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Application no. 22399/22
M.H.D. and others v. Poland

WRITTEN COMMENTS BY A THIRD PARTY:

THE OCALENIE FOUNDATION

INTRODUCTION

1. This third-party intervention is submitted by the Ocalenie Foundation under Article 36(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Rule 44(3) of the Rules of Court. The case M.H.D. and others v. Poland concerns protracted immigration detention of a married couple with two minor children, all Iraqi nationals. The applicants invoke violations of Article 3 and Article 8 of the ECHR.



2. The Ocalenie Foundation is a Polish non-governmental organisation established in 2000 with the aim of providing comprehensive integration support for asylum-seekers, refugees and migrants in Poland. Ocalenie Foundation maintains Help Centres for Foreigners in three localisations in Poland: Warsaw, Łódź and Łomża, where legal, psychological, educational, professional and material support is provided for foreigners, both adults and minors, endangered by social exclusion. Since August 2021 Ocalenie Foundation has provided humanitarian, medical and legal aid for migrants and asylum-seekers on the Polish-Belarussian border. It has been extensively described in 'The Ocalenie Foundation's Report On The Humanitarian Crisis In The Polish-Belarusian Border Region'¹. Foundation's legal team members were representing clients in domestic proceedings regarding detention of asylum-seekers and members of vulnerable groups, extension of detention, release from detention and compensation for unlawful detention. Foundation's team of psychologists and psychotherapists provide constant service for clients released from immigration detention, PTSD sufferers and victims of torture and organizes recurring trainings for practitioners related to these matters. We believe that Ocalenie

¹ The Ocalenie Foundation's Report On The Humanitarian Crisis In The Polish-Belarusian Border Region' available here: https://en.ocalenie.org.pl/wp-content/uploads/2022/10/The-Ocalenie-Foundation-report-on-the-humanitarian-crisis-in-the-PL_BY-border-region.pdf



Foundation's experience in providing holistic legal, psychological and integrative support may be of assistance to the Court in the current case M.H.D. and Others v. Poland.

3. In this third-part intervention we will focus on three aspects:

- I. Conditions and frequency of detention, concerning foreigners applying for international protection in Poland;
- II. Conditions of detention of children in Poland;
- III. Access to medical and psychological care in centres for foreigners.

I. CONDITIONS AND FREQUENCY OF DETENTION, CONCERNING FOREIGNERS APPLYING FOR INTERNATIONAL PROTECTION IN POLAND

Action of Polish courts in cases of detention of foreigners

4. An important issue in the area of detention is the judicial practice of Polish courts. One of the main problems when considering detention cases by Polish courts is the relatively poor knowledge of migration law by the judges examining the case. In Poland, the decision to place a foreigner in detention is issued by a criminal court. Criminal judges hearing detention cases do not have contact with other legal issues related to asylum law, therefore in their decisions they often rely



excessively on the arguments of the Border Guard presented in the application for placement in detention centre.

5. The visible result of such proceedings is that the court often does not sufficiently examine whether alternative measures to detention can be applied in a given case. It should be remembered that under art. 401 section 5 and art. 403 section 7a of the Act on Foreigners, the court adjudicating on placing a foreigner in a guarded centre (arrest for foreigners) or extending the period of detention is obliged to assess whether it is possible to apply alternative measures to the detained person². As the Polish Human Rights Commissioner pointed out in his report: "In most cases, in the justifications for the examined decisions, the courts analyzed the grounds for applying the above-mentioned measures and referred to the facts of a given case. In judgments that raised objections, the courts limited themselves only to stating that there were no grounds for applying alternative measures to the foreigner, without providing any justification for such a position."³.

Conditions in guarded centres for foreigners

² Rzecznik Praw Obywatelskich, *Obcokrajowcy w detencji administracyjnej Wyniki monitoringu Krajowego Mechanizmu Prewencji Tortur, Nieludzkiego, Poniżającego Traktowania lub Karania BRPO w strzeżonych ośrodkach dla cudzoziemców w Polsce*, March 2021, online: https://bip.brpo.gov.pl/sites/default/files/Obcokrajowcy_w_detencji_administracyjnej.pdf (accessed: 27.07.2024).

³ Ibidem



placing some people in dormitories and containers. Living standards in these places were much worse than in guarded centres. The National Mechanism for the Prevention of Torture noticed that two families lived in each room of the dormitory, which was considered a violation of the foreigners' right to family life⁶.

8. Other significant problems regarding living conditions in guarded centres for foreigners in Poland include, among others: installing bars on windows, also in centres where children stay; a ban on having mobile phones with a camera function, which, together with too few computer workstations, limits contact with the outside world⁷.

II. CONDITIONS OF DETENTION OF CHILDREN IN POLAND

Legal status

9. The possibility of placing foreign minors in a guarded centre for foreigners is regulated by Article 397 of the Act on Foreigners⁸ (relating to unaccompanied minors) and Article 401(4) of the Act on Foreigners (regulating the situation of minors under the care of family members). The first of these provisions stipulates that the court, when considering a request for placement in a guarded centre of an unaccompanied foreigner minor residing

⁶ Ibidem

⁷ Ibidem

⁸ Act of 12th December 2013 on Foreigners, Dz.U. 2023.519



in the territory of the Republic of Poland, guided by his welfare, shall take into account in particular: (1) the degree of physical and mental development of the underage foreigner; (2) the personality traits of the underage foreigner; (3) the circumstances of the underage foreigner's detention; (4) the personal conditions supporting the placement of the underage foreigner in a guarded centre. The provision excludes the placement of unaccompanied minors under the age of 15 in detention. In case of doubts about age, a medical examination is carried out, while in case of disagreement, the detainee is presumed to be an adult.

10. Article 401(4) of the Act on Foreigners stipulates that the court, when considering an application for placement in a guarded centre of a foreigner with a minor under his care, shall also be guided by the welfare of the minor. In this case, there is no age limit that would prevent a minor from being placed in detention.
11. With regard to unaccompanied minors seeking refugee status, Article 88a⁹ of the Act on Granting Protection to Foreigners in the Territory of the Republic of Poland, which completely excludes the detention of unaccompanied minors seeking refugee status, is applicable.

⁹ Act of 14th June 2003 on Granting Protection to Foreigners in the Territory of the Republic of Poland, Dz.U. 2023.1504



12. According to the regulations of Article 414 of the Act on Foreigners, minors placed in the centre with their families should share a room with them, while unaccompanied minors are placed in a separate part of the centre. In turn, according to Article 416, minors detained in a guarded centre have the right to participate, at the time and place determined by the head of the centre, in educational and recreational and sports activities. The program of activities should be adapted to the age of the minor and the length of his stay in the territory of the Republic of Poland.

Actual conditions of detention of foreign minors

13. According to the position of the Polish government, the problem of detention of minors is solved by provisions introduced into the laws on alternative means of controlling foreigners (supervision, or open centres). In practice, however, these solutions are rarely used by the courts, while the provisions introducing alternative measures to detention into Polish legislation allow for a high degree of discretion in their application and do not always directly order the authorities' or courts' ruling on detention cases to be guided by the welfare or interests of the child. Because of this, in practice, detention is not a measure of last resort and is often adjudicated, or extended, in an arbitrary manner (including in case of minors).



14. The detention of minors was addressed by the Supreme Court in 2023, emphasizing that: "as a rule, the deprivation of liberty of a mother with a young child poses a threat to the normal development of that child [...]. Only an individualized assessment, taking into account the psychophysical and developmental state of the minor, can justify a decision in the form of detention in a guarded centre" and that: "the welfare of the child cannot be reduced solely to health issues"¹⁰.
15. For years, the Ombudsman (National Torture Prevention Mechanism) and NGO organizations have been calling for a total ban on the detention of children, citing, among other things, Article 37 of the UN Convention on the Rights of the Child. Poland currently has three centres receiving families with children (in Kętrzyn, Przemyśl and Biała Podlaska), including one with space for unaccompanied minors. For a time in late 2021 and early 2022, the centre for families was also a centre in Lesznowola, previously and later adapted to receive men only). In 2016–2020, a total of 1097 minors were housed in these centres¹¹. In 2021, number of minors was 456 in total. Not all centres were able to respond to the special needs of minors (in Kętrzyn for example, there was a lack of a paediatrician for a certain period due to a lack of resources)¹².

¹⁰ The Supreme Court in judgment of June 20, 2023, II KK 148/22

¹¹ Rzecznik Praw Obywatelskich, op.cit.

¹² Ibidem.



16. In the course of their visits, representatives of the Ombudsman's National Torture Prevention Mechanism had contact with foreigners, including families with minor children, whose psycho-physical condition and other factual circumstances justified the belief that these persons should not be detained. It should be noted that national legislation does not require the staff of the centres to have special qualifications or to have received training relevant to the needs of a minor foreigner, such as appropriate language or intercultural communication skills.
17. According to the Ombudsman's conclusions, none of the guarded centres guarantees the proper realization of the constitutional right to education, granted to everyone, regardless of citizenship or title of residence in Poland (Article 70(1) of the Constitution). The realization of this right cannot be considered teaching and educational classes for minors organized in guarded centres. This is because neither the content of these classes, nor their form, presupposes the realization of even the minimum scope of the curriculum attitude¹³.
18. The practice of Ocalenie Foundation shows that minors with experience of staying in Guarded Centres for Foreigners after leaving them manifest symptoms of PTSD, adaptive disorders, anxiety and depression, and remain at a lower level of development than their peers.

¹³ <https://bip.brpo.gov.pl/pl/content/rpo-sady-migranci-strzezone-osrodki-rodziny-dzieci>



III. ACCESS TO MEDICAL AND PSYCHOLOGICAL CARE IN CENTRES FOR FOREIGNERS

19. According to Polish regulations, persons with experience of violence, those for whom it could cause a threat to life or health, should not be placed in Guarded Centres for Foreigners (art. 400 of the Act on Foreigners and 88a of the Act on Granting Protection to Foreigners on the Territory of the Republic).
20. Pursuant to Article 413 of the Act on foreigners, every foreigner admitted to the centre is subjected to a medical examination and necessary sanitary procedures. Pursuant to Article 400b(1)(2), a foreigner is entitled to: (a) consultations with a primary care physician and specialist physicians; (b) stay in a hospital or a treatment facility providing inpatient and round-the-clock health care services; (c) purchase of medicinal products and sanitary products, including dressing supplies (d) psychological consultations and psychotherapy.



Actual situation

21. Given the mass placement in Guarded Centres of foreigners who have spent many weeks in the forest on the Polish–Belarusian border, in conditions of hypothermia, starvation, emaciation of the body and immense psychological trauma, it should be recognized that in practice the jurisdiction treats loosely the issues related to not placing in centres foreigners with experience of violence and those whose health is at risk.
22. Despite the fact that laws guarantee foreigners contact with NGOs for psychological assistance, managers of centres for foreigners generally reject the assistance offered by NGOs, claiming that foreigners receive sufficient psychological support. However, the support offered by state organs does not inspire confidence in foreigners and is not perceived by them as objective¹⁴.
23. The experience of the Ocalenie Foundation's psychological team additionally shows that when the Foundation was allowed to assist online (or when assistance was provided by telephone), the support provided was not very effective and encountered numerous problems such as limitations in communication when consultations were used via computers in the centres, lack of intimacy and privacy necessary for the transfer of effective

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<https://bip.brpo.gov.pl/pl/content/rpo-cudzoziemcy-osrodki-pomoc-psychologiczna-ngo-odpowied-z-sg>



psychological support (conversations were often listened to by roommates or guards) and language barriers (when support was provided by telephone, it was impossible to include a third person – interpreter in the consultation).

24. The practice of the Ocalenie Foundation shows that almost every person placed in a Guarded Centre for Foreigners undergoes a mental crisis and requires urgent support in this regard. Stay in the centre causes foreigners to experience a sense of emptiness and a sense of futility in their efforts to make a better life, depression, anxiety, trauma and suicidal thoughts. These symptoms frequently persist long after leaving the centres.

25. The National Torture Prevention Mechanism notes that despite the increased influx of migrants since 2021, which has led to an increase in centre occupancy, the number of psychologists working with the centres has not changed significantly at the same time. The centre in Lesznowola increased its capacity threefold after the migration crisis in 2021 – but the number of psychological consultations (20 hours per week) remained unchanged. The centre in Kętrzyn increased the number of migrants admitted fourfold and the working hours of psychologists increased only twice¹⁵. It should be noted that the

¹⁵ Rzecznik Praw Obywatelskich, *Sytuacja Cudzoziemców w Ośrodkach Strzeżonych w dobie kryzysu na granicy Polski i Białorusi, Raport z wizytacji Krajowego Mechanizmu Prewencji Tortur*, czerwiec 2022 (<https://bip.brpo.gov.pl/sites/default/files/2022-06/Raport%20KMPT%20Sytuacja%20cudzoziemców%20w%20ośrodkach%20strzeżonych%20w%20dobie%20kryzysu%20na%20granicy%20Polski%20i%20Białorusi.pdf>).



fact that in some centres only a male psychologist was available effectively discouraged women with experience of sexual violence from receiving support.

26. Maintaining or regaining well-being (both mental and psychological) is also not conducive to detention conditions - lack of common space (having to spend time in corridors and stairwells), living space per foreigner smaller than in prisons, lack of privacy, isolation, finally - poor recreational, educational, sports and cultural opportunities. An additional factor negatively affecting the health of foreigners is the cutoff from the outside world, due to the inability to have a phone with a camera (phones without a camera, on the other hand, do not have Internet connectivity, which prevents contact with friends and family). Conditions in the centres are not only not conducive to a hygienic lifestyle, but even tend to make it impossible for those with an average mental resilience.

CONCLUSIONS

27. In conclusion, it should be pointed out that the situation of foreigners in detention has deteriorated in recent years. As regards court proceedings concerning the placement of foreigners in guarded centres, it should be pointed out that the courts still make unsatisfactory use of alternative measures to detention. This is despite the fact that it is a legal requirement to



consider each time whether alternative measures to detention can be applied in a given case.

28. Another serious problem is the living conditions in guarded detention centres. It should be emphasised that Polish law allows for a situation in which the space per foreigner is smaller than the corresponding space for a detained prisoner. Moreover, the centres are often overcrowded and the possibility of telecommunication is limited. There are still bars in windows in some centres where children are detained.

29. Detention of minors in guarded centres for foreigners is still practised in Poland. Detailed regulations on the placement of alien minors in guarded centres exist, but the lack of uniformity in the application of alternative measures to detention and the failure to consider detention as a last resort are the main problems. Placement of minors in guarded centres is highly controversial, especially with regard to their development and mental health. Based on the experience of the Ocalenie Foundation, it should be pointed out that many minors who leave the centres suffer from PTSD, adjustment disorders, anxiety attacks and depression.

30. Access to medical and psychological care is guaranteed by Polish law, but in practice these guarantees are not realised especially in the case of foreigners who have experienced violence. Detention centres make it impossible to carry out



psychological consultations by external psychologists. Attempts to provide psychological support in an online form encounter communication problems and often violate the privacy of foreigners, which in turn results in psychological crises among detainees.

