by the Border Guard and forwarded for examination by the relevant authorities; the Court moreover specified that, pending examination of their asylum applications, the applicants should not be sent back to Belarus. Despite the indication of the interim measures, the applicants were turned away to Belarus not only on the days on which the measures were indicated (see paragraphs 16, 33 and 59 above) but also at least a few times thereafter (see paragraphs 22, 34, 38 and 62 above). It should be noted that on a number of those occasions the applicants were carrying with them copies of letters informing them of the indication of an interim measure in respect of their cases and that their representatives had sent copies of those letters directly to the Border Guard.

236. The Court furthermore observes that the Government have continuously questioned the possibility of complying with the interim measures, by indicating – even after the Court explained how to interpret the interim measures in question – that the applicants were never legally admitted to Poland in the first place and that they therefore could not have been removed. The Government also disputed the legitimacy of interim measures being indicated in respect of the present cases; they submitted that there had not been a sufficient factual basis for them and that the applicants had abused this tool in order to force the Border Guard to admit them to Poland. The Court would point out that the Government have continued to rely on those arguments even after the Court rejected them by dismissing the Government's applications for the measures to be lifted (see paragraphs 21, 37 and 61 above).

237. The Court furthermore notes that in respect of cases nos. 40503/17 and 43643/17, the interim measures initially indicated on 8 June and 20 July 2017 have still not been complied with and remain in force. In respect of case no. 42902/17, the applicants were finally admitted to Poland on

7 January 2018 (the second applicant, together with her children) and 20 March 2018 (the first applicant), and the procedure concerning their applications for international protection has been initiated. It follows, therefore, that the interim measure in their case has been complied with; however that measure was undertaken only after a significant delay, which resulted in the applicants being put at risk of the kind of treatment that the measures were aimed at protecting them against (see, particularly with respect to the first applicant, paragraphs 47 and 183 above).

238. Accordingly, the Court concludes that Poland has failed to discharge its obligations under Article 34 of the Convention.

VII. RULE 39 OF THE RULES OF COURT

239. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber, or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the panel of the Grand Chamber rejects the request to refer under Article 43 of the Convention.

240. It considers that the indications made to the Government under Rule 39 of the Rules of Court in cases nos. 40503/17 and 43643/17 (see paragraphs 16 and 59 above) must remain in force until the present judgment becomes final or until the Court takes a further decision in this connection.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

241. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

242. The applicant in case no. 40503/17 claimed no less than 10,000 euros (EUR) in respect of non-pecuniary damage, leaving the exact amount to the Court's discretion.

243. The applicants in case no. 42902/17 claimed jointly EUR 210,000 in respect of non-pecuniary damage and EUR 4,200 in respect of pecuniary damage for living expenses incurred while they were residing in Brest.

244. The applicants in case no. 43643/17 claimed no less than EUR 35,000 in respect of non-pecuniary damage (leaving the determination

of the exact amount to the Court) and EUR 11,100 in respect of pecuniary damage for living expenses incurred while they were residing in Brest.

245. The Government submitted that the amounts indicated by the applicants were excessive and unjustified.

246. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects these claims. On the other hand, in respect of non-pecuniary damage, ruling on an equitable basis, it awards the applicant in case no. 40503/17 EUR 34,000, the applicants in case no. 42902/17 EUR 34,000 jointly, and the applicants in case no. 43643/17 EUR 34,000 jointly.

B. Costs and expenses

247. The applicant in case no. 40503/17 also claimed EUR 440 in respect of the costs and expenses incurred before the domestic authorities (including court fees incurred before the Warsaw Regional Administrative Court and the cost of train tickets from Brest to Terespol). He did not lodge any claim in respect of the costs incurred before the Court.

248. The applicants in case no. 42902/17 claimed EUR 120 in respect of the costs and expenses incurred before the domestic authorities (including the cost of train tickets from Brest to Terespol) and EUR 38.70 in respect of the costs incurred before the Court.

249. The applicants in case no. 43643/17 claimed EUR 740 in respect of the costs and expenses incurred before the domestic authorities (including court fees incurred before the Warsaw Regional Administrative Court and the cost of train tickets from Brest to Terespol). They did not lodge any claim in respect of the costs incurred before the Court.

250. The Government submitted that there was no reason to reimburse the applicants the cost of their train tickets. They did not comment on the remainder of the applicants' claims concerning costs and expenses.

251. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant in case no. 40503/17 EUR 140, the applicants in case no. 42902/17 EUR 39, and the applicants in case no. 43643/17 EUR 140, covering costs under all heads.

C. Default interest

252. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Decides* to join the applications;

2. *Declares*, unanimously, the applications admissible;

3. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention on account of the applicants being denied access to the asylum procedure and exposed to a risk of inhuman and degrading treatment and torture in Chechnya;

4. *Holds*, unanimously, that that it is not necessary to examine whether there has been a violation of Article 3 of the Convention on account of the applicants' treatment by the Polish authorities during border checks;

5. *Holds*, unanimously, that there has been a violation of Article 4 of Protocol No. 4 to the Convention;

6. *Holds*, unanimously, that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention;

7. *Holds*, unanimously, that Poland has failed to discharge its obligations under Article 34 of the Convention;

8. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to remove the applicants in cases nos. 40503/17 and 43643/17 to Belarus – if and when they present themselves at the Polish border crossing – until such time as the present judgment becomes final, or until a further decision is made;

9. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant in case no. 40503/17, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 34,000 (thirty-four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 140 (one hundred and forty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that the respondent State is to pay the applicants in case no. 42902/17 jointly, within three months from the date on which the judgment

becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 34,000 (thirty-four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 39 (thirty-nine euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(c) that the respondent State is to pay the applicants in case no. 43643/17 jointly, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) EUR 34,000 (thirty-four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 140 (one hundred and forty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(d) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

10. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 23 July 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Ksenija Turković
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Eicke is annexed to this judgment.

K.T.U.
R.D.

DISSENTING OPINION OF JUDGE EICKE

1. The circumstances of this case demonstrate, in my view, a most egregious disregard by the respondent State for and violation of both

(a) the fundamental principle of *refoulement* as protected not only by EU law (see §§ 83, 84 and 91 of the judgment) and the 1951 Geneva Convention (see §§ 93 and 94) but also, importantly for this Court, by Article 3 of the Convention as reinforced by Article 4 of Protocol No 4; and

(b) the obligations undertaken by all States Parties to the Convention "by virtue of Article 34 of the Convention ... to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application [including] ... to comply with interim measures" under Rule 39 of the Rules of Court (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 128, ECHR 2005-I).

2. I, therefore, fully agree with the finding of a violation of Articles 3, Article 4 of Protocol No 4, Article 13 read in conjunction with both these Articles as well as the finding that Poland has failed to discharge its obligations under Article 34 of the Convention.

3. My only point of disagreement with the other members of the Chamber arises in relation to the approach taken to the assessment of non-pecuniary damages under Article 41 of the Convention in two of the three joined cases.

4. In paragraph 210 of the judgment, in the context of Article 4 of Protocol No 4, the Court concludes that "the decisions ... in the applicants' cases were not taken with proper regard to the individual situation of each of the applicants". Unfortunately, in my view, this criticism can also levelled at the approach taken by the majority to the award of non-pecuniary damages under Article 41 in relation to applications nos. 42902/17 (*M.A. and Others v. Poland*) and 43643/17 (*M.K. and Others v. Poland*).

5. To make the same award of EUR 34,000 in respect of both (a) the single individual applicant in application no. 40503/17 (*M.K. v. Poland*), as well as (b) the multiple, individual, applicants in those two applications appears to me to be not only fundamentally inconsistent with a victim-oriented approach to the question of just satisfaction, as required by Article 41 of the Convention and reflected in some the Court's case-law as well as *inter alia* the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (as adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005), but also to be inconsistent with the "equitable basis" on which the awards are said to have been made (see paragraph 246 of the judgment). After all, the Court has made clear that the concept of "equity"

as applied by it as a "guiding principle" in the context of Article 41 "above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred" (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 224, ECHR 2009).

6. Looking at the facts of these two applications, as set out in the judgment, as compared with those of Mr M.K.'s application (no. 40503/17), it is difficult to see how the position of the individuals or the overall context in which the violations of their Convention rights occurred, could be said to be sufficiently different to warrant a significantly different approach to the compensation of the non-pecuniary damage they suffered; and importantly no such difference has been identified by the majority. In fact, in paragraph 118 the Court justified the joinder of these three applications "[i]n accordance with Rule 42 § 1 of the Rules of Court" on the basis that "they concern similar facts and raise identical legal issues under the Convention". Without more, the apparent reductions in the awards to the individual victims in these two applications fails in fully achieving "to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage" (see *Molla Sali v. Greece* (just satisfaction) [GC], no. 20452/14, § 33, 18 June 2020, and *Sargsyan v. Azerbaijan* (just satisfaction) [GC], no. 40167/06 § 39, 12 December 2017).

7. The applicants in application no. 42902/17 (*M.A. and Others v. Poland*) are:

(a) Mr M.A., referred to in the relevant parts of the judgment as "the first applicant";

(b) Mrs M.A., his wife, referred to in the relevant parts of the judgment as "the second applicant"; and

(c) their five minor children.

8. The Court's summary of the relevant facts (see paragraphs 26-51) describes how all seven applicants had not only repeatedly sought (and, in violation of Poland's obligations under the Convention not received) an individualised consideration of their application(s) for protection by the Polish authorities from *inter alia refoulement* to a risk of treatment contrary to Article 3 in Chechnya but also how the consequences (and circumstances) of the repeated failure of the Polish authorities to comply with their obligations under the Convention were also (at times very) different between the first applicant and the second applicant (and the children). After all, the evidence suggests that, having been rejected at the border yet again on 12 December 2017, for the first applicant the very risk of chain-*refoulement* advanced by the applicants materialised and he was told by the Belarusian authorities to leave the country, was immediately on return detained by the Russian authorities and was returned to Chechnya

(see paragraphs 40, 45 and 46). By contrast, the second applicant, having slipped and fallen on the way to catch the train back to Belarus, was taken to hospital in Poland but, in breach of the interim measure indicated by this Court under Rule 39, again not admitted for assessment of her international protection claim but removed from Poland on 14 December 2017. Having made one further unsuccessful attempt to apply for protection at the border, the second applicant and the children were finally admitted for substantive consideration of their applications on 7 January 2018. By contrast, the first applicant was not able to return to the Polish border to renew his application for protection and to re-join his wife and family until 20 March 2018.

9. The applicants in application no. 43643/17 (*M.K. and Others v. Poland* – see paragraphs 52-66 of the judgment) are

(d) Mr M.K., referred to in the relevant parts of the judgment as "the first applicant";

(e) Mrs Z.T., his wife, referred to in the relevant parts of the judgment as "the second applicant"; and

(f) their three minor children.

While it does not appear that these applicants were separated as a result of the actions of the Polish authorities, it appears from the evidence that the first and second applicant clearly had different and individual, while interconnected, claims for protection (see paragraph 55). The first applicant's claim is based on the fact that he was "kidnapped, detained and tortured ... because of his alleged participation in the disappearance of ... a relative of people close to Ramzan Kadyrov" which led the applicants to make an unsuccessful application for asylum in Austria. The second applicant's claim is based not only on her association with her husband but also on the fact that, the first applicant having gone into hiding after their deportation back to Russia, she was personally "harassed, threatened and questioned about her husband", "kidnapped and detained for twenty-four hours, during which she had been interrogated and threatened with sexual violence". As a result of their separate experiences, it appears that they have each been identified as torture victims and, as such, as suffering from post-traumatic stress disorder.

10. From the above it seems clear that each of the above applicants, just like Mr M.K. in application no. 40503/17, had different (and separate) experiences on which they base their claim for international protection and/or different (and separate) experiences at the hands of the Polish authorities when asking for an individualised assessment of that protection claim. It was in relation to these individualised experiences of the different (adult) applicants that the Court found serious violations of their respective Convention rights.

11. Article 41 of the Convention, of course, requires the Court to "afford just satisfaction to the injured party" and, consequently, requires an assessment of the non-pecuniary damage suffered by each "injured party";

this reflects the victim-oriented approach now so widely recognised. The fact that these applicants happened to be members of the same family whose applications happened to have been lodged together and registered by the Court under a single application number cannot, *per se*, detract from this obligation or from the fact that each of these two application numbers covered multiple applicants each of whom was a direct victim (an "injured party") of the violations alleged (and ultimately found): see, *mutates mutandis*, *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 166, ECHR 2012 (extracts), where the Court awarded non-pecuniary damages to each individual victim of a violation of Article 2 of Protocol No. 1 to the Convention (identified by name in an annex to the judgment) despite or irrespective of the fact that they happened to be members of the same family and/or their complaint was registered by the Court under a single application number; but contrast *Selim Yıldırım and Others v. Turkey*, no. 56154/00, § 94, 19 October 2006, in which, in the context of a finding of a violation of Article 2 of the Convention, a single joint award was made to close relatives in respect of the persons presumed disappeared.

12. As a consequence, taking the award of EUR 34,000 made to Mr M.K. as the reference point (reflecting accurately the Court's approach to an average award of non-pecuniary damages for a finding of a number of violations including a substantive violation of the prohibition of inhuman or degrading treatment under Article 3 as adjusted in relation to Poland), it would have been necessary and appropriate to have awarded the same amount of non-pecuniary damages to both the adult applicants in each of these two applications.

13. The position of the children in each of the two families in relation to any non-pecuniary damages each of them has suffered may appear more difficult in light of the absence of detailed information relevant to either their claim(s) or their personal experiences. However, there can be no doubt that the children were also direct victims of the breaches of the Convention found by the Court and that they will inevitably have suffered, separately and personally, "evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity" (see *Varnava and Others*, cited above, § 224, and *Molla Sali*, cited above, § 33) as a result of the violations found so as to justify an award of non-pecuniary damages. In light of the Court's rather formulaic approach to assessing non-pecuniary damages (having consistently held that it is not "the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties": ibid), it would, in my view, therefore have been equally appropriate (and necessary) to make an award of EUR 34,000 in relation to each of the children.