THE UNDERMINED ROLE OF (DOMESTIC) CASE LAW IN SHAPING THE PRACTICE OF ADMITTING ASYLUM SEEKERS IN POLAND

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The aim of this paper is to explain the observably weak role of domestic case law in shaping access to the asylum procedure at Poland's eastern border. It also addresses the lack of influence of the European Court of Human Rights in safeguarding forced migrants' right to apply for asylum in Poland. The assessment of how the case law impacts the complex reality of asylum seekers trying to enter Polish territory multiple times and apply for international protection is based on analyses of both legal sources (court rulings and relevant legislation) and sociological material (experts' opinions and statistical data). The conclusions drawn from this study indicate that the administrative body responsible for border checks and receiving asylum applications does not comply with domestic and international case law. Moreover, this takes place with governmental support and acceptance. Non-compliance stems from anti-refugee sentiments that spread through public debate in a post-2015 migratory context in Poland, portraying forced migrants as a threat to security and social cohesion. This coincided with the progressive crisis of the rule of law in Poland, which has affected the way administrative bodies supported by the government respond to and interpret administrative judgments.

Keywords: Poland, access to the asylum procedure, refusal of entry, administrative jurisprudence, human rights

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I. INTRODUCTION

In recent years, public discourse in Poland has contributed to perceptions of forced migrants as 'unwanted' and irregular, challenging public order both in Poland and in other countries of the European Union (EU). In particular, the conservative government that was elected to power in Poland in late 2015 has depicted the vast majority of asylum seekers not only as abusers of the asylum system, but also as a threat to security. Whereas the former narrative was not novel,[1] the latter was born from the refugee crisis of 2015-16, which the ruling politicians linked to increased terrorist threats. As well as a menace to security, asylum seekers were seen as a potential burden to social cohesion due to their 'cultural' or – more specifically – 'religious' distance from the host society.[2] Such perceptions became common in public debate despite the

[1] Already in 2015, abuses of the asylum procedure were indicated by the public administration responsible for migration control as one of the main forms of irregular migration in the Polish context. See Monika Szulecka, 'Przejawy nielegalnej migracji w Polsce' [2016] Archiwum Kryminologii 191, 228-45.

[2] Witold Klaus, 'Security First: The New Right-Wing Government in Poland and its Policy towards Immigrants and Refugees' (2017) 15 Surveillance & Society 523; Piotr Cap, '"We Don't Want Any Immigrants or Terrorists Here": The Linguistic Manufacturing of Xenophobia in the Post-2015 Poland' (2018) 29 Discourse & Society 380; Elżbieta M Goździak and Péter Marton, 'Where the Wild Things Are: Fear of Islam and the Anti-Refugee Rhetoric in Hungary and in Poland' (2018) 7 Central and Eastern European Migration Review 125.

fact that asylum applicants and recognised refugees constituted a minority of immigrants to Poland.[3]

Governmental resistance towards admitting asylum seekers to Poland has been expressed, among other methods, by supporting administrative practices denying access to the asylum procedure at border checkpoints, especially since mid-2015.[4] In formal terms, foreigners presenting at the border were refused entry due to the lack of required documents, such as visas. However, the fact that such refusals of entry were issued and executed immediately by the Border Guard towards persons declaring their will to apply for international protection raised doubts regarding the legality of this practice. This, in turn, led to a number of interventions by human rights defenders, including soft measures such as campaigns to raise awareness, monitoring visits, and formal letters from the Commissioner for Human Rights to the relevant ministry. These initiatives, however, did not result in any changes.

In this circumstance, human rights campaigners turned to 'hard' measures, i.e. bringing cases before the courts on behalf of individuals denied access to the asylum procedure. They expected that court verdicts would provide a conclusive interpretation of the law and international commitments. This, in turn, would offer forced migrants effective access to the asylum procedure at the border, regardless of whether or not they held documents allowing them to cross the border. This would also guarantee respect for the non-refoulement principle. When assessing administrative conduct at the border checkpoints, the domestic courts indicated a need to change the way the Border Guard dealt with potential asylum applicants. However, the practice

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3 See s I for more statistical context. For more on common beliefs, see Bartłomiej Walczak and Nikolaos Lampas, 'Beliefs on Refugees as a Terrorist Threat. The Social Determinants of Refugee-Related Stereotypes' (2020) 46(2) Studia Migracyjne - Przegląd Polonijny 53.

4 Witold Klaus, 'Closing Gates to Refugees: The Causes and Effects of the 2015 "Migration Crisis" on Border Management in Hungary and Poland' (2017) 15 Rocznik Instytutu Europy Środkowo-Wschodniej 11; Marta Szczepanik, 'Border Politics and Practices of Resistance on the Eastern Side of "Fortress Europe": The Case of Chechen Asylum Seekers at the Belarusian–Polish Border' (2018) 7 Central and Eastern European Migration Review 69.

of repeated refusal to formally receive asylum application and admit asylum seekers into Poland continued.

The issue was also brought before judges in international courts, who issued rulings regarding rights of forced migrants who had been denied entry to EU territories to apply for asylum (often with multiple attempts).[5] However, these rulings did not seem to influence the administrative conduct at the border checkpoints that had been contested since at least 2016.[6] They also appeared meaningless to the Border Guard and the Polish authorities supervising, who from August 2021 onwards started reporting an increased number of migrants (including asylum seekers) from the Middle East attempting to cross unlawfully the border between Belarus and Poland.[7]

The above-mentioned facts raise the question of why case law has had a limited impact on governance of forced migration in the context of border control in Poland. Bringing this question to the forefront of the analysis, the objective of this article is to explain the allegedly weak role of the domestic

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5 In particular, *MA and Others v Lithuania* App no 59793/17 (ECtHR, 11 December 2018), *MK and Others v Poland* App nos 40503/17, 42902/17, 43643/17 (ECtHR, 23 July 2020).

6 Jacek Białas, Marta Górczyńska and Daniel Witko, *Access to Asylum Procedure at Poland's External Borders. Current Situation and Challenges for the Future* (Helsinki Foundation for Human Rights 2019) <https://www.hfhr.pl/wp-content/uploads/2019/06/0207_report-HFHR-en.pdf> accessed 6 July 2020; Commissioner for Human Rights, 'Input of the Commissioner for Human Rights of the Republic of Poland for the Special Rapporteur's on the Human Rights of Migrants Report on Pushback Practices and Their Impact on the Human Rights of Migrants' (2021) <https://bip.brpo.gov.pl/sites/default/files/Input_of_the_CHR_for_the_Special_Rapporteur_28.01.2021.pdf> accessed 6 July 2021.

7 Witold Klaus (ed), *Humanitarian Crisis at the Polish-Belarusian Border. Report by Grupa Granica* (Grupa Granica 2021) <https://grupagranica.pl/files/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf> accessed 8 February 2022. The analysis on which this article is based was completed in November 2021, before the Russian invasion of Ukraine in February 2022 that immediately resulted in the arrival of hundreds of thousands of asylum seekers from Ukraine, whose entrance to Poland through the existing border crossing points was facilitated by Polish authorities. Therefore, the arguments presented in this article do not apply to border control practices at the border with Ukraine from 24 February 2022 onwards.

courts in shaping the daily administrative practices involving asylum seekers. It also aims to discuss the unfulfilled expectations of human rights campaigners around legal intervention before international bodies, in particular the European Court of Human Rights (ECtHR). The most probable explanation for the neglect of case law pertains to the crisis of the rule of law[8] combined with the spread of anti-immigrant and anti-refugee sentiments in Poland, which has been encouraged by the government's portrayal of asylum seekers first and foremost as a threat to social cohesion and security. These processes began in late 2015, when a new right-wing government came to power and enacted policies aimed at reforming various public spheres, including migration and asylum policies and the system of justice.

In a nutshell, the main claim of this article is that, if the authorities see forced migrants only as a burden, then we can expect the government to endorse and even encourage the questionably legal practices performed by front-line officers to prevent the arrival of forced migrants. Moreover, even if such practices are determined to be unlawful by the courts, administrative bodies may downplay such verdicts and perceive them as applying to incidents rather than broader practices. Such a scenario becomes more probable in the context of persistent threats to the rule of law, which undermine the role of courts and the hierarchy of law.

This article analyses both legal and sociological data to investigate the impact of court decisions on the state's practices in dealing with forced migrants. The legal data referred to in this article consists of selected provisions of the two main acts on which migration governance in Poland is based: the Law on Foreigners of 2013 (the 'Law on Foreigners')[9] and the Law on Granting Protection to Foreigners on the Territory of Poland of 2003 (the 'Law on

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8 See 'Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control' (European Commission, 3 April 2019) <https://ec.europa.eu/commission/presscorner/detail/pt/IP_19_1957> accessed 12 November 2020.

9 Ustawa z dnia 12 grudnia 2013 r o cudzoziemcach (tj DzU z 2021 r poz 2354) [Law on Foreigners].

Protection').[10] Other legal sources analysed here include two types of court verdicts. The first are crucial cases adjudicated by the ECtHR and directly related to the situation of asylum seekers 'pushed back' at the eastern border of Poland. The second are administrative court verdicts concerning appealed decisions of refusal of entry issued to potential asylum applicants. The database of domestic rulings includes 39 cases concluded by the first-instance court and 28 cases adjudicated by the second-instance court, in each case issued between January 2015 and November 2020.[11]

The analysis in this article also relies on conclusions from a sociological study of forced migration governance. These consist of in-depth interviews conducted between November 2018 and February 2019 with the following migration experts: three employees of public institutions dealing with migration governance; four representatives of social organisations providing legal advice to forced migrants; and 18 participants of a group discussion focused on the institutional aspects of border management.[12] This article also refers to official statistics produced by Polish administration and relevant

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[10] Ustawa z dnia 13 czerwca 2003 r o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej (tj DzU z 2021 r poz 1108) [Law on Protection].

[11] The verdicts come from the official database of administrative courts decisions. 'Centralna Baza Orzeczeń Sądów Administracyjnych' (Naczelny Sąd Administracyjny) <http://orzeczenia.nsa.gov.pl/cbo/query> accessed 4 December 2020. I selected them through the search engine available on the website of the database, using 'Border Guard' and 'refusal of entry' as search terms.

[12] The expert opinions referred to in this article were collected as part of the international project '*RESPOND – Multilevel Governance of Migration and Beyond*'. This project received funding from the European Research Council (ERC) under the EU's Horizon 2020 research and innovation programme (grant agreement No 770564). For more information about the project, see 'Respond in a Nutshell' (Respond Migration) <https://www.respondmigration.com/> accessed 7 July 2020. I participated in conducting these interviews as a team member of the Centre of Migration Research, University of Warsaw – the Polish partner within the project. Participants in the group discussion included representatives of the Office of the Commissioner for Human Rights, the Office for Foreigners, the Border Guard, governmental and local institutions involved in integration programmes, NGOs and international organisations, local authorities, and academia.

reports published by non-governmental organisations (NGOs) or public institutions.

This article uses an interdisciplinary approach to contribute to the existing literature on forced migrants' access to asylum procedures in the EU and offer an in-depth analysis of the tensions between Polish authorities and human rights campaigners over the 'closed doors' approach towards asylum seekers at the eastern border, paying special attention to the role of courts in this respect.[13] Denial of access to the asylum procedure in Poland has already been documented by NGOs involved in supporting migrants.[14] It has also been referred to in a number of academic works within broader studies devoted to asylum policy or the post-2015 approach towards (forced) migrants approaching Poland.[15] Simultaneously, rulings on appeal from

[13] Significant contributions to the existing literature include Magdalena Kmak, 'Between Citizen and Bogus Asylum Seeker: Management of Migration in the EU through the Technology of Morality' (2015) 21 Social Identities 395; Goździak and Marton (n 2); Sergio Carrera and Marco Stefan, *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice* (Routledge 2020).

[14] Aleksandra Chrzanowska and others, 'At the Border. Report on Monitoring of Access to the Procedure for Granting International Protection at Border Crossings in Terespol, Medyka, and Warszawa-Okęcie Airport' (2016) Association for Legal Intervention Analyses, Reports, Evaluations No 2/2016 <https://interwencjaprawna.pl/wp-content/uploads/2020/04/at-the-border.pdf> accessed 11 February 2022; Marta Górczyńska and Marta Szczepanik, 'A Road to Nowhere. The Account of a Monitoring Visit at the Brześć-Terespol Border Crossing between Poland and Belarus' (Helsińska Fundacja Praw Człowieka 2016); Białas, Górczyńska and Witko, *Access to Asylum Procedure at Poland's External Borders* (n 6); 'Overview of the Situation with Transit Refugees in Brest (September – December 2018)' (Human Constanta, 26 February 2019) <https://humanconstanta.org/wp-content/uploads/2019/02/Overview-of-the-situation-with-%E2%80%9Ctransit-refugees%E2%80%9D-sep-dec.pdf> accessed 6 July 2020.

[15] See e.g. Klaus, 'Closing Gates to Refugees' (n 4); Szczepanik, 'Border Politics' (n 4); Karolina Follis, 'Rejecting Refugees in Illiberal Poland: The Response from Civil Society' (2019) 15 Journal of Civil Society 307; Sławomir Łodziński, 'Uchodźcy jako „podejrzana społeczność" (Suspect Community)' (2019) 1(10) Studia Socjologiczno-Polityczne. Seria Nowa 31; Marcin Górski, 'Granica praw człowieka. Czy Polska dopuszcza się strukturalnego naruszenia EKPC w sprawach azylowych?' (2021) 47(2) Studia Migracyjne – Przegląd Polonijny 41.

refusals of entry have become topics of legal commentaries interpreting the courts' assessment.[16] Combining legal, political, and sociological perspectives, this article analyses the impact of case law on the phenomenon of 'pushbacks', which have become an integral feature of forced migration governance since late 2015 in Poland.

This analysis can be also seen as an introduction to future studies focused on the Polish approach towards migrants appearing at the eastern border in the summer and autumn of 2021. During that time, 'pushbacks' became common practice with respect to foreigners crossing (or attempting to cross) the border illegally, regardless of their humanitarian needs and declarations about seeking asylum. They also became an element of official policy, based on newly enacted provisions,[17] amid numerous concerns about their relation (or non-compliance) with international law and human rights standards.[18] The conclusions presented in this article seem the inevitable starting point for analysis of Poland's policy towards forced migrants in 2021 and onwards.

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16 E.g. Wojciech Chróścielewski, Roman Hauser and Jacek Chlebny, 'Realizacja prawa do wszczęcia postępowania w sprawie o udzielenie ochrony międzynarodowej podczas przekraczania granicy' in Jerzy Korczak and Krzysztof Sobieralski (eds), *Jednostka wobec władczej ingerencji organów administracji publicznej. Księga Jubileuszowa dedykowana Profesor Barbarze Adamiak* (Presscom 2019); Paweł Dąbrowski, 'Niedopuszczalność odmowy wjazdu cudzoziemca na terytorium RP bez wyjaśnienia, czy cudzoziemiec deklaruje wolę ubiegania się o ochronę międzynarodową. Glosa do wyroku NSA z dnia 20 września 2018 r., II OSK 1025/18' (2019) 3 Orzecznictwo Sądów Polskich 125; Jacek Chlebny, 'Przekroczenie granicy przez cudzoziemca zamierzającego złożyć wniosek o udzielenie ochrony międzynarodowej. Glosa do wyroku ETPC z 23 Lipca 2020 r., sprawy połączone 40503/17, 42902/17 i 43643/17' (2020) 12 Europejski Przegląd Sądowy 47; Jacek Chlebny, 'Rozdział 2. Postępowanie w sprawach udzielania ochrony międzynarodowej oraz pozbawiania statusu uchodźcy lub ochrony uzupełniającej' in Jacek Chlebny (ed), *Prawo o cudzoziemcach. Komentarz* (Wydawnictwo CH Beck 2020).

17 Ustawa z dnia 14 października 2021 r o zmianie ustawy o cudzoziemcach oraz niektórych innych ustaw (Dz U poz 1918); Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 20 sierpnia 2021 r zmieniające rozporządzenie w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych (Dz U poz 1536).

18 See e.g. Grażyna Baranowska, 'The Deadly Woods' (Verfassungsblog, 29 October 2021) <https://verfassungsblog.de/the-deadly-woods/> accessed 29 October 2021.

In order to develop its main claim, this article is structured into five parts. The first part reflects on Poland's general posture with respect to asylum seekers, weighed against other immigration-related phenomena. The second part describes the Border Guard's practices of restricting access to the asylum procedure and relates it to the competence of this public institution within the migration governance framework. The third part analyses the interventions by human rights campaigners that preceded judicial litigation, as well as expectations as to the outcome of litigation within the context of the rule of law crisis. The fourth part devotes attention to domestic court rulings on refusals of entry to asylum seekers. This part is followed by reflections concerning the impact of ECtHR decisions on administrative practices involving asylum seekers at the eastern border. The last two sections and the conclusion address the question of whether and how the domestic courts and the ECtHR have influenced administrative conduct at border checkpoints and, in consequence, access to the asylum procedure.

II. Poland's Approach Towards Admitting Asylum Seekers

In terms of movements into and within the EU, the territory of Poland constitutes a source, a destination, and a transit country. Since 2015, however, its role as a host for immigrants and asylum seekers has drawn the attention of both Polish society and its government. In a relatively short period, Poland has become a leader in admitting migrant workers.[19] At the same time, though, it has been branded as a country that refuses to accept forced migrants. Poland did not directly experience the intensified inflow of asylum seekers during the refugee crisis of 2015-16 because the country was not situated along one of the main routes used by forced migrants from the Middle East and Africa to reach Europe. However, debates on international and state levels around a possible response to the migration/refugee crisis contributed to significant changes in Poland's approach towards admitting foreign nationals. According to declarations from the then new government that assumed political power at the end of 2015, the preferred source of

[19] OECD, *International Migration Outlook 2020* (OECD Publishing 2020).

immigration to Poland would be 'culturally close' Eastern Europe, as well as regions with a Polish diaspora and ethnic Poles.[20]

In opposition to the openness towards economic migrants from Eastern Europe, asylum seekers – especially those associated with Muslim areas – were treated as a potential burden for the Polish state, among other reasons, due to their 'cultural distance'[21] from Polish society.[22] One of the strategies deployed to prevent their arrival in Poland were repeated refusals of entry issued at the eastern border to persons declaring their intention to apply for asylum. The very low rate of positive decisions in asylum procedures implies that this is another strategy employed by the authorities.[23]

The rate of positive decisions in the asylum procedures (concerning 7,700 applicants) issued by Polish authorities in 2021 amounted to 46%, which was three times higher than in previous years. Such a high recognition rate of asylum applications was linked by the authorities with a change in the demographics of asylum applicants in 2021.[24] For the previous two decades,

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20 See e.g. Sławomir Łodziński and Marek Szonert, '„Niepolityczna polityka"? Kształtowanie się polityki migracyjnej w Polsce w latach 1989-2016' (2017) 43 Studia Migracyjne - Przegląd Polonijny 39, 6; Kancelaria Prezesa Rady Ministrów, 'Strategia na rzecz Odpowiedzialnego Rozwoju' (2017) 150–151 <https://www.mr.gov.pl/media/36848/SOR_2017_maly_internet_03_2017_aa.pdf> accessed 20 May 2017; Ministerstwo Infrastruktury i Rozwoju, 'Nowe priorytety rządowej polityki migracyjnej' (29 March 2018) <https://www.miir.gov.pl/strony/aktualnosci/nowe-priorytety-rzadowej-polityki-migracyjnej/> accessed 7 January 2019; 5; Joanna Książek, 'Wspólnota losu czy wspólnota tożsamości? Uchodźcy kontra repatrianci' (2019) 45 Studia Migracyjne - Przegląd Polonijny 237, 246–47.

21 Cultural distance refers mostly to the religious identity of the newcomers. Especially since 2015, one can notice the growth of perceived threat linked to followers of Islam coming to Poland, with their norms conflicting with the Christian ones dominant in Poland. See e.g. Katarzyna Górak-Sosnowska, 'Islamophobia without Muslims? The Case of Poland' (2016) 5 Journal of Muslims in Europe 190.

22 See e.g. Klaus, 'Security First' (n 2).

23 Witold Klaus, 'Between Closing Borders to Refugees and Welcoming Ukrainian Workers: Polish Migration Law at the Crossroads' in Elżbieta M Goździak, Izabela Main and Brigitte Suter (eds), *Europe and the Refugee Response: A Crisis of Values?* (1st edn, Routledge 2020).

24 Urząd do Spraw Cudzoziemców, 'Napływ cudzoziemców do Polski w latach 2014-2021 (stan na 1 stycznia 2022 r)' (unpublished report disseminated via e-mail

the majority of asylum seekers coming to Poland or trespassing on its territory had originated from the Caucasus region, possessed Russian citizenship, and declared Chechen nationality. Between 2007 and 2018, only 6% per cent of asylum (re)applications resulted in either refugee status or subsidiary protection, while 80% of asylum applicants had their asylum procedures discontinued, usually due to their alleged absence from the territory of Poland.[25]

In 2015, the year that brought a significant change in the public discourse about asylum and migration, there were 12,325 asylum applicants registered in Poland. Despite political concerns about a growing number of asylum seekers reaching Poland or an uncontrolled influx of irregular migrants due to the situation of other EU countries,[26] the number of asylum claims submitted in Poland did not increase. In 2016 there were 12,319 asylum applicants. While the trend changed in 2017, it did so in a direction that did not reflect the expected 'surge'. Rather, the number of people requesting asylum that year (5,078) was less than 50% of the total in each of the two previous years. Over the following years, it decreased further – to 4,135 in 2018 and 4,096 in 2019. The number dropped significantly in 2020, to 2,803 persons, though the statistics for that year must be considered with caution due to the various travel restrictions linked to the pandemic, which also affected the possibility of crossing the border. Indeed, data from 2021 makes 2020 look like an aberration: last year, the number of asylum applicants registered in Poland reached 7,700.[27]

For about two decades, the main entry point for asylum seekers in Poland (mostly Chechens) was the railway border checkpoint in Brest-Terespol, on the border with Belarus.[28] Since 2015, the role played by this outpost has been

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within the Migration Analytical Centre coordinated by the Office for Foreigners, 4 February 2022).

25 'Statystyki' (Urząd do Spraw Cudzoziemców) <https://www.gov.pl/web/udsc/statystyki> accessed 28 February 2022.

26 See e.g. Patrycja Sasnal (ed), *Niekontrolowane migracje do Unii Europejskiej – Implikacje dla Polski* (Polski Instytut Spraw Międzynarodowych 2015).

27 'Statystyki' (n 25).

28 This can be seen in the statistics of the Border Guard and the Office for Foreigners, as well as in the majority of reports focused on admitting asylum seekers to Poland. See e.g. Norbert Rafalik, 'Cudzoziemcy ubiegający się o

significantly reduced due to the administrative practices applied towards asylum seekers there, more recently coupled with border crossing restrictions imposed in response to the Covid-19 pandemic. Despite these practices and restrictions, Belarusian citizens seeking asylum enjoyed a more welcoming approach than citizens of other countries when they came to checkpoints on the border with Belarus.[29]

The increased visibility of Ukrainians among asylum applicants since 2014, as a consequence of the military conflict with Russia affecting the eastern part of Ukraine, meant the emergence of 'new' entry points for asylum seekers into Poland along the border with Ukraine, mainly the border checkpoint in Medyka-Shegynie. The role of international airports, especially the one in Warsaw, as entry points for asylum applicants became crucial only in summer 2021 due to evacuation of Afghan nationals from their home country. With the exception of Ukrainian and Belarussian citizens, the possibility for asylum seekers to apply for international protection at land border checkpoints remains extremely limited. This is reflected by the marked decrease in the number of asylum applicants observed in Poland between 2016 and 2020.

This decrease does not mean that the situation in the home countries of the asylum applicants has improved.[30] Instead, it stemmed to a large extent from the practice of refusing entry to potential asylum applicants at the eastern border. In 2015, 53,146 decisions refusing entry were issued, 35.5% of which concerned Russian citizens. In 2016, this percentage reached 64% and a total of 118,060 migrants were denied entry. That year, the vast majority (74,061 out of 75,886) of decisions refusing entry issued to citizens of Russia (the most common citizenship of asylum applicants in Poland) concerned the border

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nadanie statusu uchodźcy w Polsce – teoria a rzeczywistość (praktyka) (stan prawny na dzień 31 grudnia 2011 r)' (2012) University of Warsaw Centre of Migration Research Working Paper 55/113, 14, 21 <http://www.migracje.uw.edu.pl/wp-content/uploads/2016/10/WP_55_113__2.pdf> accessed 27 July 2020; Szczepanik, 'Border Politics' (n 4) 77.

29 Witold Klaus, 'The Porous Border Woven with Prejudices and Economic Interests. Polish Border Admission Practices in the Time of COVID-19' (2021) 10 Social Sciences 435.

30 See e.g. Marta Szczepanik, *Republika strachu. Prawa człowieka we współczesnej Czeczenii* (Helsińska Fundacja Praw Człowieka 2019).

checkpoint in Terespol.[31] Such statistics are not surprising in light of the complaints from asylum seekers, received and reported by human rights campaigners in Poland and Belarus, indicating multiple failed attempts to exercise their right to seek asylum.[32]

Indeed, 2016 became a symbolic year for the initiation of a deterrence policy towards asylum seekers. Denial of access to the territory was presented by the authorities as a necessary step to prevent abuses of the asylum procedure and block an emerging route of irregular migration to the EU that could be used for terrorist purposes.[33] The state's resistance towards asylum seekers was also reflected in the Polish position on the influx of asylum applicants to southern EU countries in 2015 and the challenges of responding to high migration pressure there. For reasons of public order and security, the Polish government declined to participate in the emergency relocation scheme established in 2015.[34]

Poland also failed to fulfil binding obligations under the EU Council Decisions establishing provisional measures regarding international protection for the benefit of Italy and Greece.[35] This failure led the European

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31 'Statystyki SG' (Komenda Główna Straży Granicznej) <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html> accessed 15 September 2020.

32 Some individuals were barred from entering Poland and submitting an asylum application as many as 20-40 times. 'Overview of the Situation with Transit Refugees in Brest (September – December 2018)' (n 14); Białas, Górczyńska and Witko, *Access to Asylum Procedure at Poland's External Borders* (n 6).

33 'Czeczeni koczowali na granicy. Szef MSWiA: Rząd PiS nie narazi Polski na zagrożenie terrorystyczne' (TVN24.pl, 31 August 2016) <https://tvn24.pl/polska/czeczeni-koczowali-na-granicy-szef-mswia-rzad-pis-nie-narazi-polski-na-zagrozenie-terrorystyczne-ra672450> accessed 23 July 2019.

34 'Komunikat Centrum Informacyjnego Rządu w związku z wyrokiem TSUE w sprawie relokacji uchodźców' (Kancelaria Prezesa Rady Ministrów, 2 April 2020) <https://www.gov.pl/web/premier/komunikat-centrum-informacyjnego-rzadu-w-zwiazku-z-wyrokiem-tsue-w-sprawie-relokacji-uchodzcow> accessed 27 June 2021.

35 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (2015) OJ L 239; Council Decision (EU) 2015/1601 of 22 September 2015

Commission to start infringement procedures against Poland. Ultimately, in April 2020, Poland and two other Central Eastern European (CEE) states, Czechia and Hungary, were found to have infringed EU law due to failure to relocate asylum seekers from the southern part of the EU.[36] Since the Court of Justice of the EU (CJEU) judgment was delivered more than two years after the expiry of the Relocation Decisions, the Polish government published a statement pointing to the judgment's lack of practical significance. Additionally, the government pointed to the role that Poland and the other two CEE countries played in changing the EU's approach towards migratory pressures and asylum seekers, i.e. in convincing other EU countries that mandatory relocation was not a solution. The statement further identified inconsistent treatment of different EU states – whereas most countries did not comply with their obligations under the relocation mechanism, only three were eventually subjects of judgment by the CJEU.[37]

The summer and autumn of 2021 brought more evidence of the state's resistance towards asylum seekers. In response to increased migration pressure at the border with Belarus, the government proposed and was able to pass provisions legalising 'pushbacks' of asylum seekers detected immediately after unauthorised border crossings.[38] The practice of 'pushbacks' to Belarus was presented by the authorities as preventing 'push-ins', i.e. unauthorised arrivals of economic migrants disguised as tourists inspired and supported by Belarusian authorities.[39] Indeed, most of the illegal

establishing provisional measures in the area of international protection for the benefit of Italy and Greece (2015) OJ L 248.

36 Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Republic of Poland and Others* EU:C:2020:257.

37 'Komunikat Centrum Informacyjnego Rządu w związku z wyrokiem TSUE w sprawie relokacji uchodźców' (n 34). For an analysis of the joined cases C-715/17, C-718/17 and C-719/17 and other CJEU judgments with regard to EU states' post-2015 practices in the area of forced migration governance in the border context, see Frederique Berrod, 'The Schengen Crisis and the EU's Internal and External Borders: A Step Backwards for Security-Oriented Migration Policy?' (2020) 1(2) Borders in Globalization Review 53.

38 Ustawa z dnia 14 października 2021 (n 17); Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 20 sierpnia 2021 (n 17).

39 See e.g. the opinions expressed by Polish MEPs Beata Kempa and Joachim Brudziński during the debate on pushbacks at external EU borders held at

border crossings were supported by the Belarusian border services or even triggered by the use of force towards migrants, previously lured to Belarus with an (expensive) offer of 'easy' access to EU territories. [40] The increased migration pressure at the EU's eastern external border in 2021 has been recognised by Poland and other EU states as an element of 'hybrid war', including 'instrumentalisation of human beings for political purposes', initiated by the Belarusian president as a response to EU sanctions imposed against the Belarusian authorities.[41]

These circumstances, however, have not convinced Polish authorities to offer humanitarian aid for migrants stuck at the border, even despite the interim measures imposed by ECtHR indicating the need for such assistance.[42] Instead, the government introduced a state of emergency in the border region and denied access to persons other than residents and law enforcement.[43] Journalists, professional lawyers supporting migrants, and activists offering humanitarian and medical aid were 'pushed out' from the border area. Thus, the Polish authorities contributed to the vulnerable position of foreign nationals and infringements of crucial principles, such as the right to life and safety of all those remaining under the authority of the Polish state, as well as the right to asylum and freedom from inhumane treatment. The ease with which the government promoted 'pushbacks' and investments in building fences at the border, disregarding humanitarian

European Parliament on 20 October 2021. European Parliament, 'Verbatim Report of Proceedings' (20 October 2021) 155, 160 <https://www.europarl.europa.eu/doceo/document/CRE-9-2021-10-20_EN.pdf> accessed 26 October 2021.

40 See e.g. Baranowska (n 18); Klaus (ed), 'Humanitarian Crisis at the Polish-Belarusian Border' (n 7).

41 These sanctions were imposed after false presidential elections in Belarus in August 2020 and the application of repressive measures against the Belarusian opposition. For more, see European Parliament Resolution of 7 October 2021 on the situation in Belarus after one year of protests and their violent repression (2021) 2021/2881(RSP) <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0420_EN.html> accessed 11 February 2022.

42 *RA and Others v Poland* App no 42120/21 (ECtHR, 25 August 2021).

43 Rozporządzenie Rady Ministrów z dnia 2 września 2021 r w sprawie ograniczeń wolności i praw w związku z obowiązywaniem stanu wyjątkowego (Dz U poz 1613 z późn zm).

issues related to this problem, may be rooted in the government's aims to reduce access to asylum procedures at border checkpoints.

III. The Border Guard's Practices Restricting Access to Asylum: Abuse of Competences?

The hardening attitude towards forced migrants, taking the form of 'pushbacks' and refusing entry to asylum seekers, has attracted the attention of social activists and legal professionals offering support to migrants,[44] public bodies involved in protection of human rights,[45] and eventually also international bodies such as the ECtHR. Any initiative aimed at investigating (from any angle – legal, sociological, and political)[46] the source and consequences of denied access to the asylum procedure in Poland requires an assessment of the Border Guard's role in this context.[47] This public institution is subject to the Ministry of the Interior. Its name could be taken to indicate a narrow scope of competences. In fact, however, the Border Guard's role is extensive, and includes giving (or denying) permission to cross the border, detecting immigration law- and border-related infringements (both at the border and within the territory), conducting return procedures, and – in certain circumstances – granting permits for stay. Such a broad scope of competencies, including the Commander-in-Chief of the Border Guard's

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44 Chrzanowska and others (n 14); Górczyńska and Szczepanik (n 14).

45 'Wystąpienie do Komendanta Głównego Straży Granicznej w sprawie praktyk stosowanych wobec cudzoziemców na przejściach granicznych w Terespolu i w Medyce' (Rzecznik Praw Obywatelskich, 7 April 2017) <https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Komendanta%20G%C5%82%C3%B3wnego%20Stra%C5%BCy%20Granicznej%20w%20sprawie%20praktyk%20stosowanych%20wobec%20cudzoziemc%C3%B3w%20na%20przej%C5%9Bciach%20granicznych%20w%20Terespolu%20i%20w%20Medyce.pdf> accessed 19 August 2020.

46 Klaus, 'Closing Gates to Refugees' (n 4); Białas, Górczyńska and Witko, *Access to Asylum Procedure at Poland's External Borders* (n 6); Follis (n 15).

47 For more, see Maja Łysienia, 'Access to Effective Remedies for Foreigners Affected by Decisions, Actions, and Inactions of the Polish Border Guard' in Sergio Carrera and Marco Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice* (Routledge 2020).

role as appeal body, raises questions about the availability of effective remedies for foreigners affected by decisions issued by this institution.[48]

As regards the subject of this article, the crucial competencies of the Border Guard are the tasks performed at the external border and, in particular, at border checkpoints.[49] There, Border Guard officers conduct a check of persons and the documents they possess. When conditions for entering Poland are not fulfilled, e.g. due to lack of valid documents, they issue an administrative decision on refusal of entry. The Law on Foreigners envisages several prerequisites for issuing such a decision. An expression of intent to submit an asylum application or an already submitted asylum application is expressly mentioned as pre-empting the issuance of a refusal of entry.[50] When persons appearing at the border declare their intention to apply for international protection during a border check, the Border Guard is supposed to receive the asylum application and immediately pass it along to the Head of the Office for Foreigners, an administrative central body supervised by the minister of internal affairs.[51] Therefore, the statutory task of the Border Guard makes it a sort of intermediary between the Office for Foreigners and the asylum applicant as far as submitting applications is concerned. This task does not include considering whether the application is justified or not.[52]

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48 See Ustawa z dnia 12 października 1990 r o Straży Granicznej, tj Dz U z 2019 r poz 147 z późn zm) art 1 sub-s 2, setting forth all tasks of the Border Guard.

49 The current conduct towards persons apprehended outside border crossing points and denied the right to ask for asylum is a very recent phenomenon that appeared in mid-2021. It involves procedures other than the refusals of entry at border checkpoints analysed in this article.

50 See Law on Foreigners (n 9) art 28, specifying the circumstances in which the decision on refusal of entry should be made and when it is excluded.

51 See.e.g. Chlebny, 'Rozdział 2. Postępowanie w sprawach udzielania ochrony międzynarodowej oraz pozbawiania statusu uchodźcy lub ochrony uzupełniającej' (n 16) 1024–26. The Head of the Office for Foreigners is responsible for assessing the merits of the application and issuing a decision, i.e. granting or denying international protection. Law on Protection (n 10) arts 23-24.

52 For commentary on article 28 of the Law on Foreigners (n 9) and the role of the Border Guard in determining the positive and negative premises of issuing a refusal of entry, see Chróścielewski, Hauser and Chlebny (n 16); Rafał Rogala,

Refusals of entry are issued by the head of the Border Guard outpost and may be appealed to the Commander-in-Chief of the Border Guard.[53] The initial decision is executed immediately and appeal has no suspensive effect. A further appeal against Commander-in-Chief's decision can be brought before an administrative court, which checks whether the Border Guard acted in compliance with the law in force and within the framework of its statutory competences.[54] It seems that, despite the Border Guard's lack of competencies, assessing who was (and who was not) eligible to submit an asylum claim during border checks became a common practice after 2015. The reasons behind this can be attributed to beliefs held by border guards and supported by the authorities, as suggested by one representative of the public institution charged with implementing the migration and asylum law:

> I really don't like that every time I speak to the officers there is a belief that the asylum procedure is abused. Of course, it is, we all know that it is. [...] However, such a belief that every foreigner [abuses the procedure] when they enter and even say that something happened in their country, is so strong among the officers conducting the [preliminary] interview that it interrupts fair performance of the duties. If this is added to the lack of any documentation of the course of such an interview, then we have the effect discussed here: these people who theoretically should be admitted, they do not enter Poland.[55]

The fact that migrants were being refused entry despite declaring an intention to apply for asylum led to questions being raised by human rights campaigners (chiefly NGOs and the Commissioner for Human Rights) about the feasibility of exercising the right to asylum at the eastern border of Poland. It also led to discussions about the limits of the Border Guard's competencies and the legal restraints on the administrative procedures they

'Dział III. Przekraczanie granicy' in Jacek Chlebny (ed), *Prawo o cudzoziemcach. Komentarz* (Wydawnictwo CH Beck 2020) 130–132.

53 Law on Foreigners (n 9) art 33.

54 See s IV for more details about administrative courts and appellate procedures.

55 Group Discussion (Warsaw, Poland, 10 December 2018).

conduct.[56] Since these concerns pertain to implementation of law, addressing them required legal intervention and judicial assessment of the practices.

IV. Involving the Courts as a Strategy to Unblock Access to the Asylum Procedure

The evidence gathered by human rights campaigners at border checkpoints during monitoring visits confirmed that oral declarations of intent to apply for asylum were either ignored or misinterpreted by the border guards during border checks.[57] Reporting the problem to the government and publishing accounts, however, did not bring any change to the practices identified as infringing both domestic administrative law and international commitments related to asylum.[58] This is due to the fact that public officials, at all levels of the public administration responsible for migration control, perceived the Border Guard's practices as fully proper and compliant with the law in force.[59]

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[56] Monika Szulecka, 'Border Management and Migration Controls in Poland' (2019) 2019/24 54 <http://www.diva-portal.org/smash/ record.jsf?pid=diva2%3A1348294 &dswid=-7631> accessed 20 November 2019; Łysienia (n 47).

[57] See e.g. Chrzanowska and others (n 14); Górczyńska and Szczepanik (n 14); 'The Commissioner's Inquiry to the Border Guard and the Ministry of Foreign Affairs Regarding the Foreigner Who Was Refused Entry to Poland' (Rzecznik Praw Obywatelskich, 13 June 2017) <https://bip.brpo.gov.pl/pl/content/rzecznik-pyta-stra%C5%BC-graniczn%C4%85-i-msz-o-odmow%C4%99-prawa-wjazdu-cudzoziemcowi> accessed 11 February 2022.

[58] See e.g. the response of the Ministry of Administration to the Commissioner for Human Rights' enquiry related to refusals of entry issued to asylum seekers at the border. 'Rozmowy Straży Granicznej z cudzoziemcami na granicy nie będą protokołowane. Odpowiedź MSWiA dla Rzecznika' (Rzecznik Praw Obywatelskich, 9 November 2018) <https://www.rpo.gov.pl/pl/content/rozmowy-strazy-granicznej-z-cudzoziemcami-na-granicy-nie-b%C4%99d%C4%85-protokolowane-odpowied%C5%BA-mswia-dla-RPO> accessed 26 November 2020.

[59] This assessment was also shared by the judges who adjudicated 13 of the cases analysed in the first instance. For more, see s 4. See also 'Rozmowy Straży Granicznej z cudzoziemcami na granicy nie będą protokołowane' (n 58); Białas, Górczyńska and Witko, *Access to Asylum Procedure at Poland's External Borders* (n 6) 12-13.

Efforts by human rights campaigners to raise awareness among the general public did not influence the disputed border practices. In light of this, NGO representatives began to perceive the courts as the necessary last resort for dealing with the alleged unlawful conduct of the administrative bodies responsible for migration control. In an effort to build cases to bring before the courts, lawyers working for NGOs involved in providing legal aid to migrants, together with representatives of the Warsaw Bar Association, decided to intervene directly at the border checkpoint in Terespol.[60] On 17 March 2017, 14 attorneys authorised to represent 26 asylum seekers travelled to the checkpoint in Terespol and attempted to draw the attention of the Border Guard to their clients' declarations of intent to apply for asylum. Even the presence of attorneys on the spot did not influence the Border Guard's conduct; the attorneys were refused contact with their clients and the asylum seekers were refused entry.

The lawyers who participated in the intervention then appealed these refusals of entry before the competent court, expecting that the resulting rulings could influence the disputed practices or legal framework. Indeed, these actions initiated the development of domestic case law addressing, directly, the insufficient documentation of activities preceding the refusal of entry and, indirectly, restrictions on access to the asylum procedure as encountered at the eastern border of Poland. At the same time, however, the lawyers realised that, behind those cases, there were people waiting for immediate solutions to their problems who were not interested in mere symbolic recognition of the unjust treatment they faced. Eventual judgments were not a satisfactory solution for the individuals concerned, since the

60 The initiative of the Warsaw Bar Association was supported by two leading NGOs in the area of legal aid provided to migrants: the Helsinki Foundation for Human Rights and the Association for Legal Intervention. For more information, see 'At the Border. Attorneys from Warsaw Bar, HFHR and ALI Help Asylum Seekers in Terespol' (Helsińska Fundacja Praw Człowieka, 17 March 2017) <http://www. hfhr.pl/en/at-the-border-attorneys-from-warsaw-bar-hfhr-and-ali-help-asylum-seekers-in-terespol/> accessed 14 May 2019; Jacek Białas, Marta Górczyńska and Daniel Witko, *Dostęp do procedury azylowej na zewnętrznych granicach Polski. Stan obecny i wyzwania na przyszłość* (Helsińska Fundacja Praw Człowieka 2019) 11 <http://www.hfhr.pl/wp-content/uploads/2019/04/Dost%C4%99p-do-procedury-azylowej-v2.pdf> accessed 27 April 2019.

decision refusing entry was executed immediately and appeals had no suspensive effect.

The limitations of the legal action taken by human rights campaigners reflect the narrow scope of judicial review in the area of asylum, including access to the asylum procedure. This sphere is subject to the competence of administrative courts, i.e. the regional courts and the Supreme Administrative Court (SAC). While these courts are part of the judicial system in Poland, alongside the Supreme Court, common courts, and military courts,[61] the role of the administrative court is limited to assessing the legality of administrative conduct (here: issuing refusals of entry), not the substance of the case (here: access to the asylum procedure from a human rights perspective).[62] This, however, does not diminish the role of these courts in disciplining public entities.[63]

Interventions aimed at unblocking access to the asylum procedure took place in challenging circumstances, at a time when the authorities lacked respect for the separation of powers and the Constitution, as claimed by many legal experts.[64] While the Polish Constitution guarantees the judiciary's independence from any other power, regardless of the type of court, and envisages that judges shall be impartial, independent (in performing their duties) and subject only to the Constitution and statutes,[65] these and other constitutional guarantees attached to the judicial office (as well as respect for

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61 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r (DzU 1997 nr 78 poz 483) art 175 [Constitution of Poland].

62 Chróścielewski, Hauser and Chlebny (n 16); Dąbrowski (n 16). For a comment on the role of domestic courts and the ECtHR in adjudicating asylum-related cases, see also Thomas Spijkerboer, 'Subsidiarity and "Arguability": The European Court of Human Rights' Case Law on Judicial Review in Asylum Cases' (2009) 21 International Journal of Refugee Law 48, 52.

63 See Przemysław Szustakiewicz, 'The Division of Competences between Administrative Courts and Common Courts in Poland' (2020) 58 Studia Politologiczne 49.

64 See e.g. Adam Bodnar, 'Protection of Human Rights after the Constitutional Crisis in Poland' (2018) 66 Jahrbuch des öffentlichen Rechts der Gegenwart 639, 640; Miroslaw Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland' (2019) 11 Hague Journal on the Rule of Law 417.

65 Constitution of Poland (n 61) arts 173, 178.

the Constitution) have been significantly threatened by the introduction of a number of reforms since late 2015. These directly affected the common courts and the Supreme Court, as well as the National Council of Judiciary, leading to a perceived increase in the political subordination of judges, undermining the pillars of the judiciary and decreasing the status of the profession. Reforms in the system of justice turned out to be one of the most visible facets of a broader rule of law crisis in Poland, infringing the rule of tripartite division of powers in Poland.[66] Another important facet of this crisis is a lack of respect for the hierarchy of law (or a selective approach to this, e.g. respecting EU law when it serves the objectives of the government and ignoring it when it contradicts the applied policy).[67] Despite these circumstances, human rights campaigners had little choice but to rely upon the judicial system when other approaches (e.g. inquiries and raising awareness) failed.

V. Domestic Courts Ruling on Administrative Practices at Border Checkpoints

The judgments released by the SAC mostly address problems envisaged in the Law on Foreigners and the Administrative Procedure Code,[68] as well as the

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66 See e.g. 'Rule of Law: European Commission Launches Infringement Procedure to Protect Judges in Poland from Political Control' (n 8); European Commission, '2020 Rule of Law Report: Country Chapter on the Rule of Law in Poland' (Commission Staff Working Document, 30 September 2020) SWD(2020) 320 Final <https://ec.europa.eu/info/sites/default/files/pl_rol_country_chapter.pdf> accessed 11 February 2022. See also Bodnar (n 64); Wyrzykowski (n 64); Małgorzata Gersdorf and Mateusz Pilich, 'Judges and Representatives of the People: A Polish Perspective' (2020) 16 European Constitutional Law Review 345.

67 Stanisław Biernat and Ewa Łętowska, 'This Was Not Just Another Ultra Vires Judgment!' (Verfassungsblog, 27 October 2021) <https://verfassungsblog.de/this-was-not-just-another-ultra-vires-judgment/> accessed 31 October 2021. See also the debate at the European Parliament on the rule of law crisis in Poland and the primacy of EU law. European Parliament, 'Verbatim Report of Proceedings' (19 October 2021) 27-90 <https://www.europarl.europa.eu/doceo/document/CRE-9-2021-10-19_EN.pdf> accessed 26 October 2021. For more on the selective application of EU law, see s V.

68 Ustawa z dnia 14 czerwca 1960 r Kodeks postępowania administracyjnego (tj Dz U z 2020 r poz 256 z późn zm).

Schengen Borders Code.[69] Even if the cases relate to the constitutional right to asylum,[70] seeking asylum is analysed merely as one of the negative prerequisites for issuing a refusal of entry. Therefore, while these decisions refer to denial of access to the asylum procedure, their content focuses on how the Border Guard conducted the first and second line border checks, as well as how it justified the refusal of entry. The administrative court proceedings are not recorded in any direct way (e.g. video, audio, detailed transcription, or even detailed description). This means that subsequent courts must rely solely on statements delivered by the parties. Indeed, the lack of proper documentation of the preliminary interview at the border (conducted during the second line check) has given rise to disagreement between human rights campaigners and the Border Guard and has been repeatedly addressed by first- and second-instance courts.

The Warsaw Regional Administrative Court (WRAC) has issued at least 39 judgments in cases concerning persons refused entry and pointing to the intent of applying for asylum at the border.[71] The WRAC is one of 16 Regional Administrative Courts in Poland, corresponding to the administrative division of Polish territory into 16 voivodeships. Complaints against administrative bodies are submitted to the Regional Administrative Court located not in the voivodeship where the underlying conduct giving rise to the dispute took place, but rather where the relevant administrative body has its seat. Therefore, in the first instance, only the WRAC processes complaints against refusals of entry issued by the Border Guard. Although the judgments of the WRAC are not final – they can be appealed before the SAC – they take on importance in explaining the disagreement over the legality of the disputed practices at the border.

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69 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) [2016] OJ L77/1.

70 The right to seek asylum is enshrined in article 56 of the Constitution of Poland of 1997.

71 This number does not represent all refusals of entry appealed before the administrative court.

In 26 of the 39 cases considered, the WRAC found the foreigners' complaints justified and revoked the Border Guard's decisions.[72] In the remaining 13, the WRAC upheld the decision of the Border Guard and dismissed the complaint. However, nine of these decisions were appealed before the SAC, which in two instances found improper conduct by the administrative body and revoked the decisions of Border Guard and the first-instance administrative court. The Border Guard submitted a cassation appeal in all but seven of the mentioned 26 cases, but each of these appeals was rejected.[73]

The SAC's first important rulings on the issue, released in 2018, did not exactly "open" access to the asylum procedure at the border. However, they did confirm that the administrative body had not sufficiently detailed their decisions refusing entry, in particular in cases raising doubts regarding the reasons for arrival. The Court found that the Border Guard provided insufficient documentation of the preliminary interview and failed to explain how it selected the documents it held as evidence for the refusal of entry.[74] The SAC commented on the official notes prepared by the Border Guard refusing entry in the following way:

> The content of the prepared note [...] contains very laconic information as to the circumstances that could be significant for the determination that the foreign woman may not be refused entry [...]. On the basis of this ambiguous content of the note, it is not possible to assess that there are no obstacles to issuing a decision refusing entry to the territory [...]. The questions she was asked are unknown. It is not known whether the note reflects the applicant's

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72 In 15 of these cases, the Court also ruled on the discontinuance of the administrative procedure. Such decisions have been questioned by legal experts, who indicated that judicial control over the administrative conduct becomes a façade when the court proceeding is discontinued only because the foreigner refused entry is no longer present on the territory of Poland. Chróścielewski, Hauser and Chlebny (n 16) 75.

73 The comprehensive study completed in April 2019 by the Helsinki Foundation for Human Rights, which referred to 37 cases adjudicated by the first-instance court, found a similar percentage of court decisions upholding and revoking decisions of the Border Guard. Białas, Górczyńska and Witko, *Dostęp do procedury azylowej na zewnętrznych granicach Polski* (n 60) 31–32.

74 See e.g. SAC judgment no II OSK 345/18 (20.09.2018); SAC judgment II OSK 1713/18 (02.10.2018); SAC judgment II OSK 2270/18 (11.01.2019).

> entire statement or is only a brief summary of the officer's reception, i.e. the officer's understanding of the information provided.[75]

The two last sentences of the quoted excerpt are crucial to understand the tensions at the border. Official notes did not reflect the full content of the preliminary interview; they included only the reasons justifying the refusal of entry. Without being able to compare these notes with detailed transcripts or recordings, it is impossible to know what else the foreigner might have said during the border control. According to the administrative rulings, asylum seekers do not damage their asylum claims by declaring reasons for entry that are distinct from seeking protection from persecution (such as visiting families).[76] However, officials might have mentioned only these reasons in the official notes and intentionally omitted reasons linked to seeking asylum, leading to the issuance of the refusal of entry.

The SAC assessed the value of official notes as low. Nonetheless, it admitted official notes as evidence, provided that they did not raise doubts about whether the indicated reasons clearly justified the decision issued. As one commentator has argued, if – despite being in a position to draw up a detailed report – 'the administrative body reduces its obligations to drawing official notes, it unwillingly begs the question about the real intents of the administrative body and generates the risk of neglecting the course of the events that was recorded only in that way'.[77] This opinion is echoed by other voices calling for transparency in border control procedures and, in particular, for better documentation of administrative conduct with (potential) asylum applicants.[78]

Although the domestic courts found the prevailing mode of documenting border checks insufficient to comply with the Polish administrative code in

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75 SAC judgment no II OSK 414/19 (18.07.2019).

76 SAC judgment no II OSK 345/18 (n 74); SAC judgment no II OSK 830/18 (20.09.2028); SAC judgment no II OSK 1674/18 (20.09.2018); SAC judgment no II OSK 890/18 (20.09.2018). See also Rogala (n 52) 131–32.

77 Dąbrowski (n 16). Dąbrowski's analysis relates to a case concerning a refusal of entry issued to a person whose reason for entry was not sufficiently determined.

78 'Wystąpienie do Komendanta Głównego Straży Granicznej w sprawie praktyk stosowanych wobec cudzoziemców na przejściach granicznych w Terespolu i w Medyce' (n 45); Białas, Górczyńska and Witko, *Access to Asylum Procedure at Poland's External Borders* (n 6).

any cases raising doubts regarding the reasons of entry, the Border Guard saw these rulings as pertaining only to the cases specifically appealed. While they *recognised* the negative assessment of the way they issued decisions refusing entry to individual potential asylum applicants, recognition is not the same as acceptance, as demonstrated by the persistence of the criticised practices. The border guards, with the support of the Ministry of Interior, deemed that the case law was not applicable to daily practices involving hundreds or thousands of foreigners appearing at the border checkpoints. According to one interviewed representative of the Border Guard, the rulings issued up to the end of 2018 included ambivalent statements, not consistent case law:

> Many cases related to the refusals of entry were concluded by the voivodship court or the Supreme Administrative Court [...]. We lost 20 and something cases. However, there were 19 or 18 verdicts in favour of the Border Guard. And this shows that the case law for the courts is not obvious. There were some recommendations after the visits of the Commissioner (for Human Rights) and when we found them appropriate, we implemented them. There might happen that the officer interpreted something improperly, but we supervise it [...]. It is also not simple for the front-line officer to interpret certain things on spot.[79]

For the Border Guard, the incoherence of the first instance rulings of the WRAC became an important argument to defend its practices at the border. Indeed, in 13 sentences judges found no irregularities in the conduct at the border. Following arguments presented by the Border Guard, the court pointed to the specificity of the border check (the need for efficiency foreclosing the possibility of giving access to third parties at every stage of border check) and the Border Guard's focus on preventing entry of persons not meeting the requirements posed by the law in force.[80] Moreover, in the verdicts dismissing appeals against administrative decisions by the Border Guard upholding refusals of entry, the WRAC questioned the results of the monitoring initiatives referred to by the complainants. They found them to be subjective assessments of the situation at the border, made by visitors not

79 Interview (Warsaw, Poland, 21 December 2018).

80 WRAC judgment no IV SA/Wa 2264/17 (20.02.2018).

familiar with daily practices of border control who paid attention to isolated incidents rather than common practices.[81]

The SAC, by contrast, gave credence to requests directed by the Commissioner for Human Rights to the Border Guard and the Ministry of Interior to guarantee access to the asylum procedure, based on findings from monitoring visits at the eastern border.[82] Additionally, the SAC indicated that improper conduct by administrative bodies, such as paying insufficient attention to the legal prerequisites for issuing a decision refusing entry, undermines trust towards public administration. Last, but not least, the SAC noted that lack of respect for the non-refoulement rule could be perceived as a threat to human rights protection.[83] However, this lack of respect was characterized as a consequence of 'misinterpretation' of declarations given by asylum seekers at the border. Indeed, if this issue does not appear spontaneously, officers are not obliged to verify whether or not the person undergoing border check wants to apply for international protection, as was confirmed in some judgments of the WRAC.[84] While the officers *are* obliged to clarify any stated reasons for entry that could potentially be linked to asylum seeking, the lack of evidence available to the courts usually left them no basis on which to decide whether the declarations given by foreigners were sufficiently clear.

Not all border checkpoints suffered from the same procedural deficiencies. For instance, in Medyka, at the border with Ukraine, the Border Guard routinely prepared detailed written reports in connection with its decisions on refusal of entry.[85] However, in Terespol, the most popular entry point for asylum seekers at the Belarusian-Polish border, only official notes were taken, sometimes in circumstances that did not allow for privacy and individual treatment of foreigners explaining their reasons for entering Poland despite lacking documents authorising them to do so.[86] Several

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81 WRAC judgment no IV SA/Wa 2005/17 (23.11.2017); WRAC judgment no IV SA/Wa 1044/18 (02.07.2018).

82 SAC judgment no II OSK 1062/18 (20.09.2018).

83 SAC judgment no II OSK 1752/18 (26.07.2018).

84 WRAC judgment no IV SA/Wa 1847/17 (17.10.2017); WRAC judgment no IV SA/Wa 1829/17 (21.11.2017).

85 Chrzanowska and others (n 14).

86 Ibid; Górczyńska and Szczepanik (n 14).

requests were directed to the Border Guard to unify the practices and introduce an obligation to prepare written reports before refusing entry. In response, the Border Guard found that such detailed reports were not required by Polish law and instead issued instructions for its officers to draw up official notes including only a summary of declarations given by foreigners at the border, an approach it claimed was compliant with the Schengen Borders Code.[87] In this way, the Border Guard addressed the requests in a direction that went against the purposes these requests sought to achieve.[88] This only deepened the problem described in an interview by a legal expert representing a public institution dealing with challenges faced by asylum seekers:

> The problem is that what the border guards do is completely beyond any form of documentation. [...] [A]nything can happen there and no one really has any control over what was going on between an officer and a foreigner. [...] As the Border Guard rightly points out [...] as a rule, there is no clear provision stating that the conversation conducted within second line check is to be recorded. But in our opinion, it should be. Moreover, there should be a question as to whether someone is not afraid of returning to their country of origin due to ongoing persecution. [...] The problem is that there is absolutely no political will to introduce such a change. [...] We are not talking in terms of good or bad practice here, we are talking about a fundamental violation of the law at this point. It is not a good practice when we simply want to lead to the situation in which a foreigner is able to actually exercise their rights.[89]

The Border Guard has always emphasised its independence in conducting border checks and competency to assess whether the conditions of entry are

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87 'Rozmowy Straży Granicznej z cudzoziemcami na granicy nie będą protokołowane. Odpowiedź MSWiA dla Rzecznika' (n 58).

88 Referring to practices observed in the Polish context, legal experts noticed that an exceptional mode of conduct became the rule – Border Guards deciding on the refusal of entry often checked what documents foreigners did or did not possess. Such a practice should be an exception, reserved for cases that do not give rise to any doubt (when reasons potentially related to seeking protection are not presented). In all other cases, Border Guard should clarify whether or not the person may be let in and provide detailed documentation determining the reasons for entry. Chróścielewski, Hauser and Chlebny (n 16) 72.

89 Group Discussion (Warsaw, Poland, 10 December 2018).

fulfilled. It has also stressed the impossibility of third party presence (such as legal representatives) during border checks.[90] The courts expressed other views on this issue, but they were inconsistent with one another. In one of the SAC verdicts, the Court stated that, if a legal representative is present at the border and was formally authorised to represent the foreigner before they came to the border, this representative should be allowed to be present during the second-line check.[91] This is because this part of the border check could have important administrative consequences for the foreigner.[92] However, in another SAC judgment, the Court emphasised that, where a legal representative 'overtakes' the role of a foreigner undergoing a border check and interrupt's the foreigner's declaration of intent to apply for asylum, then the preliminary interview should be continued without their presence.[93] Such inconsistency in the judicial approach towards this issue could work in favour of the administrative body. Indeed, the Border Guard took advantage of all arguments made available by the courts in justifying its refusal to allow the presence of legal representatives during border checks.

VI. (Lack of) Influence of European Court of Human Rights Judgments

In light of the Border Guard's disregard of the domestic case law – case law which, with time, became more extensive and coherent[94] – human rights

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90 See e.g. the Border Guard's press release concerning the intervention undertaken by professional lawyers at the border checkpoint in Terespol in March 2017: 'Komunikat dotyczący sytuacji na przejściu granicznym w Terespolu' (Komenda Główna Straży Granicznej, 17 March 2017) <https://strazgraniczna.pl/pl/aktualnosci/4674,Komunikat-dotyczacy-sytuacji-na-przejsciu-granicznym-w-Terespolu.html> accessed 23 November 2020. For the SAC's assessment of arguments given by the Border Guard in the appeal procedures before the court, see e.g. SAC judgment no II OSK 445/18 (20.09.2018); SAC judgment no II OSK 2868/18 (11.01.2019).

91 SAC judgment no II OSK 2109/18 (20.11.2018).

92 Chróścielewski, Hauser and Chlebny (n 16).

93 SAC judgment no II OSK 2700/18 (11.01.2019).

94 In particular, SAC judgments became very consistent in requiring the Border Guard to prepare written detailed reports based on its interviews with migrants prior to refusing entry in cases giving rise to doubts about the declared reasons of

campaigners involved in asylum-related cases came to believe that it was necessary to submit complaints to the European Court of Human Rights (ECtHR). Domestic courts could only address the problem faced by asylum seekers at the checkpoints at the eastern border of Poland from the perspective of administrative conduct. Initiating proceedings before ECtHR aimed instead at obtaining a judicial assessment of access to the asylum procedure from a human rights perspective.[95] The first key ruling, *M.K. and Others v Poland*, based on three cases of Chechen nationals refused entry into Poland on multiple occasions,[96] was released on 23 July 2020. The judgment was long-awaited among human rights campaigners in Poland since it related directly to the situation at the Polish border. An earlier verdict on similar issues, *M.A. and Others v Lithuania*,[97] had failed to produce a direct impact on administrative practices towards asylum seekers at the Polish eastern border. Persons willing to apply for international protection were still refused entry at border checkpoints and sent back to Belarus, which was indicated in *M.A. and Others v Lithuania* as an unsafe country for Chechen nationals.[98]

The case *M.K. and Others v Poland* represented the joint adjudication of three complaints submitted by a total of 13 Chechens (including eight minors) who were refused entry and denied access to the asylum procedure in Poland multiple times. It provided a number of detailed descriptions of how declarations given by foreigners were treated by the Border Guard and what role could have been played by detailed written reports, if they had been obligatory. The judgment also sheds light on the arguments presented by both parties in the appeal procedures. Therefore, the judgment serves as a useful summary of the numerous accounts and statements given by both

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entry. See SAC judgment no II OSK 829/18 (20.09.2018); SAC judgment no II OSK 414/19 (n 75).

95 In CEE countries, the ECtHR may be treated as a *de facto* asylum court. Michał Kowalski, 'International Refugee Law and Judicial Dialogue from the Polish Perspective' in Anna Wyrozumska (ed), *Transnational Judicial Dialogue on International Law in Central and Eastern Europe* (Wydawnictwo Uniwersytetu Łódzkiego 2017).

96 *MK and Others v Poland* (n 5).

97 *MA and Others v Lithuania* (n 5).

98 Białas, Górczyńska and Witko, *Dostęp do procedury azylowej na zewnętrznych granicach Polski* (n 60) 21. See also Szulecka, 'Border Management and Migration Controls in Poland' (n 56).

human rights campaigners and the administration responsible for migration control in this context.

The experiences of a Chechen couple with minor children attempting to enter Poland and apply for asylum, referred to in the judgment, constitutes just one of many accounts pointing to quite clearly stated, but 'unheard' wish to ask for protection:

> The applicants presented to the border guards documents confirming that, as torture victims, they had developed post-traumatic stress disorder. [...] 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 [...]. The official notes prepared by the officers of the Border Guard reported that the applicants had indicated (as reasons of entry), *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.[99]

The ECtHR confirmed that the Border Guard's conduct violated article 3 of the European Convention on Human Rights (ECHR). The court found that, by repeatedly refusing to receive asylum applications at the border, Polish authorities exposed asylum seekers to risks of experiencing torture or inhumane or degrading treatment in Belarus or Russia.[100] Administrative practices at the border were also found to violate article 13 of the ECHR, since decisions refusing entry were executed immediately, regardless of any pending appeal, depriving asylum seekers of an effective remedy with suspensive effect.[101] The ECtHR construed individual refusals of entry issued to asylum applicants as part of a wider policy aimed at denying entry to foreigners coming from Belarusian territory, which amounted to collective expulsions prohibited under article 4 of Protocol No 4 of the ECHR.[102] The ECtHR also found that the way in which Polish authorities neglected the

99 *MK and Others v Poland* (n 5) paras 55-56.

100 Ibid paras 174-86.

101 Ibid paras 219-20.

102 Ibid paras 204-11.

ECtHR interim measures prohibiting sending asylum seekers to Belarus violated article 34 of the ECHR.[103]

The crucial outcome of this ruling, however, is that the Court found in the experiences of complainants refused entry a 'systemic practice of misrepresenting statements given by asylum seekers'.[104] Thus, it assessed the accounts of human rights campaigners (including public institutions, such as the Commissioner for Human Rights or Commissioner of Children's Rights, and the NGOs) more reliable than the explanation provided by the government, which claimed that no declarations of the will to apply for asylum were given by foreigners at the border and that the persons concerned migrated solely for economic reasons.

The ECtHR judgment also provided a reflection on how Polish authorities neglected interim measures that it had issued upon request of lawyers supporting asylum seekers. Based on convincing evidence that applicants could not feel safe in Chechnya and that the territory of Belarus did not offer them freedom from persecution, the ECtHR received submissions under Rule 39 of the Rules of Court[105] asking it to issue a decision requesting Polish authorities not to return a particular family to Belarus. The Court received similar requests with regard to three other Chechen nationals and one citizen of Syria (whose case was adjudicated within the joined case *D.A. and Others v Poland*).

The interim measures issued by the ECtHR in response to these requests were ignored at the border checkpoint – asylum seekers covered by these decisions were refused entry to Poland on several occasions. The Polish government argued that there was no real risk of irreparable harm from sending the asylum applicants back to Belarus, as they had already stayed there for a few months.[106] The government also stated that the interim measures were not applicable because the persons concerned were not allowed to enter Poland. In consequence, they could not be removed since they were not under the authority of Poland. In this respect, the

103 Ibid paras 235-38.

104 Ibid paras 178.

105 ECtHR, 'Rules of Court' (1 January 2020) <https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf> accessed 25 November 2020.

106 *MA and Others v Lithuania* (n 5) para 226.

government's argument ignored the reasoning advanced by the ECtHR in support of the interim measures, according to which persons subjected to controls by the Polish border service on Polish territory fall under the authority of Poland.[107]

The Polish government used a similar strategy – based on denying its own authority to act – to avoid ECtHR interim measures in another case involving a group of 32 Afghani nationals stranded at the Belarusian-Polish border for several weeks.[108] Polish authorities denied them entry into the territory of Poland and ignored their declarations of intent to apply for asylum (expressed verbally, in the presence of Polish border services, human rights campaigners, and the media). To prevent inhumane and degrading treatment and secure their right to life, the ECtHR imposed interim measures ordering the Polish authorities to provide the asylum seekers with food, clothes, necessary medical aid and – if possible – shelter.[109] At the same time, however, the ECtHR emphasised the authority of the states to control the border and decide who is allowed to enter or not. This became the Polish authorities' key argument in refusing to provide asylum seekers with any support, since their physical presence on Belarusian territory meant that helping them would violate the territorial integrity of another country.[110]

In their response to the ECtHR, Polish authorities suggested that the optimal solution for asylum seekers would be to approach the closest border crossing and apply for international protection there.[111] The authorities emphasised that the Belarusian border services were not interesting in allowing migrants to return to Belarus because they were profiting from 'pushing in' migrants to EU territory. This solution was proposed by the same

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107 Ibid para 236.

108 *RA and Others v Poland* (n 42).

109 These interim measures were also imposed on authorities in Latvia with respect to 41 Iraqi nationals stuck at that country's border with Belarus. *Ahmed and Others v Latvia* App no 42165/21 (ECtHR, 25 August 2021).

110 'Poland Provided the ECHR with Its Position on the Order for Interim Measures' (Ministry of the Interior and Administration, 30 September 2021) <https://www.gov.pl/web/mswia-en/poland-provided-the-echr-with-its-position-on-the-order-for-interim-measures> accessed 27 October 2021.

111 Ibid. The asylum seekers were staying approximately 30 kilometres from the closest border crossing point.

Polish authorities that for multiple years had been reducing access to the asylum procedure at border crossing points and disregarded domestic and ECtHR law in this respect. The governmental approach to the interim measures raised concerns around whether ECtHR judgments would have any impact on policies towards asylum seekers at the border. Such concerns appeared substantiated – regardless of the rank and the character of court delivering the judgment in favour of asylum seekers, the arguments given by the courts were interpreted as pertaining only to specific incidents.

Assessing the impact of the judgment in *M.K. and Others v Poland* became challenging due to restrictions on border crossings introduced by state actors during the COVID-19 pandemic in 2020-21. In theory, this should not have affected forced migrants' access to asylum procedures at the border. In practice, however, such access was precluded by the closure of border checkpoints and the suspension of cross-border train connections. People seeking asylum were not included in the list of categories of persons authorised to cross the border and enter Polish territory during the time when the provisions restricting cross-border mobility were in force.[112] In response to the increasing number of arrivals through the 'green border' in August 2021, pandemic-related provisions were changed to stipulate the immediate return of any persons detected after crossing the border in an unauthorised manner (through a closed checkpoint or outside of checkpoints), effectively excluding the possibility of applying for asylum in such circumstances. Though as a mere ministerial decree this provision did not supersede the right to submit an asylum application, in practice it provided a legal basis for unlawful pushbacks.

The years 2020 and 2021 raised further questions about the state's approach towards asylum seekers, in particular its double standards in this respect. After August 2020, asylum seekers originating from Belarus enjoyed a

[112] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 13 marca 2020 r w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych (Dz U poz 435 z późn zm). See also 'Koronawirus a prawa cudzoziemców szukających ochrony przed prześladowaniami. RPO pyta Straż Graniczną o obecne procedury na granicy wschodniej' (Rzecznik Praw Obywatelskich, 2 April 2020) <https://bip.brpo.gov.pl/pl/content/koronawirus-granice-ochrona-miedzynarodowa-w-Polsce> accessed 29 July 2021.

welcoming approach at the border and, later on, support in economic adjustment. To some extent, this welcoming approach was applied also to Afghani nationals evacuated directly from their country of origin. Despite declaring readiness to issue only 45 humanitarian visas,[113] Polish authorities ultimately offered approximately one thousand Afghani citizens the chance to reach a safe place in Poland and submit asylum applications.[114] In general, however, non-Belarusian citizens seeking asylum faced a continuation of the deterrence policy, unchanged by the ECtHR judgment of July 2020. Almost one year later, on 8 July 2021, another ECtHR judgment was announced, in the case *D.A. and Others v Poland*.[115] It referred to the contested administrative practices at the border checkpoint in Terespol – this time towards asylum seekers from Syria previously living in Belarus. The Court in this case essentially repeated the conclusions from its judgment in *M.K and Others v Poland*. The Court noted that decisions refusing entry violated not only the provisions of the ECHR, but also domestic law, and were not compliant with 'judgments of the domestic administrative courts that held that the officers of the Border Guard had not conducted sufficient evidentiary proceedings in the applicants' cases'.[116]

The unchanged situation one year after the key ruling in *M.K. and Others v Poland*, the filing of additional ECtHR cases (e.g. *D.A. and Others v Poland* and *Sherov v Poland*),[117] and other facets of the state's incomprehension of EU values and international law,[118] do not encourage faith in case law as a factor

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113 'Ważne jest zaangażowanie polskich władz w sytuację w Afganistanie. Rzecznik pisze do MSZ' (Rzecznik Praw Obywatelskich, 18 August 2021) <https://bip.brpo.gov.pl/pl/content/wazne-jest-zaangazowanie-polskich-wladz-w-sytuacje-w-afganistanie-rzecznik-pisze-do-msz> accessed 2 November 2021.

114 'Statystyki' (n 25).

115 *DA and Others v Poland* App no 51246/17 (ECtHR, 8 July 2021).

116 Ibid para 60.

117 *Sherov v Poland and 3 Other Applications* App no 54029/17 (ECtHR, 11 January 2021).

118 Apart from the already mentioned threats to the rule of law, this includes, for instance, discrimination against minority groups, such as the LGBT+ community. See e.g. Tímea Drinóczi and Agnieszka Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20 German Law Journal 1140; Zofia Kinowska-Mazaraki, 'The Polish Paradox: From a Fight for Democracy to the Political Radicalization and Social Exclusion' (2021) 10 Social Sciences 112.

shaping governance of forced migration in Poland. The same claim can be made about the state's response to the increased number of arrivals of migrants from states in crisis in Asia and Africa entering Poland through the territory of Belarus. Blocking the possibility to provide humanitarian aid in the border area,[119] ignoring requests for asylum from migrants crossing the 'green border', and the continued and increasingly legalised practice of pushbacks,[120] do not create expectations that the authorities will comply with the case law discussed above on access to the asylum procedure at the border. It is, however, probable that, while ignoring the case law in favour of the asylum seekers, the authorities will emphasise the role of judgments in favour of practices aimed at returning migrants who crossed the border in an unauthorised manner.[121] This, in turn, may further substantially reduce access to the asylum procedure in Poland.

VII. Concluding Remarks

The analysis presented in this article was inspired by the growing number of accounts pointing to ignored declarations of intent to apply for asylum at checkpoints along the eastern border of Poland, in the context of developing

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119 Or refusing to provide aid as ordered by the ECtHR in interim measures. See *RA and Others v Poland* (n 42).

120 Provisions authorising pushbacks have been introduced in the legislation despite their non-compliance with the 1951 Geneva Convention and EU directives regarding asylum. See e.g. Convention Relating to the Status of Refugees (adopted 28 July 1951 and entered into force 22 April 1954) 189 UNTS 150, art 33(1); 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 [2011] OJ L 337, art 21(1); 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 [2013] OJ L 180, arts 8-9.

121 E.g. *ND and NT v Spain* App nos 8675/15 and 8697/17 (ECtHR, 13 February 2020). For concerns regarding the possible impact of this judgment on justifying pushbacks at the EU external borders, see Nora Markard, 'A Hole of Unclear Dimensions: Reading ND and NT v. Spain' (EU Immigration and Asylum Law and Policy, 1 April 2020) <https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/> accessed 2 November 2021.

domestic and international case law in this respect. Disputed practices at the border involving asylum seekers have been assessed by two types of courts: domestic administrative courts and the ECtHR. The domestic courts decided on the legality of activities undertaken by Border Guard without investigating the facts. In other words, administrative courts did not verify whether complainants were asking for asylum at the border or not; they merely assessed whether the administrative decision refusing them entry was taken in a just manner. The ECtHR, for its part, assessed the reported cases from the perspective of human rights infringements. Regardless of the different scope of the assessment of the complaints, both the Polish SAC and the ECtHR found the administrative practice of refusing entry to persons declaring their will to apply for international protection improper, infringing either on the provisions of administrative proceedings or on the migrants' human rights.

In its rulings, the SAC included guidance for how the Border Guard should conduct themselves when they take a decision on refusal of entry, reminding them that such a decision is precluded by a migrant's expression of an intent to apply for asylum. The ECtHR, adjudicating complaints from asylum seekers repeatedly sent back from the Polish border to Belarus or Ukraine without the possibility to file asylum applications, found violations of a number of articles of the ECHR. However, as of this writing, neither the rulings at the domestic nor the international level have changed the administrative practices involving asylum seekers at the border, a facet of the Polish administration's broader deterrence policy. This fact confirms the weak role of courts in shaping forced migration governance in the area of access to the asylum procedure at the Polish border.

Responding to the domestic and international courts' assessments, both the Border Guard and the government stressed that, while malpractices could happen incidentally, they represented isolated incidents. This has become the main argument for downplaying the court decisions and neglecting the changes emerging in the developing case law. Over time, the case law has become coherent and clear about the conduct of the administrative body at the border checkpoints. The ECtHR has concluded that the administrative practices at the border were not incidental, but instead constituted an element of broader state policy, a 'systemic practice of misrepresenting

statements given by asylum-seekers'[122], and a 'wider state policy refusing entry to foreigners coming from Belarus'.[123] The government saw such a conclusion as unjust and incompatible with its vision for forced migration management, which provided the authorities with sufficient reason to undermine court guidelines.

The Polish authorities' continued efforts to deter asylum seekers and refusal to comply with domestic and ECtHR case law is part of a broader policy towards forced migrants. In particular, since political debates on the threats posed by cross border mobility intensified in 2015, the Polish government has perceived a conflict between respect for the rights of individuals and the security of the state. There has been no 'golden mean' on the horizon. Disregard for case law seems to reflect the readiness of the authorities to break the rules, if only to deliver on their promise of preventing the arrival of 'undesirable' migrants, among whom asylum seekers constitute a visible group. The situation at the Polish-Belarusian border since August 2021 confirms this approach. The rules being infringed this time, however, include not only the right to asylum, but also the rights to life, safety, and freedom from inhumane treatment. The objective of protecting the external border has become paramount, justifying all actions deployed by the authorities against people seen as a 'weapon' in the hands of the Belarusian dictatorship.[124]

Anti-refugee or anti-immigrant sentiments, together with prioritising state security over human rights, do not sufficiently explain the weak influence of both domestic and international courts on government policy. Another factor is the ambiguous relationship between the judiciary and the executive in Poland. Also of importance is a current of disregard for international commitments and decisions issued by international judicial bodies. Altogether, these problems may be framed as a crisis of the rule of law,

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122 *MK and Others v Poland* (n 5) para 174.

123 Ibid para 208.

124 For comments on mobility across Polish-Belarusian in the context of a planned border fence, see Jan Grzymski, Marta Jaroszewicz and Mateusz Krępa, 'Walling the EU Borders: Past Experiences and (In)Effectiveness. The Context for the Fence at the Polish-Belarusian Border' [2021] (9) CMR Spotlight. Centre of Migration Research Newsletter <http://www.migracje.uw.edu.pl/wp-content/uploads/2021/10/Spotlight-SEPTEMBER-2021.pdf> accessed 27 October 2021.

characterized by an apparent disrespect for the hierarchy of law, the undermining of judicial assessments, and a decreased emphasis on values such as respect for human rights. In these circumstances, the main principle of both domestic and international legal systems, i.e. that the law 'must bind not only the ruled, but also – and primarily – those who hold the power',[125] is neglected.

Verdicts issued by domestic and international courts are released months or years after the events under question – in other words, long past the time of refusal of entry. For legal professionals and the administration, these verdicts are simply case law to be taken into account (or ignored). For the individuals whose experiences become the subject of court assessment, they may constitute delayed reactions to infringements of their fundamental rights. Although these reactions do not solve these problems when they appear, they may compensate for harm experienced.[126] However, taking into account the thousands of forced migrants who were denied possibility to apply for asylum at the border, recognition of harms and awards of monetary compensation in just a few exemplar cases does not remedy the situation. The crucial thing is that, despite case law and clear guidelines on how domestic and international law should be implemented, for forced migrants, being permitted entry into Poland to exercise the right to seek asylum is not the rule, but the exception.

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125 Gersdorf and Pilich (n 66) 350.

126 In its judgment in *MK and Others v Poland* (n 5), the ECtHR ordered Poland to pay EUR 34,000 to compensate the non-pecuniary damage of the applicants in each of the three adjudicated cases (40503/17, 42902/17, and 43643/17).