



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

FIRST SECTION

CASE OF NIKOGHOSYAN AND OTHERS v. POLAND

(Application no. 14743/17)

JUDGMENT

Art 5 § 1 (f) • Prevent unauthorised entry into country • Automatic placement of a family of adult and child asylum-seekers in six-month-long detention without thorough and individualised assessment of particular situation and needs • Family's detention not a measure of last resort • As minors detained, greater speed and diligence required

STRASBOURG

3 March 2022

FINAL

03/06/2022

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

In the case of Nikoghosyan and Others v. Poland,

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

Péter Paczolay, *President*,
Krzysztof Wojtyczek,
Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Ioannis Ktistakis,
Davor Derenčinović, *judges*,

Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 14743/17) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by five Armenian nationals, Mr Artur Nikoghosyan, Ms Varditer Hovhannisyan, and their children, Elen, Mamikon and Maria Nikoghosyan (“the applicants”), on 15 February 2017;

the decision to give notice to the Polish Government (“the Government”) of the complaints concerning the applicants’ administrative detention;

the decision to give priority to the application (Rule 41 of the Rules of Court);

the decision of the Armenian Government not to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

the parties’ observations;

Having deliberated in private on 1 February 2022,

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

INTRODUCTION

1. The case concerns automatic placement of a family of adult and child asylum-seekers in six-month-long detention without an individualised assessment of their particular situation and needs.

THE FACTS

2. The first applicant, Mr Artur Nikoghosyan, was born in 1967. The second applicant is his wife, Ms Varditer Hovhannisyan, who was born in 1979. The third, fourth and fifth applicants are their children, Mamikon Nikoghosyan, Elen Nikoghosyan and Maria Nikoghosyan, who were born in 2002, 2003 and 2015 respectively. All the applicants are Armenian nationals and currently residing in Biała Podlaska. The applicants were represented by Ms S. Paduchowska, a lawyer practising in Lublin.

3. The Government were represented by their Agents, Ms J. Chrzanowska and, subsequently, Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND

5. In the period between 25 October and 3 November 2016 the applicants attempted on numerous occasions to enter Poland at the border crossing in Medyka.

6. The first applicant submitted that Polish border guards had prevented him and his family from crossing the border and from filing their applications for asylum, despite the fact that they had expressed their determination to lodge such applications. The Government submitted that the applicants had not had any valid travel documents. Furthermore, they had not declared any intention to apply for international protection, but had instead stated that they wished to settle in Poland for economic reasons.

7. The officers of the Border Guard then summarily turned the family away to Ukraine.

8. It appears that on 25, 28 and 31 October 2016, 1 November 2016 and twice on 3 November 2016, administrative decisions were issued turning the applicants away from the Polish border on the grounds that the family did not have any documents authorising their entry into Polish territory and that the applicants had stated that they were not at any risk of persecution in their home country but were emigrating for economic reasons. No copies of these decisions have been submitted to the Court. They were described in the above terms in the decisions of 7 November 2016 (see paragraphs 14-17 below).

II. ASYLUM PROCEEDINGS

9. On 6 November 2016 the first applicant lodged an asylum application with the border guards in Medyka on behalf of himself and his family. The first applicant submitted that if they were returned, he and his family would be at risk of persecution in their home country because of his involvement in an opposition movement.

10. On 9 December 2016 the first and second applicants each had an asylum interview.

11. On 19 April 2017 the head of the Aliens Office (*Szef Urzędu do Spraw Cudzoziemców*) decided not to grant the applicants refugee status and international protection. The authority concluded that the evidence obtained in the case did not demonstrate that the applicants were at any risk to their life or limb if they returned to their home country.

12. It appears that the applicants appealed against the above-mentioned decisions and that the proceedings are ongoing.

III. ADMINISTRATIVE DETENTION

13. On 7 November 2016 the Przemyśl District Court (*Sąd Rejonowy*) ordered that the first applicant and his three children be committed to the guarded centre for aliens (*Strzeżony Ośrodek dla Cudzoziemców*) in Biała Podlaska for 60 days.

14. The court observed, firstly, that the presence of the first applicant during the asylum proceedings in his case had to be ensured in order to check his contradictory statements as to the reason for the family's emigration to Poland and their fears of persecution in their home country. In this regard, it was noted that on 25, 28 and 31 October 2016, 1 November 2016 and twice on 3 November 2016, administrative decisions had been issued turning the applicants away from the Polish border on the grounds, *inter alia*, that they had stated that they were not at any risk of persecution in their home country but were emigrating for economic reasons (see paragraph 8 above).

15. Secondly, the court relied on the high risk that the first applicant would abscond, given that he had filed his asylum application after being prevented several times from crossing the border illegally.

16. Thirdly, the court considered that the first applicant's presence in Poland could not be ensured by any of the statutory alternatives to detention, such as regular reporting to the authorities, a deposit equal to twice the monthly minimum salary (that is, 3,700 Polish zlotys; approximately 874 euros (EUR)), or his residence at a specified address. More specifically, the court found that no alternative measure could be ordered because the family had only EUR 50 and did not have any address in Poland, and that it would therefore be impossible to assign them to a particular regional asylum authority.

17. On the same date the Przemyśl District Court issued a similar decision in respect of the second applicant.

18. On 25 November 2016 the first applicant, and on an unspecified date the second applicant, appealed against the impugned decisions, arguing that their repeated attempts to enter Polish territory without proper documents had resulted from difficulties of communication between them and the border guards.

19. On 7 December 2016 the Przemyśl Regional Court (*Sąd Okręgowy*) upheld the decision of 7 November 2006 in respect of the second applicant.

20. On 19 December 2016 the Przemyśl Regional Court upheld the decision of 7 November 2006 in respect of the first applicant and his three children.

21. The Regional Court relied on the same reasons as the first-instance court. Moreover, it explained that the applicants' previous attempts to enter Poland without proper documents and solely for economic reasons triggered the statutory presumption that they were highly likely to abscond (see section 87(2) of the 2013 Act, cited in paragraph 33 below).

22. On 27 December 2016 the first and second applicants applied for release from the guarded centre for aliens on the ground that during their interviews earlier in December they had not been informed that any other evidence would be sought by the authorities. The presence of the adult applicants at the guarded centre was therefore not necessary for the continuation of the asylum proceedings concerning their family.

23. On 5 January 2017 the Biała Podlaska District Court extended the administrative detention of the first applicant and his children until 6 May 2017. The domestic court observed that it was necessary to obtain further evidence in order to complete the asylum proceedings concerning the applicants. It followed that the applicants' presence in Poland had to be ensured by means of their detention because, in the light of the equivocal information provided by the first applicant, it was highly probable that the applicants were intending to flee Poland. The text of the decision twice refers to the first applicant using a feminine form.

24. On 25 January 2017 the Lublin Regional Court upheld the above-mentioned decision. The court held that the grounds for the first applicant's detention were still valid, that no alternatives to detention existed and that the measure did not pose any threat to the well-being of the first applicant's three children. The court found that the children had access to adequate medical and psychological care. Their best interests were also secured by the fact that they were not separated from their parents.

25. On 5 January 2017 the Biała Podlaska District Court issued a similar decision in respect of the second applicant, who, in the text of the decision, is referred to twice using a feminine form and five times using a masculine form or as "the son of". The domestic court observed that it was highly likely that the applicant would flee Poland because of "the facts of his [original writing] behaviour" and "repeated attempts to cross the Polish border without [proper] documents during the [asylum] proceedings".

26. On 11 January 2017 the head of the Biała Podlaska Border Guard (*Komendant Placówki Straży Granicznej*) issued two decisions refusing to grant the first and second applicants' release from the guarded centre for aliens. The authority essentially reiterated the reasons which had been relied on by the domestic courts in the decisions described above (see paragraphs 14-25 above).

27. It appears that on 12 January 2017 the first and second applicants appealed to the Regional Court against the decisions of 5 January 2017. They argued that the decisions ordering and upholding their administrative detention had been schematic and arbitrary. More specifically, they submitted that when they had previously attempted to cross the border between Ukraine and Poland, the Polish border guards had refused to communicate with them and, ultimately, to allow them to file an asylum application, turning them away in summary fashion. The applicants also maintained that they had never stated that their wish to immigrate to Poland was for economic reasons. They

also argued extensively that the authorities which had ordered their detention had disregarded the best interests of their minor children. In particular, they had not viewed detention as a measure of last resort and had overlooked the fact that the guarded centre for aliens in Biała Podlaska was not suitable for children's needs.

28. It is not known whether the applicants also lodged an appeal with a district court against the Border Guard's decisions of 11 January 2017.

29. On 5 May 2017 the applicants were released from the guarded centre as the maximum statutory period for administrative detention had come to an end (see paragraph 34 below *in fine*).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

30. The procedure for granting refugee status and "tolerated stays" and for the expulsion and detention of aliens is regulated by the Aliens Act of 13 June 2003, which grants protection to aliens within the territory of the Republic of Poland (*Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej* – "the 2003 Act").

31. Matters relating to the administrative detention of aliens, their placement in and release from guarded centres and the living conditions in such facilities, including the admission of families with minor children and the provision of healthcare and education, are regulated by the 2003 Act in so far as the relevant provisions were not repealed by the Aliens Act of 12 December 2013 (*Ustawa o cudzoziemcach* – "the 2013 Act"), which entered into force on 1 May 2014.

32. Section 87(1) of the 2003 Act enumerates the grounds for the detention of asylum-seekers. Under point 2 of this provision, such detention may be ordered for the purpose of gathering, with the participation of the asylum-seeker, information which forms the basis for the application for international protection and which cannot be obtained without the detention of the asylum-seeker, if there is a significant risk of his or her absconding. Additionally, according to point 5 of this provision, such detention may be ordered where the alien concerned is likely to abscond and it is not possible to transfer him or her immediately to another European Union member State.

33. Section 87(2), point 2, of the 2003 Act sets out a presumption of fact in respect of persons seeking international protection, according to which a probability of their absconding exists if they have crossed or attempted to cross the border illegally, unless they arrived directly from a territory in which they were in danger of persecution or of serious harm and presented credible reasons for their illegal entry into Poland and applied for international protection as soon as they crossed the border.

34. Under section 89 of the 2003 Act, placement in a guarded centre is initially ordered for a maximum period of sixty days. Pending the completion of the asylum proceedings, detention of the alien concerned may be extended

for the period that is deemed necessary for the adoption of a final decision in the matter and for the implementation of the removal order. The total duration of detention in a guarded centre may not exceed six months.

35. Pursuant to section 401(4) of the 2013 Act, a court examining a request for a migrant accompanying a child to be placed in a guarded centre for aliens must consider the child's best interests.

36. A remedy entitling aliens to seek compensation for their manifestly unjustified placement in a guarded centre for aliens is provided for under section 407(1) of the 2013 Act, which, in so far as relevant, reads as follows:

"1. An alien is entitled to compensation for pecuniary and non-pecuniary damage from the State Treasury in the event of unjustified ... placement in a guarded centre or unjustified imposition of detention for aliens."

37. This procedure is further regulated under Articles 552 § 4 to 555 of the Code of Criminal Procedure, in so far as applicable. Any claim for compensation becomes time-barred one year after the person's release from detention (Article 555).

38. In addition, Article 23 of the Civil Code, which entered into force in 1964, contains a non-exhaustive list of so-called "personal rights" (*prawa osobiste*). This provision states:

"The personal rights of an individual, in particular health, liberty, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, the inviolability of the home, scientific or artistic work, [as well as] inventions and improvements, shall be protected by the civil law, regardless of the protection laid down in other legal provisions."

Pursuant to Article 24 paragraph 1 of the Civil Code:

"A person whose personal rights are at risk [of infringement] by a third party may seek an injunction, unless the activity [complained of] is not unlawful. In the event of an infringement, [the person concerned] may also require the party responsible for the infringement to take the necessary steps to remove [the infringement's] consequences ... In compliance with the principles of this Code, [the person concerned] may also seek pecuniary compensation or may ask the court to award an adequate sum for the benefit of a specific public interest."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

39. The applicants complained that their administrative detention in the guarded centre for aliens had violated Article 5 § 1 (f) of the Convention, which reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

...”

A. Admissibility

1. Parties' submissions

40. The Government made a preliminary objection alleging that the application was inadmissible for non-exhaustion of domestic remedies.

41. They argued that the applicants should have lodged an action for compensation for unjustified detention in a guarded centre under section 407 of the 2013 Act (see paragraph 36 above). To this end, the Government referred to several domestic court judgments in which plaintiffs had been awarded compensation for their past administrative detention.

42. The Government also argued that the applicants could alternatively have brought an action under Articles 23 and 24 of the Civil Code, seeking compensation for infringement of their personal rights.

43. The applicants replied that they had complied with the requirement to exhaust domestic remedies as they had appealed against the decisions of 7 November 2016 ordering their detention in the guarded centre.

2. The Court's assessment

44. The general principles relating to exhaustion of domestic remedies are set out in the judgment in the case of *Bistieva and Others v. Poland* (no. 75157/14, §§ 52-57, 10 April 2018).

45. In particular, the issue whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)).

46. The Court reiterates that a remedy seeking to challenge the legality of an ongoing deprivation of liberty must, in order to be effective, offer the person concerned a prospect of ending the situation complained of (see *Gavril Yossifov v. Bulgaria*, no. 74012/01, § 40, 6 November 2008, and *Mustafa Avci v. Turkey*, no. 39322/12, § 60, 23 May 2017).

47. In the present case, on the date on which their application was lodged with the Court the applicants were being detained in the guarded centre for aliens. It follows that neither of the remedies suggested by the Government, as they are of a purely compensatory nature, could have resulted in the applicants' release even if their detention had been found to be unlawful or unjustified (see *Bilalova and Others v. Poland*, no. 23685/14, § 64, 26 March 2020, and contrast *Bistieva and Others*, cited above, §§ 58-66).

48. It follows that the Court must reject the Government's preliminary objection.

49. Moreover, the Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

50. The applicants submitted that their administrative detention was contrary to the requirements of Article 5 § 1 (f) of the Convention.

51. The measure had been arbitrary in that the authorities had disregarded their claim that they had feared persecution in their home country and instead had considered that the family had been trying to settle in Poland for economic reasons.

52. Moreover, the measure had not complied with the requirements of necessity and proportionality. There had been no risk they would flee the country. In fact, even after their release from the guarded centre they had stayed in Poland, awaiting the end of the asylum proceedings.

53. The applicants claimed that the authorities had not considered any alternative and less stringent measure to secure their presence in Poland pending completion of the asylum proceedings. Instead, the authorities had treated their case in a superficial manner, influenced by the general situation at the country's border. As to the latter, the applicants essentially noted that there had been a pattern of ordering administrative detention of persons who, like them, had lodged their first asylum application after having previously been turned away from the Polish border. The Polish border guards had, at the material time, intensified the practice of using summary procedures to turn away migrants trying to cross the Polish eastern border without the necessary documents. The applicants referred to several applications which the Court had notified to the respondent State in this context.

54. The applicants also submitted that the courts had ordered their detention in a guarded centre in complete disregard of the interests of their minor children – the three minor applicants and the fourth, newly born, child. They argued that children's best interests were threatened by any detention measure, even where the children were not separated from their parents. The applicants added that their detention in the guarded centre had been a highly traumatic experience for the children. In that connection they submitted medical certificates issued in March 2017. These documents stated that the third applicant, the eldest child, had been experiencing chest pains, headaches, dizziness, fainting, sleep disturbance, lack of appetite, depression,

social withdrawal and constant anxiety. The doctors had attributed these symptoms to the family's detention.

55. The applicants also complained that their detention had lasted too long, especially given the fact that the only evidence necessary for the examination of their asylum application had already been obtained in December 2016, when the first and second applicants had had their interviews (see paragraph 16 above).

(b) The Government

56. The Government submitted that the applicants' detention from 7 November 2016 until 5 May 2017 had been in accordance with Article 5 § 1 (f) of the Convention.

57. They argued that the measure had been lawful and necessary given the risk that the applicants would abscond. That risk had been based on a statutory presumption stemming from the fact that the applicants had applied for asylum only after several unsuccessful attempts to cross the border illegally (see paragraphs 15 and 33 above). Moreover, as stated in the District Court's decisions of 7 November 2016, the applicants' presence had had to be secured in order to obtain comprehensive information about their situation in so far as it had been relevant to their asylum application (see paragraphs 14 and 32 above).

58. The Government also stressed that the courts had considered alternative measures but had concluded that the applicants had not qualified for any less stringent measure (see paragraph 16 above).

59. Lastly, the Government submitted that the authorities had given due regard to the children's welfare. The children had not been separated from the parents and the family had been placed in a guarded centre, one of three establishments of the same kind that had been adapted to meet the needs of families. Children in a family guarded centre had been provided with medical care, adequate living conditions and formal education comprising Polish language classes and sports. Moreover, a social worker had monitored the situation of persons in administrative detention and offered assistance matching their specific needs. Specialised medical and psychological care had also been made available to persons in need. Leisure activities had been organised with a particular focus on children.

60. Overall, the Government argued that the applicants' detention had, at all times, been justified and proportionate.

2. The Court's assessment

(a) General principles

61. The general principles concerning deprivation of liberty are set out in the judgments in the cases of *Saadi v. the United Kingdom* ([GC], no. 3229/03, §§ 61-74, ECHR 2008) and *Bilalova and Others* (cited above, §§ 73-76).

62. In particular, the Court reiterates that while the first limb of that provision permits the detention of an asylum-seeker or other immigrant prior to the State's grant of authorisation to enter, such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion (see *Saadi*, cited above, §§ 64-66).

63. In sum, to avoid being branded as arbitrary, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country"; and the length of the detention should not exceed that reasonably required for the purpose pursued (see *Saadi*, cited above, § 74).

64. Moreover, where a child is present the Court considers that the deprivation of liberty must be necessary to achieve the aim pursued. The detention of young children in unsuitable conditions may on its own lead to a finding of a violation of Article 5 § 1, regardless of whether the children were accompanied by an adult or not (see *Bilalova and Others*, cited above, § 76).

65. Various international bodies, including the Council of Europe, are increasingly calling on States to expeditiously and completely cease or eradicate the immigration detention of children. The Court has found that the presence in a detention centre of a child accompanying its parents will comply with Article 5 § 1 (f) only where the national authorities can establish that such a measure of last resort was taken after verification that no other measure involving a lesser restriction of their freedom could be implemented (see *G.B. and Others v. Turkey*, no. 4633/15, §§ 151 and 168, 17 October 2019, with further references, and *A.B. and Others v. France*, no. 11593/12, § 120, 20 July 2016).

(b) Application of these principles to the present case

66. The Court observes that in the present case the applicant family was placed, from 7 November 2016 until 5 May 2017, in the guarded centre for aliens in Biała Podlaska in order to prevent their unauthorised entry into the country while their application for asylum was being examined. At the material time, no decision had been given on the applicants' deportation. The measure in question therefore falls under the first limb of Article 5 § 1 (f) of the Convention.

67. The applicants' detention was prescribed by domestic law, as it was based on section 89 of the Aliens Act (see paragraphs 30 and 34 above).

68. The domestic courts ordered and extended the measure relying on two grounds.

69. The first ground was the need to check the adult applicants' contradictory statements as to the reasons for the family's emigration to

Poland and their fears of persecution in their home country (see paragraphs 14, 17, 21 and 23-26 above).

70. In this context, the Court notes that the first and second applicants' interviews in the context of the asylum proceedings took place on 9 December 2016 (see paragraph 10 above). No further information was sought from the applicants before the first-instance authority's refusal to grant them asylum on 19 April 2017 (see paragraph 11 above). It must therefore be assumed that the authorities had indeed obtained the necessary clarifications from the first and second applicants as early as 9 December 2016.

71. Accordingly, the Court considers that the need to clarify the applicants' statements as to the true reasons for their arrival in Poland was apt to constitute a valid ground for the initial decisions to have them detained, and possibly also for upholding those decisions on appeal on 7 and 19 December 2016 (see paragraphs 19 and 20 above).

72. Conversely, continuing to rely on this ground for the purposes of extending the detention by means of the decision of 5 January 2017, upheld on 25 January 2017 (see paragraphs 23-25 above), and for refusing to lift the measure (decision of 11 January 2017, see paragraph 26 above), cannot, in the Court's opinion, be justified. At that stage of the proceedings the applicants had clearly raised this matter in their appeals, submitting that they had had their interviews and that they had not been informed that any other evidence would be sought by the authorities (see paragraph 22 above).

73. Lastly, the Court is not convinced that the domestic courts carried out a thorough and individualised examination of this aspect of the case. In its decision of 5 January 2017 the District Court, while holding that the equivocal information submitted by the first applicant made it highly probable that the applicants were intending to flee Poland, referred to the first applicant using a feminine form (see paragraph 23 above). That may be indicative of a lack of diligence on the part of the authorities.

74. The second ground on which the domestic courts relied when ordering and extending the applicants' detention was the statutory presumption that the applicants posed a high risk of absconding because they had previously attempted to enter Poland illegally for economic reasons (see paragraphs 15, 17, 21 and 23-26 above).

75. In this context the Court notes that Article 5 § 1 (f) does not prevent States from enacting domestic-law provisions that formulate the grounds on which immigrants' confinement can be ordered with due regard to the practical realities of a major influx of asylum-seekers (see *Z.A. and Others v. Russia* [GC], nos. 61411/15 and 3 others, § 163, 21 November 2019, concerning detention in a transit zone). It follows that the Court will not, in principle, take issue with a statutory presumption such as the one that operated in the instant case, as long as the asylum-seeker in question had an effective opportunity to rebut such presumption.

76. In the present case the applicants argued that they had been turned away from the Polish border because the border guards had disregarded or misunderstood their claims that they feared persecution in their home country. The guards had wrongly considered that the applicants had been emigrating for economic reasons (see paragraphs 8, 18 and 52 above).

77. The Court takes note of the recent broader context as described by the applicants (see paragraph 54 above) and illustrated by the Court's recent judgment in the case of *M.K. and Others v. Poland* (nos. 40503/17 and 2 others, 23 July 2020). The Court cannot, however, verify the applicants' version and thus conclusively find that, in the present case, the applicants indeed made a straightforward claim to the border guards that they were seeking asylum because they risked persecution in Armenia.

78. Irrespective of this, however, the Court reiterates its finding that the domestic courts which extended the applicants' detention on the basis of the impugned presumption did not give sufficiently thorough or individualised consideration to the applicants' situation. In addition to its observations in respect of the first applicant in paragraph 79 above, the Court notes that the decision concerning the second applicant, issued on 5 January 2017 by the Biała Podlaska District Court, also contained a number of errors, such as the fact that the second applicant was referred to using a masculine form or as "the son of ..." (see paragraph 25 above). As such, the decision can be seen as not based on a throughout assessment of the applicants' individual situation.

79. The Court has already expressed reservations as to the practice of certain authorities of automatically placing asylum-seekers in detention without an individual assessment of their particular situation or needs (see, *mutatis mutandis*, *Thimothawes v. Belgium*, no. 39061/11, § 73, 4 April 2017, and *Mahamed Jama v. Malta*, no. 10290/13, § 146, 26 November 2015).

80. In the present case the fact that the first applicant was accompanied by his three minor children was not given any consideration when the courts first decided to place them in detention (see paragraphs 13-17 above).

81. It was only at a later stage that the Regional Court looked into the material conditions at the Biała Podlaska guarded centre for aliens and concluded that the family's well-being was not threatened by their detention because the premises in which the family was being held were suited to the children's needs (see paragraph 24 above).

82. The Court considers that the examination of this aspect of the applicants' case was likewise not thorough or individualised.

83. Firstly, the domestic courts did not refer to what appears to be a new element in the case, namely the fact that, while in detention, the second applicant had given birth to her fourth child (see paragraph 56 above; see also, *mutatis mutandis*, *M.D. and A.D. v. France*, no. 57035/18, § 89, 22 July 2021).

84. Secondly, the domestic courts, and later the Government, relied on the argument that the well-being of the children had necessarily been protected by the fact that the family had been detained together – in other words, because the children had not been separated from their parents (see paragraphs 24 and 56 above). On this point the Court reiterates the principle stated in a similar context, albeit under Article 8 of the Convention, that the child's best interests cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life (see *Bistieva and Others*, cited above, § 85; see also, *mutatis mutandis*, *Popov v. France*, nos. 39472/07 and 39474/07, § 147, 19 January 2012). In the case of *Bistieva and Others*, the Court found a violation of Article 8 on account of the detention of the mother and the children for almost six months in a guarded centre which, like the Biała Podlaska guarded centre, was designated as being suitable for the detention of families with children and had received a relatively positive evaluation of its organisation and living conditions (see *Bistieva and Others*, cited above, § 84).

85. While in the present case the applicants did not contest the assertion that the material conditions of reception in Biała Podlaska guarded centre had been adequate, this establishment undoubtedly constituted a place of confinement similar, in many respects, to prisons or remand centres (see *Bistieva and Others*, cited above, § 88).

86. It emerges from the Court's well-established case-law in this area that, as a matter of principle, the confinement of young children in detention establishments should be avoided and that only placement in suitable conditions may be compatible with the Convention, on condition, however, that the authorities establish that they took this measure of last resort only after actually verifying that no other measure less restrictive of liberty could be put in place and that the authorities act with the required expedition (see *A.B. and Others*, cited above, § 123).

87. As to this last point, the Court acknowledges that in the present case the domestic courts did look into the alternative of imposing a less stringent measure on the applicants. The domestic courts, having verified that the applicants had only EUR 50 on them and had no address in Poland, simply concluded that the applicants did not qualify for any alternative measure under the law (see paragraphs 16, 17, 24 and 26 above).

88. The foregoing considerations are sufficient to enable the Court to conclude that in the particular circumstances of the present case, the detention of both the adult and the child applicants, for a period of almost six months, was not a measure of last resort for which no alternative was available (see, *mutatis mutandis*, *R.K. and Others*, cited above, § 86; *Popov*, cited above, § 119; *Bilalova and Others*, cited above, § 80; and, conversely, *A.M. and Others*, cited above, § 68, and *G.B. and Others*, cited above, § 151).

The Court is of the view that the fact that minors were being detained called for greater speed and diligence on the part of the authorities.

89. There has accordingly been a violation of Article 5 § 1 (f) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

90. The applicants also complained that the domestic courts, in deciding on the family's committal to the guarded centre for aliens, had not taken into account evidence adduced by them in order to assess the truthfulness of the statements of the border guards on the issue of the applicants' repeated attempts to enter Polish territory for economic reasons. In other words, the authorities had automatically relied on the information provided by the border guards.

91. This complaint falls to be examined under Article 5 § 4 of the Convention, which reads as follows:

“4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

92. The Government essentially submitted that the applicants' detention had been subject to adequate judicial review. The applicants had had an opportunity to be heard by the court that had ruled on their detention, and to request legal aid. The Government stated that “the applicants [had been able to] present submissions in writing”, that “they could have asked the domestic courts to allow them to be present at the hearings”, and that they had had access to the case file. The Government also submitted that the domestic courts had thoroughly examined the applicants' case, looking into all its aspects.

93. Having regard to the facts of the case, the submissions of the parties and its findings under Article 5 § 1 (f) of the Convention (see paragraphs 66-89 above), the Court considers that it has examined the main legal questions raised in the present application and that there is no need to give a separate ruling on the complaint under Article 5 § 4 of the Convention (see, *mutatis mutandis*, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

III. VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

94. After the Government had been given notice of the application the applicants raised additional complaints in their observations on the case, alleging that their detention in the guarded centre had also breached Articles 3 and 8 of the Convention.

95. Article 35 of the Convention, in so far as relevant, provides:

“1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

...

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.”

96. The Court observes that the applicants did not raise these complaints, even in substance when they first lodged their application on 15 February 2017. Given that the applicants were released from their administrative detention on 5 May 2017 (see paragraph 29 above) and that they did not pursue any proceedings for compensation while at liberty, the Court must declare these complaints inadmissible as lodged out of time. Accordingly, the remainder of the application must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. Article 41 of the Convention provides:

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

A. Damage

98. The applicants claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

99. The Government commented that the above-mentioned sum was excessive.

100. Given the awards in similar cases against Poland, the principle of equity, as well as the circumstances of the present case, particularly, the length of the applicants’ administrative detention and the fact that it involved children, the Court awards the applicants jointly EUR 15,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

101. The applicants did not make any claims for the costs and expenses incurred before the domestic courts or those incurred before the Court.

102. Accordingly, the Court does not make any award in this regard.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 5 § 1 (f) of the Convention admissible and the complaints under Articles 3 and 8 of the Convention inadmissible.
2. *Holds* that there has been a violation of Article 5 § 1 (f) of the Convention;
3. *Holds* that it is not necessary to examine the admissibility and merits of the complaint under Article 5 § 4 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement; and
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 3 March 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Péter Paczolay
President