Journey Interrupted: Access to Asylum at the Borders of Poland in the Time of the COVID-19 Pandemic

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Abstract
This article explores border restrictions introduced by the Polish government in response to the global pandemic and how they affected those seeking asylum. The author argues that the government’s failure to exempt asylum seekers from the general border closure was not an accidental omission, but rather indicates a deliberate decision to exclude this category of migrants from the right to enter Poland during the pandemic. This decision is the continuation of a long-standing policy of closed doors implemented at Poland’s eastern borders since 2015, when the currently ruling Law and Justice Party won the parliamentary elections by exploiting anti-immigration sentiments surrounding the “refugee crisis.” The sudden drop of asylum applications submitted in Poland in 2020, along with the reluctance of border authorities to apply discretionary measures to allow entry to Poland for those seeking international protection, seem to confirm the unlawful practice of denying access to asylum in the time of the pandemic. The Polish example fits in with the general trend of closing the borders for refugees which might be observed in the states of the Global North not only in the times of a health crisis.

Keywords
Access to Asylum, COVID-19, Non-Refoulement

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Introduction

Border restrictions introduced by states across the world in response to the outbreak of the SARS-CoV-2 pandemic made access to asylum even more difficult than under regular circumstances. Travel bans, information chaos, and restrictions in the operation of international transport have affected the right to seek asylum in many parts of the world, and Poland was no exception. The number of applications for international protection received by Polish migration authorities in 2020 has been the lowest in twenty years. Moreover, in the first four months of the pandemic, not even one asylum application was received at the Brest-Terespol border crossing, traditionally the busiest entry point to Poland for asylum seekers.

One might argue that this was inevitable and, at least to some extent, justified, considering that extraordinary times call for extraordinary measures. This paper, however, attempts to demonstrate that closing the borders of Poland to asylum seekers in the time of the pandemic is a continuation of the long-standing practice of systemic pushbacks recently acknowledged and condemned by the European Court of Human Rights (ECtHR) in the judgement M.K. and Others v. Poland. The practice has existed at Poland’s eastern borders since 2015, when the right-wing Law and Justice Party took advantage of fears surrounding the “refugee crisis” and fuelled anti-refugee sentiments among the society to win the parliamentary elections.

In order to offer the reader a comprehensive overview on the subject of access to asylum at the borders of Poland in the time of the COVID-19 pandemic, this paper has the following structure: in the first section, the state of law following the introduction of the legal measures aimed at containing the spread of the virus is analysed; in the second section, the statistical data which can serve as evidence of closing the borders of Poland to refugees are explored; in the third section, a wider context of pushback policy in Poland is presented and, finally, the conclusions are drawn.

Extraordinary Measures for Extraordinary Times?

In April 2020, when the new virus was spreading across the globe, the Office of the UN High Commissioner for Refugees informed that as a response to the escalating health crisis, 167 countries had fully or partially closed their borders, from which at least fifty-

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2 European Court of Human Rights, judgement of 23 July 2020, M.K. and Others v. Poland, applications nos. 40503/17, 42902/17 and 43643/17.
seven had not introduced any exceptions for persons seeking asylum.\(^4\) The UNHCR has launched an online platform allowing users to track temporary measures introduced by states and their impact on protection.\(^5\) Indeed, at the beginning of the worldwide chaos caused by the outbreak of the new infectious disease, it seemed that the right to asylum and the non-refoulement principle were at risk of mass violations like never before.

Poland was no exception. By means of the Regulation of the Ministry of Internal Affairs and Administration of 13 March 2020,\(^6\) border traffic at the external borders of Poland (with the Russian Federation, Republic of Belarus, and Ukraine) was temporarily suspended or restricted, and border traffic at the internal EU borders (with the Federal Republic of Germany, Czech Republic, Lithuanian Republic, and Slovakian Republic) was restricted, both until further notice. The Regulation was introduced based on Article 16(3)(2) of the Act of 12 October 1990 on the protection of the state border,\(^7\) according to which the Minister responsible for internal affairs may order a temporary suspension or restriction of border traffic at specific border crossing points, considering the need to ensure national security or public safety, or protection against threat to human life or health, as well as preventing the spread of animal disease epidemics.

As a result, since 15 March 2020, passenger traffic in the direction of entry to Poland has been limited to the categories of persons enumerated in the text of the Regulation, including Polish citizens and indicated groups of foreigners, such as: spouses and children of Polish citizens, holders of a Pole’s Card, diplomats and their families, holders of permanent or temporary residence permits, foreigners allowed to work in the territory of Poland, and foreign large goods vehicle drivers. Additionally, as a way of exception, the Regulation gave the competence to commanding officers of the Border Guard stations to allow any other foreigner, upon prior consent of the Commander in Chief of the Border Guard, to enter the territory of Poland in particularly justified cases. The Regulation did not specify the legal means of granting such permission.

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Persons seeking international protection had not been included in the text of the Regulation, which was immediately pointed out by the Polish Commissioner for Human Rights (Ombudsman)\(^8\) and the group of non-governmental organisations providing assistance to refugees and migrants.\(^9\) They argued that, since the external borders of Poland had been almost entirely closed and asylum seekers had not been included on the list of foreigners allowed to enter, the right to seek asylum became impossible to exercise. The problem concerned not only foreigners seeking entry to Poland, but also those already present on its territory. Information chaos combined with temporary suspension of the face-to-face applicant’s service at the Office for Foreigners (the central asylum determination authority) made access to asylum procedures in the first months of the pandemic incredibly difficult.\(^10\)

In the meantime, under international law, persons in need of protection from persecution shall retain the right to seek asylum even in the most extraordinary circumstances. According to the 1951 Refugee Convention, states are responsible for ensuring protection from expulsion to all persons within their jurisdiction, including at the frontiers.\(^11\) Prohibition of non-refoulement, considered by most legal scholars as a peremptory norm deriving from customary international law\(^12\) and enshrined also in other international treaties,\(^13\) cannot be derogated.\(^14\) Therefore, under any circumstances, measures that are introduced in order to mitigate the risk for public health caused by the spread of the virus cannot preclude entry to those at risk of persecution.\(^15\) The right to

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\(^8\) Ombudsman’s communication of 2 April 2020, Coronavirus and the rights of foreigners seeking protection from persecution. The Ombudsman asks the Border Guard about the current procedures on the eastern border, accessed 16 February 2021, [https://www.rpo.gov.pl/pl/content/koronawirus-granice-ochrona-miedzynarodowa-w-Polsce](https://www.rpo.gov.pl/pl/content/koronawirus-granice-ochrona-miedzynarodowa-w-Polsce).


\(^13\) For example, Article 31(d) of the 1984 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.


asylum and the prohibition of collective expulsions of foreigners are envisaged also in EU law.\textsuperscript{16}

Despite several amendments of the Regulation since its introduction and the gradual expansion of the list of non-nationals allowed to enter Poland, as well as repeated calls by the Ombudsman to include asylum seekers,\textsuperscript{17} persons seeking international protection have not been mentioned in the text of the legal act to this day. Under these circumstances, it would be very hard to argue that the failure to include this extremely vulnerable group of foreigners on the list of persons allowed to enter Poland was an accidental omission made by the government under the pressure of extraordinary times. It rather points to a deliberate policy of the Polish government.

The explanation which the Border Guard provided in response to the Ombudsman’s concerns has raised even more doubts regarding the observation of the non-refoulement principle at the borders of Poland in the time of the COVID-19 pandemic.\textsuperscript{18} The Commander in Chief explained that under extraordinary safety measures introduced at the external borders, only persons falling into one of the categories enumerated in the text of the Regulation are being sent to the border checks in the direction of entry to Poland. Other categories of travellers do not undergo either border control or administrative proceedings during which decisions on the refusal of entry could be issued.

Not only might such practises violate several procedural rights, including the right to effective remedy, but they might also hinder the right to asylum and pose great risk of the collective expulsion of foreigners. The European Court of Human Rights has found in a number of cases that all measures compelling foreigners to leave the country, or not allowing them to enter, must be taken on an individual basis after careful examination of each case.\textsuperscript{19} Meanwhile, under the current state of Polish domestic law, potential asylum seekers arriving to the borders of Poland who do not fall into one of the categories of foreigners allowed to enter under the provisions of the Regulation are not being allowed to undergo the border check and, therefore, have no chance to present their case and request international protection.


\textsuperscript{17} The correspondence between the Commander in Chief of Border Guard and the Ombudsman is summarised in the letter of the Ombudsman of 12 May 2020 to the Minister of Internal Affairs and Administration, accessed 23 February 2021, https://www.rpo.gov.pl/sites/default/files/Wystapienie%20do%20MSWiA%20ws%20osytuacji%20na%20granicach%2C%2012.05.2020.pdf.

\textsuperscript{18} Ibid.

\textsuperscript{19} European Court of Human Rights, judgement of 23 February 2012, Hirsi Jamaa and Others v. Italy, application no. 27765/09. §§ 183-185.
Despite this, the Border Guard has assured, in correspondence with the Ombudsman, that the right to asylum is being observed and that applications for international protection are being received. Analysis of the statistical data, however, contradicts these assurances.

**Figures Don’t Lie**

During the entirety of 2020, 2,815 persons applied for asylum in Poland,\(^{20}\) which was 32% less than the year before, and the least since 1999. In the period of April to July 2020, in the first months of the pandemic, no application for international protection was received at the Brest-Terespol border crossing point, which has traditionally been the main entry point to Poland for most asylum applicants.\(^{21}\) In the third quarter of the year, asylum applications were received from only twenty-two people at that border crossing point. The same number of applications was received in the fourth quarter. For comparison: in the first quarter of 2020, just before the beginning of the pandemic, 404 persons submitted asylum applications in Terespol.

![Graph: Number of asylum applications in Poland (2015-2020, thousands)]

Apart from the legal measures introduced by the Polish government, what has also affected the situation at the border is the suspension of the Brest-Terespol train. The train

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\(^{21}\) Most of the asylum applicants come to Poland from the former USSR republics, such as the Russian Federation (mostly from Chechnya), Tajikistan, Ukraine, Belarus, Georgia, Armenia, etc.

\(^{22}\) Source: [https://migracje.gov.pl](https://migracje.gov.pl)
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arriving from Brest to Terespol has served for many years as the main means of transport for asylum seekers arriving to the border of Poland. It is chosen particularly by citizens of the former USSR countries due to convenient connections between Moscow and Brest.\(^{23}\) Suspension of the train, combined with the refusal of the Border Guard to accept asylum applications at other border crossings, led to the actual denial of access to asylum.\(^{24}\)

As the statistics and testimonial evidence prove, the problem with accessing asylum at the external border of Poland, which is at the same time the external border of the EU, has primarily affected citizens of the Russian Federation of Chechen origin, who are the largest group of asylum applicants every year in Poland.\(^{25}\) Despite the fact that Poland also shares the border with Russia, it is the Polish-Belarusian border crossing point in Terespol that has served, for them, as a main point of entry to Poland since the 1990s. The suspension of the Brest-Terespol train, along with the introduction of entry restrictions, made the possibility of submitting asylum applications at the external borders of Poland in the time of the COVID-19 pandemic, if not impossible, then at least extremely difficult.

According to the statistics provided by the Border Guard,\(^{26}\) in the first three months of 2020 there were subsequently 2,163 (January); 1,695 (February); and 729 (March) decisions on the refusal of entry issued towards citizens of Russia at the border crossing in Terespol. It is worth noting that, as the non-governmental organisations report, most of the Russians refused entry at that border crossing were, in fact, rejected asylum seekers.\(^{27}\) Starting from April until the end of the year, there were just a few of these refusals each month (between three and fourteen). Even taking into account that some of the asylum seekers have not been able to reach the border of Poland due to the pandemic, it can be assumed that those who have managed to reach it might have been arbitrarily rejected entry, with no official administrative proceedings conducted and no decisions on the


\(^{25}\) In 2019, out of 4,111 asylum applicants 2,618 were the citizens of Russian Federation (63%); in 2018, out of 4,172 applicants 2,743 were the citizens of Russian Federation (65%); in 2017, out of 5,105 applicants 3,574 were the citizens of Russian Federation (70%). Statistical data can be accessed on: https://migracje.gov.pl/en/ accessed on 07.03.2021.

\(^{26}\) Statistical data provided on 24 February 2021 by the Information Protection Office of the Headquarters of the Border Guard upon the request of the author of the article (letter no. KG-OI-VIII.0180.45.2021.JL).

refusal of entry issued. Such concerns were also raised by the Ombudsman in the official letter to the Minister of Internal Affairs and Administration.\(^\text{28}\)

One might rightly argue that, even though they were not expressly included in the text of the Regulation, asylum seekers have retained the right to seek protection from persecution under the provisions of international law, which should be applied directly without any reservations. Yet, analysis of the statistical data shows that in the entirety of 2020, out of the total number of 23,848 permissions to entry granted by commanding officers of the Border Guard under special procedures foreseen in the Regulation, only eleven were granted for the purpose of seeking asylum. The right to asylum, the non-refoulement principle, and the prohibition of collective expulsion have been seriously undermined.

As a side note, it must be mentioned that last year Poland witnessed a significant increase in the number of asylum applications lodged by citizens of Belarus. While in recent years, around thirty to forty asylum applications per year were filed by Belarusian nationals, in 2020, because of state repressions conducted after a series of nationwide anti-government demonstrations, 408 Belarusians requested international protection in Poland. As a gesture of political support for the Belarusian opposition, on 15 September 2020,\(^\text{29}\) the Minister of Internal Affairs and Administration amended the Regulation and excluded Belarusian citizens who were holders of Polish tourist visas from the travel ban to Poland. Already on 21 September 2020,\(^\text{30}\) the Regulation was amended again to exclude all citizens of the Republic of Belarus from the ban, regardless of visa possession.

Although in principle, the introduction of entry facilitation for repressed Belarusians stays in line with international human rights obligations and should be positively assessed, the differentiation of the situation of refugees based on their citizenship finds neither legal nor moral justification and should be deemed discriminatory.

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**Old Game, New Rules**


Denying access to asylum at Poland’s borders to people fleeing persecution is not a phenomenon solely connected to the COVID-19 pandemic. Mass summary expulsions of asylum seekers routinely carried out by the Polish Border Guard have been widely reported since at least 2015. The policy of closed doors and rejection of the EU refugee relocation scheme were the main campaign promises made by the Law and Justice Party, which won the parliamentary elections in the fall of 2015. The problem particularly concerns the Brest-Terespol crossing point as, due to the absence of regular border control between Russia and Belarus, it has been for years a main entry point to Poland for refugees fleeing Chechnya and other former USSR republics, such as Georgia, Tajikistan, Armenia, etc.

According to the reports of national and international NGOs, as well as the Polish Ombudsman, Border Guard officers intentionally ignored the asylum claims made by foreigners arriving to the eastern borders of Poland. The refusal of entry decision is being issued based on a brief memo drafted by the officer and not signed by the foreigner. The border check interviews last only a few minutes and are purposely conducted in a way that does not allow for the proper identification of persons seeking international protection. The questions asked by the Border Guard officers intend to prove that the reasons for entry declared by the foreigners are of an economic nature. Moreover, the interviews are conducted in the premises of the closed railway station where neither lawyers representing the asylum seekers nor independent monitoring bodies, such as representatives of non-governmental organisations or the UNHCR, are allowed to enter.

35 Ibid.
Foreigners who are refused entry to Poland are being expelled to Belarus by return train the same day.

Under the provisions of the domestic law, when an asylum seeker arrives to the border, the role of the Border Guard is limited to establishing their identity, collecting the information necessary for completing their asylum application, and transferring the application to the competent authority, i.e. the Head of the Office for Foreigners, within forty-eight hours.36 Foreigners not meeting the entry conditions are issued an immediately enforceable decision on the refusal of entry, which can be appealed to the Chief Commander of the Border Guard within fourteen days.37 Such decisions cannot be issued, however, to a foreigner who, in the course of the border check, declares his or her intention to seek asylum.38

At the peak of the “border crisis” in the summer of 2016, as many as a few hundred persons, mostly Chechen families, were being refused entry to Poland for months.39 Each day they would board the same morning train to make yet another attempt to apply for asylum in Poland. Asylum applications were, however, received only from one or two families daily. Some people were returned to Belarus over seventy times before they were eventually allowed to apply for asylum and enter Poland, while some have never been allowed to enter.40

Politicians of the ruling party, including members of the government, deny, on the one hand, the existence of the unlawful pushback policy at the external borders of Poland,41 but on the other hand, on multiple occasions, made unambiguous statements against accepting refugees, particularly from Muslim countries,42 and proudly emphasised

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38 Article 28(2)(a) and (b) of the Act on Foreigners.
the tightness of Poland’s borders. In response to the 2017 European Parliament resolution calling Poland to ensure access to asylum, the Polish government stated that “the measures introduced at the external border, particularly at the Terespol border crossing point, were appropriate in the current migratory situation.” As a side note, it is also worth noting that Poland, together with other V4 countries, has strongly opposed the acceptance of refugees within the EU relocation scheme attempting to address the 2015 refugee crisis. In the judgement of 2 April 2020, the Court of Justice of the European Union (CJEU) found Poland in failure to fulfil its obligations under EU law by refusing to comply with the temporary mechanism for the relocation of applicants for international protection.

In the last few years, numerous cases on the arbitrary refusal of entry were brought to domestic administrative courts by asylum seekers and their legal representatives. In all cases heard by the Supreme Administrative Court, the refusal decisions of the Border Guard were overturned. The Court has found the border proceedings conducted by the Border Guard officers flawed due to their improper way of conducting interviews with foreigners. The Court indicated that, instead of the brief memos drafted by the officers, protocols compliant with Article 67 § 1 of the Code of the Administrative Proceedings and signed by both the Border Guard officers and the foreigner shall be drafted. Despite the established case law of the domestic administrative courts, the Ministry of Internal Affairs and Administration expressed the opinion that judgements delivered in individual cases

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45 Białas, Górczyńska, and Witko, Access to Asylum.


48 CJEU, judgement of the Court (Third Chamber) of 2 April 2020, European Commission v. Republic of Poland and Others, joined cases C-715/17, C-718/17 and C-719/17.


50 See for example the rulings of the Supreme Administrative Court of Poland in the cases nos.: II OSK 2511/18, II OSK 2599/18, II OSK 3100/18.
are not applicable to the general situation, hence the practice at the border has remained unchanged.\textsuperscript{51}

On 23 July 2020, the ECtHR delivered its first ruling on access to asylum in Terespol, confirming the systemic practice of pushbacks at the eastern borders of Poland. The case of \textit{M.K. and Others v. Poland} concerned the return of a group of Chechens who arrived to the Terespol border crossing point in 2017 with the intention to seek asylum and, instead of having their applications received, they were returned to Brest in Belarus. The Court found Poland in violation of Article 3 (freedom from torture), Article 13 (right to effective remedy), and Article 34 (right to individual application) of the European Convention on Human Rights,\textsuperscript{52} as well as Article 4 Protocol 4 to the Convention (prohibition of collective expulsion of migrants). The Court stressed that Belarus cannot be considered a safe country for Chechen refugees, therefore, ‘by failing to allow the applicants to remain on Polish territory pending the examination of their applications, [Poland] knowingly exposed them to a serious risk of chain-refoulement and treatment prohibited by Article 3 of the Convention’ (§ 185). Several other border cases are pending examination before the ECtHR.\textsuperscript{53}

However, just like domestic rulings before, the ruling of the ECtHR has not changed the unlawful practice of pushbacks. On 3 February 2021, the consortium of non-governmental organisations providing legal assistance to migrants in Poland, in response to the call for submissions on pushback practices made by the UN Special Rapporteur on the human rights of migrants, drew his attention to the ongoing systemic violations of asylum seekers’ rights at the external borders of Poland.\textsuperscript{54}

Considering the jurisprudence of the domestic and European courts, the Regulation giving the competence to Border Guard officers to decide which foreigners arriving to the border should be allowed entry if they are not included in the text of the Regulation, should be assessed critically. By failing to include \textit{expressis verbis} persons seeking international protection in the text of the Regulation, the Minister opened the doors to arbitrary decisions made by the Border Guard which, as the hitherto case law and practice prove, might lead to the violation of asylum seekers’ rights. What is even more concerning is that, according


\textsuperscript{52} 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.


\textsuperscript{54} The submission is available on: \url{https://www.hfhr.pl/wp-content/uploads/2021/02/Submission-for-HRC-report-2021-POLAND-NGOs-printed.pdf} [accessed on 24.02.2021].
to the Commander in Chief of the Border Guard, under these extraordinary measures, the Border Guard are no longer obliged to initiate the formal administrative proceedings to issue the refusal of entry decision but can unofficially ban travellers from approaching the border check instead. The statistical data seem to be proving that trend.

Even if we agree that extraordinary times justify extraordinary measures, it seems that, in the case of Poland, these extraordinary times are an excuse to sanction an unlawful pushback policy.

Conclusions
As this paper demonstrates, the reason behind the unprecedentedly low number of asylum applications received by Poland in 2020 is twofold. First, mobility restrictions introduced by most states in response to the outbreak of the pandemic made it more difficult to travel across the world, also for refugees. Restricting the categories of travellers allowed to exit and enter, suspending international train and bus connections, requiring valid PCR tests, and introducing obligatory quarantine after arrival did not make it easy for people on the move. For this reason, the number of asylum applications submitted in the EU+ countries fell to the lowest level since 2013. However, as an analysis of the legal measures introduced by Poland to address the health crisis conducted along with analysis of the statistical data show, another reason is the deliberate policy of the Polish government.

Failure to include persons seeking international protection on the list of foreigners allowed to enter Poland despite the general entry ban was not an accidental omission. Despite several amendments to the law and the persistent calls of the Polish Ombudsman, asylum seekers have not been included in the text of the Regulation. Even though one might rightly argue that they have retained the right to enter under the peremptory norms of international law, the statistical data proves that access to asylum has been seriously undermined.

The legislative omissions of the government, as well as the practises implemented at the border, are consistent with the long-standing practice of routine pushbacks observed at the eastern borders of Poland since 2015, when the current ruling party won the elections using anti-refugee rhetoric. This practice was acknowledged by domestic courts and, most recently, by the European Court of Human Rights. However, instead of changing the practice and exercising caution in entrusting the Border Guard with the competence to grant entry permission to persons seeking asylum, legal measures

introduced by Poland in the time of the COVID-19 pandemic seem to sanction the unlawful practice and make it even easier to reject asylum seekers at the borders without conducting the proper administrative proceedings on the refusal of entry.

Polish border practice does not seem to differ a lot from the practice of many other states which chose to close their borders to asylum seekers in the time of the COVID-19 pandemic. In a joint statement of April 2020, the UNHCR and IOM warned that growing instances of denials of entry, collective expulsions, pushbacks at borders, and forced returns created serious risk of violations of the rights of refugees and migrants around the globe. Poland is not the only state which has failed to exempt those seeking asylum from general border closure. As argued by some scholars, the pandemic has extinguished the right to asylum in states of the Global North.

Meanwhile, denying access to asylum to persons fleeing persecutions must never be justified, even in the most extraordinary times. Although international law does not prevent states from adopting exceptional measures due to the need to protect public health, which may include, *inter alia*, the obligation to undergo virus testing or the obligation to undergo quarantine upon arrival, these measures should be applied in a non-discriminatory and proportionate manner and must not infringe peremptory norms such as the prohibition of torture or the principle of non-refoulement. By closing its borders to refugees in the time of a global pandemic, Poland failed to observe these norms not only on paper but also in practice.

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