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Date: 10/09/2019

DH-DD(2019)931

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Meeting: 1355^h meeting (September 2019) (DH)

Communication from a NGO (Helsinki Foundation for Human Rights) (21/08/2019) in the case of Bistieva and Others v. Poland (Application No. 75157/14) and reply from the authorities (06/09/2019).

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1355^e réunion (septembre 2019) (DH)

Communication d'une ONG (Helsinki Foundation for Human Rights) (21/08/2019) dans l'affaire Bistieva et autres c. Pologne (requête n° 75157/14) et réponse des autorités (06/09/2019) (**anglais uniquement**).

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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Warsaw, 20 August 2019

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DGI

21 AOUT 2019

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

TO:

The Secretary of the Committee of Ministers

Council of Europe

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**COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
("HFHR") CONCERNING EXECUTION OF ECtHR JUDGMENT IN CASE
BISTIEVA AND OTHERS AGAINST POLAND (APPLICATION NO. 75157/14)**

To the attention of:

1. Mr. Jan Sobczak

Plenipotentiary of the Minister of Foreign Affairs for cases and procedures before
the European Court of Human Rights
Agent of Polish Government

2. Mr. Adam Bodnar

Commissioner for Human Rights

3. Mr. Mikołaj Pawlak

Commissioner for Children Rights

EXECUTIVE SUMMARY

- 10 April 2018 the Court delivered judgment in case *Bistieva and Others v. Poland*, the Court holds that there has been a violation of Article 8 of the Convention; this judgment has become final on 10 June 2019; it was the first (and so far, the only one) international body decision concerning placing of asylum-seekers in detention centres in Poland,
- the Polish government presented its observations in the Action Report of 11 June 2019, the Government stated i.a. that the alternatives to detention were introduced to Polish law and are widely used and that the employees of the asylum authority (Aliens Office) were trained about the *Bistieva* judgement, therefore, in the Government's opinion, the general measures adopted are sufficient to conclude that Poland has fulfilled its obligations under the Article 46 § 1 of the Convention,
- according to the HFHR and other NGOs as well as national human rights institutions, child's best interest principle is not observed in practice; according to the Children Rights Commissioner, between 2014 and 2017 more than 1100 children were placed in detention, there is also number of similar cases of asylum seekers families detention pending before the Court,
- therefore, according to the HFHR, there is a need to implement measures in order to prevent similar violations in the future; for this reason, this letter contains recommendations concerning actions to be taken in order to implement *Bistieva* judgment properly.

RECOMMENDATIONS

- In the opinion of the HFHR, the following actions should be taken by Polish authorities in order to fully implement the *Bistieva* judgment:
 - conduct training for judges and officers of the Border Guard on the application of the principle of the child's best interest in the detention decisions as well as on the jurisprudence of the ECtHR in this respect ,

- draft and implement practical guidelines for specific activities that the Border Guard and national courts should carry out as a part of the examination of the best interests of the child based on the international human rights law and recommendations of the UN Committee of the Rights of the Child,
 - ensure that the courts conduct the determination of the best interest of the child in every detention case, including hearing the child and providing independent psychological and/or medical examination on the impact of the detention on child's well-being,
 - ensure that the decisions on placing the family in a detention centre also contain detailed personalized justification regarding the situation of children.
- Recommendations for the Committee:
- To have a full picture of children's detention in Poland, the Committee should request the Government to provide accurate and current statistics on the number of children placed in detention centers and on the alternatives used,
 - we also request that the execution of Bistieva v. Poland judgment will be considered at the next Committee meeting.

1. INTRODUCTION

The Helsinki Foundation for Human Rights with its seat in Warsaw, Poland would like to respectfully present to the Committee of Ministers of the Council of Europe its communication, under the Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, regarding the execution by the Polish authorities of the European Court of Human Rights' ("ECtHR", "the Court") judgment in the case *Bistieva and Others v. Poland* (application no. 75157/14).

The HFHR is a Polish non-governmental organisation established in 1989 with a principal aim to promote human rights, the rule of law and the development of an open society in Poland and other countries. The HFHR actively disseminates the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "Convention") and is dedicated to contributing to the proper execution of ECtHR judgments. Protection of asylum-seekers, refugees and migrants rights is one of the main HFHR's activities.

In its communication, the HFHR will refer to the Government's action report containing information on measures taken to implement the judgment *Bistieva* judgment. We will focus in particular on the practical implementation of alternatives to detention and determination of child's best interest in cases of detention of the asylum-seekers in Poland. We will also provide recommendations on how to implement *Bistieva* judgment properly in order to prevent similar violations in the future.

2. BISTIEVA AND OTHERS V. POLAND JUDGMENT

The case concerned the detention of a Chechen asylum-seeking family, including three minor children. The Court held that Polish authorities had not viewed the family's administrative detention as a measure of last resort. Nor had they given due consideration to possible alternative measures. According to the ECtHR, the Polish

authorities had not considered the child's best interests in this case. The Court held 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. The Court also stated that the applicants' detention lasted five months and twenty days while the detention of minors called for greater speed and diligence on the part of the authorities. As a result, the Court held that the detention of the family constituted a violation of Article 8 of the European Convention on Human Rights.

It must be noted that it was the first (and so far, the only one) international body decision concerning placing of asylum-seekers in detention centres in Poland. Therefore, the *Bistieva* judgement should play an important role in the interpretation of the domestic detention provisions when it comes to asylum-seekers, especially in terms of the application of the best interest of the child principle.

3. GOVERNMENT'S ACTION REPORT

On 11 June 2019, the Government presented to the Committee of Ministers an Action report containing information on the measures taken to implement the judgment in the case of *Bistieva and Others against Poland*.

The Government indicated that on 1 May 2014 the new *Aliens Act* of 12 December 2013 (*Aliens Act*) came into force. The new law has introduced alternative measures to detention such as reporting duty, obligation to deposit a financial guarantee and obligation to stay in the designated place of residence. New law provides that in case where there are reasons to detain an alien applying for international protection, the Border Guard is obliged to assess in the first place whether the application of measures alternative to detention would be sufficient. *Aliens Act* also amended the provisions of the *Act on granting protection to aliens in the territory of the Republic of Poland* of 13 June 2003 (*Protection Act*) which states that the applicant is placed in the detention centre only if the application of the alternative measures is not possible. The Government stated that placement of a foreigner in the detention centre shall take place merely in cases specifically indicated in the legal provisions and shall be

applied as a measure of last resort. The national courts, when deciding on the application of detention, are also obliged to consider the best interest of the child.

The Government stated that in cases of families with children alternative measures are used in the first place. The Government provided statistical data that illustrates the prevalence of the application of alternative measures with respect to foreigners.

The Government also stated that in order to standardize the detention procedures, the *Rules of conduct of the Border Guard with respect to foreigners requiring special treatment (Zasady postępowania Straży Granicznej z cudzoziemcami wymagającymi szczególnego traktowania)* were developed and implemented in 2015. The Rules define vulnerable groups that include, among others, children, pregnant women, persons of a different sexual orientation and persons that experienced physical or mental violence. The Rules establish a vulnerability identification system and specify actions to be taken when a person with special needs is identified.

The Government stated that the *Bistieva* judgment has been translated into Polish and published on the website of the Ministry of Justice and in the HUDOC database. It was also disseminated among the employees of the asylum authority.

Therefore, the Government is of the opinion that the general measures adopted are sufficient to conclude that Poland has fulfilled its obligations under the Article 46 § 1 of the Convention.

4. OBSERVATIONS OF HFHR, OTHER NGOS AND NATIONAL HUMAN RIGHTS INSTITUTIONS ON CHILDREN DETENTION

It should be admitted that the alternatives to detention have been introduced to Polish domestic law and are being used in practice. However, the statistics presented by the Government in the Action Report do not specify the number of children detained in the presented period, therefore these data cannot be treated as fully illustrating the phenomenon of asylum-seeking children detention. It must be also noted that experience of the NGOs and national human rights institutions shows that asylum-seeking children detention is still area of concern.

- determination of the child's best interest and application of the alternatives to detention

According to the information provided by the Commissioner for Children Rights, in the period of 2014-2017, 1103 children were placed in the detention centres.¹ According to available statistics, in 2018 a total number of 248 children, both unaccompanied and with families, were detained.² According to the information provided by Polish NGO Association for Legal Intervention children constitute 25% of those placed in detention.³

In the opinion of the Commissioner for Children Rights, the number of children being placed in the detention centres is very high which raises the question whether the Polish authorities observe child's best interest principle in their practice and whether the alternative measures have priority over the detention. In the Commissioner's assessment, courts assess the possibility of applying alternative measures in a superficial way. In the number of the reviewed cases, courts *a priori* stated that the alternatives to detention cannot be implemented because the family has left Poland in an irregular manner during the asylum procedure. The Commissioner for Children Rights also observed that the national courts held very often that it was not possible to apply alternatives on the basis that asylum-seekers had no place of residence on the territory of Poland, ignoring the fact that they are entitled to stay in the reception centers for asylum-seekers for the duration of the asylum process.⁴

¹ Commissioner for Children Rights (Rzecznik Praw Dziecka), *Ruling on placing children in the guarded centres for foreigners* (Orzekanie o umieszczeniu małoletnich cudzoziemców w strzeżonych ośrodkach), available at: http://brpd.gov.pl/sites/default/files/2018_03_06_wyst_prezesa.pdf

² Asylum Information Database, Poland, *Detention of vulnerable applicants*, available at: <https://www.asylumineurope.org/reports/country/poland/detention-asylum-seekers/legal-framework-detention/detention-vulnerable>

³ Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej), *Rusza Kampania Zakładnicy Systemu*, available at: <https://interwencjaprawna.pl/detencja>

⁴ Commissioner for Children Rights, *Ruling (...)*

According to the findings of the study conducted by the HFHR for the United Nations High Commissioner for Refugees,⁵ when ruling on the detention of families with children, the national courts rarely referred to the child's situation. National authorities usually fail to treat a child as an individual party of the proceeding and thoroughly examine his/her situation. In the majority of the cases reviewed within the study, the courts have assessed only the situation of the child's parent(s), ignoring the presence of the child.

Moreover, in the clear majority of the reviewed cases, the best interest of the child was not examined or properly assessed. In these rare cases where the child's best interest was examined by the national courts, it was usually limited to the statement that placing a child in the detention centre, together with his/her parents, reflects their best interest. The experience of the Association for Legal Intervention also shows that when examining child's best interest the national courts find it sufficient that the detention facilities ensure medical and psychological aid for migrants and that the doctor providing medical aid in the detention centre issues a medical certificate confirming no obstacles for further detention.⁶

According to the Polish law provisions the Border Guard has the competence to apply alternatives to detention on its own, in which case it does not submit to the court an application for placing an applicant in a detention centre. As previously indicated, alternatives to detention are applied by the Border Guard in cases of families of asylum-seekers with children. However, the HFHR study showed that none of the Border Guard's decisions to apply non-custodial measures, refer directly to the principle of the child's best interest. Although the child's best interests may have been

⁵ HFHR, UNHCR, *Research on the applicability of the best interests of the child principle as the primary consideration in detention decisions as well as the alternatives to detention*, available at: <http://www.hfhr.pl/en/hfhrrs-study-on-immigration-detention-of-families-for-unhcr>. During the study, HFHR lawyers examined 96 court cases concerning detention of families with children as well as 84 proceedings conducted by the Border Guard with a view to applying measures alternative to detention. The study covered the cases files of the relevant proceedings conducted between 1 May 2014 and 31 July 2016.

⁶ Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej), *ALI in Action: 2018 Report* (SIP w działaniu: RAPORT 2018 r.), available at: https://interwencjaprawna.pl/wp-content/uploads/2019/05/raport_sip_w_dzialaniu_2019R.pdf

a factor in the immigration authorities' decision to apply alternative measures rather than requesting a detention order from a court, it was not reflected in the justification of any reviewed decision.

In August 2019 the United Nations Committee Against Torture ("CAT") presented its observations on the periodic report of Poland. CAT expressed its concern that families with children and unaccompanied minors over 15 years of age are placed in detention centres where conditions require improvements. Therefore CAT recommended that Poland should refrain from placing persons in need of international protection, and in particular children, in detention centres.⁷

- evidence used by the courts to assess child's best interest

According to the HFHR study, national court's assessment of the child's situation has always been based on the documents presented by the Border Guard. In none of the analysed cases did the court make use of their competence to order a medical or psychological independent examination of the child nor interviewed them in the course of the proceeding, contrary to the provisions of Article 12 of the Convention on the Rights of the Child.

According to Association for Legal Intervention, in the children detention cases the courts also disregarded independent psychological opinions confirming negative impact of detention on the well-being of a child, which were contrary to the opinions presented by the Border Guards. Only in one case known to that organisation, the Regional Court appointed its own independent psychologist to assess the impact of detention on children well-being and in consequence released the family from the detention centre.⁸

⁷ Committee against Torture, Concluding observations on the seventh periodic report of Poland, available at:
https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/POL/CAT_C_POL_CO_7_35715_E.pdf

⁸ Association for Legal Intervention, ALL in Action...

The Commissioner for Children Rights is of the view that in order to properly determine the best interest of the child, the independent psychologists shall be appointed by the courts, which hardly ever happens in practice.⁹

- period of stay of children in detention centres

In all the cases analyzed by HFHR within the framework of the above-mentioned study, the detention was applied for the maximum period. According to the available data in the first half of 2018, the average period of detention of a child was 115 days (while in the guarded centre of Kętrzyn even 166 days)¹⁰.

It must be noted that in the NGOs and Commissioner for Children Rights view, the administrative detention of children is never in their best interests and always violates the rights of minors. Even when applied for a short time, it may have a permanent negative effect on the mental state of a minor, affecting his/her further development.¹¹

- children detention cases pending before the ECtHR

There are currently number of cases pending before the ECtHR which concern unlawful detention of asylum-seeking families with children:

- *Bilalova v. Poland* case (No. 23685/14), communicated in 2014; the case concerns the detention of the family of Chechen asylum-seekers (single mother with five children); the applicant argued that child's best interest was never properly assessed by the national authorities, also alternatives to detention were not considered in their case; on 6 September 2018 the Polish Government submitted unilateral declaration acknowledging that there has been a violation of Article 8 of the Convention in this case,

⁹ Commissioner for Children Rights, Ruling (...)

¹⁰ Asylum Information Database, Poland, Detention of vulnerable applicants, available at: <https://www.asylumineurope.org/reports/country/poland/detention-asylum-seekers/legal-framework-detention/detention-vulnerable>

¹¹ Commissioner for Children Rights, Ruling (...), HFHR, Report 2018, Rights of persons deprived of liberty, available at: <http://www.hfhr.pl/wp-content/uploads/2018/07/Report-SPT-EN-FIN.pdf>

- joined applications *A. B. v. Poland* (No. 15845/15) and *T.K. and S.B. v. Poland* (No 56300/15), communicated in 2016; the case concerns the detention of asylum-seeking family from Chechnya (parents with a child), the applicants claim that the detention of their new-born son was clearly not in his best interests as he fell seriously ill while in detention,

- *M.Z and Others v. Poland* (No. 79752/16), communicated in 2018; the case concerns a family from Tajikistan (a mother with two infants) who was placed in the detention centre despite mother's physical and mental state indicating she had been a victim of violence and her health deteriorating as a result of detention, the applicants also pointed out that while issuing the detention order the authorities had failed to properly assess its impact on the children,

- *R.M. and Others v. Poland* (no. 11247/18), communicated in 2019; the case concerns the detention of asylum-seeking family (mother with three children) transferred to Poland under Dublin III Regulation, they complained they were detained for more than 7 months despite psychological problems of one of the children, proven by the psychologist's opinion, they have also complained about the violation of their procedural rights during detention proceedings.

- *Z.E. and Others v. Poland* (application no 4457/18, not communicated yet); the case concerns a single mother with four children aged 17, 14, 11 and 10; the applicants claim that children were victims of domestic violence , they also claim that their stay in the detention centre was extended despite presenting to the courts independent psychological opinions indicating the detention is harmful for children; eventually they were released after 10 months of stay in the detention centre when the national court decided to appoint the independent psychologist, who established that further stay in the detention centre was contrary to children's best interest.

- cases of children detention examined by the national courts

In March 2017, the Supreme Court of Poland awarded the compensation to the family of asylum-seekers (single mother with two children) for the moral damage they

suffered when unlawfully placed in the detention centre. Although the family had informed the Border Guards about the severe violence they experienced in the country of origin, they were not identified as victims of torture and other forms of serious violence. The Supreme Court, when examining the compensation case, stressed that the courts are obliged to appoint an expert when assessing the influence of detention on the mental state of a foreigner.¹²

Another case run by HFHR was a case of Chechen family (single father with children aged 4 and 6) placed in the detention centre in Biala Podlaska following their transfer to Poland under Dublin III regulation. Although their detention was prolonged few times by the courts, the best interest of children was never assessed properly. The rulings of the courts were based solely on the statements submitted by the Border Guard, which pointed to the absence to any contraindications to further detention of the children. Meanwhile, the medical records kept by the centre revealed that the children badly respond to being confined.¹³

Number of cases of detention of asylum-seekers families with children were also identified by the National Prevention Mechanism during visits in detention centres. One of the cases concerns Chechen asylum seekers family - single mother with 3 children aged 5, 8 and 9. According to the NPM women reported that she was tortured in country of origin and one of the children was also subjected to violence during the police raid on their home (the child's foot has been shot through). NPM experts stated that there were irregular scars on the child's foot. NPM also reported several other cases of detention of asylum seekers families with children where parents were identified as torture victims and suffered PTSD.¹⁴

¹² Based on information available at:
<https://www.asylumineurope.org/reports/country/poland/detention-asylum-seekers/legal-framework-detention/detention-vulnerable>

¹³ HFHR intervenes in case of detention of father with two children <http://www.hfhr.pl/en/hfhr-intervenes-in-case-of-detention-of-father-with-two-children/>

¹⁴ Commissioner for Human Rights (Rzecznik Praw Obywatelskich), Torture victims should not be placed in detention centres (Ofiary tortur nie powinny przebywać w strzeżonych ośrodkach dla cudzoziemców), available at:

5. HFHR recommendations

Having regard to the above-mentioned argumentation, the HFHR requests that the Committee of Ministers take them into consideration during supervision of the execution of the *Bistieva* judgement.

In our opinion, the general measures taken by the Polish authorities are not sufficient to prevent further violations of the Convention similar to those found in the *Bistieva v. Poland* judgement. The experience of non-governmental organizations and national human rights institutions shows that legislative changes were not sufficient as they are not always applied in practice. Children situation is not analysed properly by the courts. They do not analyse individual situation of children treating them as “attachements” in their parents cases. The national court also neither conduct children hearings nor order their examination by independent experts. The principle of the child’s best interest is rarely applied by the national courts ruling on the detention of children. In these rare cases where the child’s best interest was examined by the national courts, it was usually limited to the statements that placing a child in the detention centre, together with his/her parents, reflects the best interests of the child. Moreover, the detention of children is not applied for the shortest period of time.

In the opinion of the HFHR, the following actions should be taken by Polish authorities in order to fully implement the *Bistieva* judgment:

- conduct training for judges and officers of the Border Guard on the application of the principle of the child’s best interest in the detention decisions as well as on the jurisprudence of the ECtHR in this respect ,
- draft and implement practical guidelines for specific activities that the Border Guard and national courts should carry out as a part of the examination of the best interests

of the child based on the international human rights law and recommendations of the UN Committee of the Rights if the Child,

- ensure that the courts conduct the determination of the best interest of the child in every detention case, including hearing the child and providing independent psychological and/or medical examination on the impact of the detention on child's well-being,
- ensure that the decisions on placing the family in a detention centre contain detailed personalized justification regarding the situation of children.

Recommendations for the Committee:

- to have a full picture of children's detention in Poland, the Committee should request the Government to provide accurate and current statistics on the number of children placed in detention centers and on the alternatives used,
- we also request that the execution of Bistieva v. Poland judgment will be considered at the next Committee meeting.

We believe that this written communication proves to be useful for the Committee of Ministers in performing the task defined in Article 46(2) of the Convention.

The communication was prepared by Jacek Białas, a lawyer of the Strategic Litigation Programme of the Helsinki Foundation for Human Rights.

On behalf of the Helsinki Foundation for Human Rights,

Piotr Kłodoczny, Ph.D.


Secretary of the Board

Danuta Przywara


President of the Board



Warsaw, 6 September 2019

**Republic of Poland
Ministry
of Foreign Affairs**

Plenipotentiary of the Minister
of Foreign Affairs for cases and procedures
before the European Court of Human Rights
Agent for the Polish Government

DPT.432.124.2019 / 16

**Mr Fredrik Sundberg
Head of the Department
for the Execution of Judgments
of the European Court of Human Rights
Council of Europe
Strasbourg**

Dear Sir,

With reference to the communication submitted to the Committee of Ministers of the Council of Europe on 21 August 2019 by the Helsinki Foundation for Human Rights concerning execution of the European Court of Human Rights' judgment in the case of *Bistieva and others v. Poland* (application no. 75157/14), transmitted to the Government on 26 August 2019, attached you will find the Government's comments in response to the said communication, prepared on the basis of information submitted by the Ministry of Internal Affairs and Administration and the Ministry of Justice.

Yours sincerely,

**Jan Sobczak
Government Agent**

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In reply to the communication of the Helsinki Foundation for Human Rights (hereinafter: HFHR) of 21 August 2019 in the case *Bistieva and others v. Poland* (application no. 75157/14, judgment of 10 April 2018), the Government of Poland would like to stress that according to the information at its disposal it cannot be said that under current legal regime (new *Aliens Act* of 12 December 2013 which amended several other legal acts) relevant domestic authorities do not assess the situation of minor migrant children properly or that the alternative measures to administrative detention of migrants are not applied in a sufficient or proper manner.

It should be recalled that a foreigner applying for international protection in Poland can be placed in the guarded centre for aliens only on the basis of the *Act on granting protection to aliens in the territory of the Republic of Poland* of 13 June 2003 (hereinafter: "the 2003 Act"). In accordance with the relevant provisions of that act, minor children accompanying such asylum-seeking foreigner are placed in the guarded centre together with him or her. It should also be mentioned, that a foreigner can be placed in the guarded centre also outside of the asylum procedure, on the basis of the *Aliens Act*. However, it should be stressed that regardless of the legal basis for the placement in administrative detention of a migrant (with or without accompanying minor children), before a decision is made in this respect, the competent authority. *i.e.* either Border Guard or the district court, is obliged to assess the possibility of applying alternative measures to detention. The issue of alternative measures is examined at least once – firstly by the Border Guard, and in the case the Border Guard concludes the application of such measures to be impossible and applies to the court for the placement of a foreigner in the guarded centre – it is examined again by the domestic court before rendering the decision on the administrative detention.

In practice, in respect of migrant families with minor children the alternative measures are usually applied when the family is stopped on the territory of Poland for the first time (in majority of cases it concerns migrant families without valid entry documents stopped at the border, where they apply for the international protection in Poland). Only after such a family is stopped again - most commonly at the border during an attempt to illegally exit Poland or when they are send back to Poland in accordance with Dublin procedure after leaving it illegally - the Border Guard may come to a conclusion that there is a risk of another illegal exit, which cannot be sufficiently prevented by the alternative measures.

Further on, with regard to the observations on children' detention presented by the HFHR in point 4 of it communication, and the following recommendations in this respect (pages 2-3 of the communication, repeated on pages 13-14), the Government would like to submit the following comments.

Determination of the child's best interest and application of alternatives to detention

- **HFHR's introductory remark concerning the statistical data on the application of administrative detention and alternative measures**

In respect of the HFHR's comment on unprecise statistical data presented in the Government's Action Report of 11 June 2019 due to the lack of information on the number of children placed in

the administrative detention, the Government would like to present most recent data in this respect, as provided by the Border Guard:

	Application of administrative detention – number of minors placed in the guarded centres			Application of alternative measures – number of minors in respect of whom alternative measures were applied
	total	including	released	
2018	229	210 – minors accompanied by their legal guardians	out of which 78 were released on the basis of Article 406 of the <i>Aliens Act</i>	605
		19 – unaccompanied minors		
2019 (1 st half)	71	58 – minors accompanied by their legal guardians	out of which 20 were released on the basis of Article 406 of the <i>Aliens Act</i>	327
		13 – unaccompanied minors		

It should be underlined that the available data shows that the number of detained minors presents a downward tendency.

Furthermore, it is also worth noticing that the Border Guard, which is authorised to grant permission for a humanitarian stay of a foreigner on the territory of Poland within the framework of the return proceedings, when deciding on such a permission is obliged to examine, among other things, whether the return would breach the rights of a child, as defined in the Convention on the Rights of the Child or the right to respect for private and family life, as defined by the European Convention on Human Rights (Article 348 §§ 2-3 of the *Aliens Act*).

In 2018, 22 minors were granted the permission for a humanitarian stay, and in the first half of 2019 – 6 minors.

- **Remarks on the lack of proper assessment of the notion of the child’s best interest and of the child’s individual situation and recommendation in this respect**

In the Government’s opinion, the practice of the domestic courts deciding on the placement and extension of the foreigners’ stay in the guarded centres shows that the best interest of a child is taken into account properly. In their case-law, the domestic courts expressed the view that the detention measure would be too severe or even not possible and deemed the alternative measures, such as regular reporting to the Border Guard, as sufficient. They also invoked the principle of the best interest of the child, arguing that the child’s stay in the guarded centre could negatively affect its mental well-being (e.g. decision of the Regional Court in Lublin of 25 July 2018 in the case no. XI Kz 401/18, decision of the same court of 1 August 2018 in the case no. XI Kz 411/18, decision of the Regional Court in Jelenia Góra of 30 July 2018 in the case no. VI Kz 214/18).

What needs to be stressed is that currently both, the Border Guard and the domestic courts, pay particular attention to the issue of children's detention and the length of such detention while requesting for the application of administrative detention or deciding thereof. References to both, international and national legal provisions concerning detention of migrant minors can be found in the domestic courts' case-law and legal doctrine.

Therefore, the interest of a child is taken into account in the detention cases and there is no need for inclusion in the decisions ordering placement of a family with minor children in administrative detention a detailed personalized justification regarding the situation of migrant children accompanying their legal guardians.

It should be recalled that as of 2013 the guarded centres are profiled, basing on the categories of persons placed therein (unaccompanied men, unaccompanied women, unaccompanied minors, families, families with children), thus enabling adjusting the conditions in a designed facility to the particular needs of a given category of persons. Consequently, children can be placed only in the guarded centres for aliens in Kętrzyn (families with children and unaccompanied minors), Biała Podlaska (families with children) and Przemyśl (families with children). What is more, all of the guarded centres are monitored externally, by penitentiary judges, National Prevention Mechanism and international bodies, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

Evidence used by the courts to assess child's best interest and the recommendation in this respect

With regard to the HFHR's remarks on the evidence used by the domestic courts when deciding on the placement of minors in guarded centres and its recommendation to order a hearing of a child and a psychological and/or medical examination in every case, the Government is of the opinion that the examination of the best interest of the child is sufficient and the suggested procedures seem to be impossible to implement in reality – not least due to the time constraints (request for placement in guarded centre has to be decided by the court within 24 hours) and communication difficulties. However, the above does not exclude ordering such measures by the courts in specific cases, should the best interest of a child indicated such a need.

Period of stay of children in detention centres

Referring to the issue of the period of stay of children in the guarded centres for aliens, it should be pointed out that the Border Guard, while requesting the court to place migrants accompanied by children in administrative detention, makes use of its powers, as provided for in the domestic law, and is guided by the need to secure the pending proceedings. However, it should be underlined that the mere fact of requesting the court for the placement in the guarded centre for the maximum time allowed (*i.e.* 60 days on the basis of the 2003 Act or 3 months on the basis of the *Aliens Act*) and allowing such a motion by the court, does not mean that the foreigner, including a minor, will actually stay in detention till the end of the time specified in the placement decision. Since 2014, thanks to the new legal regulations, the Border Guard has had the authority to issue a decision on the release of the foreigner from the guarded centre in

justified cases, *ex officio* or upon request, without the need of turning to the court in this respect. According to Article 406 of the *Aliens Act*, the Border Guard shall release the foreigner *i.a.* in the case:

- when the reasons justifying the use of detention measure ceased to exist,
- it was ascertained that the stay in the guarded centre could pose threat to life or health of the foreigner or that he or she could have been subjected to violence,
- it was ascertained that there are other circumstances preventing the use of detention measure,
- it was ascertained that, for legal or factual reasons, the execution of a decision on the obligation to return (*decyzja o zobowiązaniu do powrotu*) is not possible.

The above provisions are used in practice, also to the benefit of the minors placed in administrative detention (see the table above).

HFHR recommendations in respect of the training and awareness-rising activities

The Government submits that both, the Border Guards and the domestic courts are engaged in numerous training and awareness activities that are of importance also for the problem of the children detention in the context of migration, and they are open for further cooperation in this field and positively assess the HFHR's idea for trainings and other activities on the issue of application of the principle of the child's best interest in the detention decisions.

It should be noted that the subject of the rights of a child has been already included in numerous seminars and trainings for the officers of the Border Guard, organised in particular by the Border Guard's Centre for Specialised Trainings in Lubań, but also in a direct cooperation with non-governmental organisations (*e.g.* with Foundation We Give Children Strength) or the UNHCR.

As regards the domestic courts, taking into consideration the HFHR's recommendations, the Ministry of Justice (Department for Strategy and European Funds) submitted on 30 August 2019 a request to the Ministry of Internal Affairs and Administration (Department of European Funds) to consider the inclusion of the ideas for trainings suggested by the HFHR in the future competitions for the funding from the European funds, especially considering that these themes are covered by the Norwegian Financial Mechanism, implemented by the Ministry of Internal Affairs and Administration.

Additionally, in case of the domestic courts, the awareness-rising and training activities planned by the Ministry of Justice on the subject of hearing of a child, should be mentioned. The Ministry in question is going to develop and implement tools for hearing of the children and organise trainings on this issue – what may indirectly lead also to the improvement of the migrant children in the contact with the justice system, since they will aim at rising the awareness of the particular needs of children in general.