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

Legal summary

November 2026

A.R. and Others v. Poland [GC] - 42120/21

Judgment 24.11.2026 [GC]

Article 1

Jurisdiction of States

Respondent State's jurisdiction over the first applicant after his unlawful crossing of the Belarusian border into Poland in the context of "instrumentalisation of migration" by Belarus

Lack of jurisdiction over the first and second applicants for the period during which they were at the Belarusian side of the Polish-Belarusian border

Article 3

Expulsion

Summary removal to Belarus of the first applicant after his unlawful crossing of the Belarusian border into Poland in the context of "instrumentalisation of migration" by Belarus: *violation*

Article 34

Hinder the exercise of the right of application

Failure to comply with interim measures indicated under Rule 39 by preventing the first and second applicants' lawyers from having access to their clients for the purpose of the Court proceedings and by returning the first applicant to Belarus: *violation*

Facts – The case concerns the applicants' attempts to enter Poland unlawfully from Belarus in a context of "instrumentalisation of migration" by Belarus and their allegations of summary return to that country between August and October 2021.

The application was lodged by 32 Afghan nationals who allege that they crossed the "green" border between Belarus and Poland in early August 2021 before being forcibly "pushed back" to Belarus by Polish border guards. They set up a makeshift camp near the Belarusian-Polish border, where they were allegedly left stranded between the Polish border guards, on the one hand, and their Belarusian counterparts, on the other. The applicants allege that, while staying in the camp, their claims for asylum in Poland were not considered by the Polish authorities.

On 25 August 2021 the Court applied Rule 39 of its Rules of Court and indicated that the Polish Government had to provide the applicants with humanitarian aid and adequate medical assistance. On 27 September 2021 the Court extended this interim measure until further notice. On that date it also added two further interim measures, indicating

to the Government (i) to allow the applicants' lawyers to establish the necessary contact with them, either by allowing direct contact with the applicants, provided that the latter were on Polish territory, or if not, by allowing the lawyers access to the Polish border near to the applicants' then whereabouts; and (ii) not to return the applicants to Belarus, provided the latter were on Polish territory.

On 20 October 2021, seventeen of the thirty-two applicants, including the first applicant, crossed the barbed wire fence along the Belarusian-Polish border. They were allegedly then apprehended by Polish border guards, who took them to the border crossing and sent them back to Belarus. The second applicant had remained behind the fence. The first and second applicants submitted that they had been obliged to return to Afghanistan.

On 25 June 2024 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

Law –

(1) *Preliminary issue: striking-out of the application in respect of applicants nos. 3-32* – After the case had been relinquished to the Grand Chamber, the Court had asked the applicants' representatives to confirm whether all the applicants wished to pursue their application. The representatives had informed the Court that the first and second applicants wished to pursue their application, whereas the remaining applicants either did not wish to do so or contact with them had been lost. Therefore, in accordance with Article 37 § 1 (a) of the Convention, the Court concluded that applicants nos. 3-32 no longer wished to pursue their applications. Further, the Court did not see any special circumstances regarding respect for the rights guaranteed by the Convention and the Protocols thereto requiring it, under Article 37 § 1 *in fine*, to continue the examination of the application in respect of those applicants as their complaints were the same as those raised by the first and second applicants.

Conclusion: application struck out to the extent it concerned applicants nos. 3 to 32 (unanimously).

(2) *Alleged violations of the Convention on account of the applicants' removal to Belarus* –

Article 1:

The Court assessed whether the two remaining applicants had been within the respondent State's jurisdiction at the material time separately for each of the four successive relevant periods. It found that only the first applicant had come under its jurisdiction and only during the last period, when he had crossed the border on 20 October 2021 and was removed on that day. More specifically:

(a) *Periods prior to the applicants' settlement in the camp* – The Court found that the applicants had not adduced prima facie evidence in support of their argument that they had been within the jurisdiction of Poland during the period in question.

Conclusion: lack of jurisdiction (fifteen votes to two).

(b) *The period between the applicants' settlement in the camp and the night of 18 to 19 August 2021* – The Court found that the applicants' version of events during that period were rather vague and lacking in precision and had not been sufficient to demonstrate, on the basis of prima facie evidence, that they had been present on Polish territory during the relevant period.

Conclusion: lack of jurisdiction (twelve votes to five).

(c) *The period after the night of 18 to 19 August 2021 when the applicants were present in the camp* – It was not disputed that the makeshift camp, in which the applicants had claimed to have stayed with other migrants, had been located entirely on Belarusian territory. Nor had it been alleged that Poland had exercised jurisdiction outside its national territory in the area where the applicants had then been staying. The applicants had alleged that they had been within the jurisdiction of Poland at the time on account of the actions of the Polish guards, who had prevented them from moving towards Polish territory, ignored their applications for international protection in Poland, kept watch on their exchanges with anyone approaching them from the Polish side and monitored humanitarian aid supplies from Poland.

The Court reiterated that States had the sovereign right to control the entry of aliens into their territory and that the mere fact that a person outside the territory of a State sought to enter that territory and was denied such access was not in itself sufficient to establish that State's jurisdiction over that person. Furthermore, the mere fact that a foreign national abroad had initiated immigration proceedings in a Contracting State was not sufficient, in the absence of other connecting ties, to establish that State's jurisdiction in respect of the risk alleged by him or her of being subjected in his or her State of origin to treatment contrary to Article 3.

Even assuming that the Polish agents had exercised some form of control over the applicants when they had been present in the camp, the Court considered that the level of the alleged control had been insufficient to bring the applicants within Polish jurisdiction within the meaning of Article 1. The applicants, unlike those in *M.K. and Others v. Poland*, had been on Belarusian territory at a place close to the border but which had no border infrastructure belonging to the Polish State, and no one had been allowed to cross the Polish-Belarusian border at that location. Even though the Polish border guards had been present in the vicinity on the Polish side, they had not taken any official action *vis-à-vis* the applicants and had only passively prevented them from entering Polish territory at an unauthorised location.

Furthermore, the Court did not find it unusual that Polish officers had been present in the border area and had been monitoring individuals and goods arriving from Polish territory. Polish-Belarusian relations at the time had been tense, measures related to the declaration of a state of emergency in the zone concerned had been in place, armed Belarusian agents had been also present in the same area and the physical barrier separating Polish territory from Belarusian territory had not yet been erected in the area in question. Moreover, the allegation that Belarusian agents had prevented the applicants from returning to Belarus and had endeavoured to keep them in the camp clearly could not be attributed to Polish agents.

Lastly, the Court observed that the domestic court, ruling on the applicants' complaints that they had been deprived of their liberty at the Polish-Belarusian border, found that it had no jurisdiction to hear the case on the grounds, first, that the applicants had been outside its jurisdiction and, second, that their few interactions with the Polish officials during the period under consideration had been insufficient to bring the applicants within Polish jurisdiction.

Conclusion: lack of jurisdiction (thirteen votes to four).

(d) *The events of 20 October 2021* – The Government had not disputed that, on 20 October 2021, a number of the occupants of the camp near Usnarz Górny had crossed the border fence and found themselves within Polish territorial jurisdiction for the purposes of Article 1. Nor was it disputed that the Polish officers who had been

present that day in the area had not submitted any of those concerned to identity checks.

The first applicant's presence among the group of individuals who had found themselves within Polish jurisdiction on 20 October 2021 was corroborated by various evidence before it and his account of the events of 20 October 2021 was consistent with the Government's version.

Accordingly, the Court considered, that the first applicant's version of events was coherent and credible and that his presence within the jurisdiction of the respondent State on 20 October 2021 was established.

Conclusion: first applicant within the jurisdiction of Poland on 20 October 2021 (unanimously).

Article 3:

(a) *The specific and novel context of the present case* – In the present case – as also in the cases *of H.M.M. and Others v. Latvia* [GC] and *C.O.C.G. and Others v. Lithuania* [GC], adopted on the same day, – the Court was confronted with a factual context which it had not previously had to address. The respondent States in those three cases had been the targets of hostile actions which had been carried out by the Belarusian authorities which the parties and various third-party interveners had described as "instrumentalisation of migration". The Court considered that, for the purpose of these cases, instrumentalisation of migration by a third State could be understood as comprising the following two elements:

(i) a third State encouraged, facilitated or forced the movement of third-country nationals or stateless persons to the border of a High Contracting Party, with the aim of destabilising that State or the wider region; and

(ii) such actions were liable to put at risk essential functions of the State concerned, including the maintenance of law and order, the safeguarding of its national security, and the fulfilment of its human rights obligations under the Convention.

The Court emphasised that the instrumentalisation of migration was by its very nature an exploitative enterprise and that treating human beings as "instruments" was an affront to the values of the Convention.

It had been acknowledged, notably by various Council of Europe and EU bodies, and not disputed by the applicants or any of the third-party interveners in the present case, that at the material time the Belarusian authorities had encouraged, facilitated and forced the arrival of nationals of various third countries in Belarus and their irregular crossing of the border into Poland, Latvia and Lithuania, with the aim of destabilising those States and the European Union as a whole, as a form of retaliation for sanctions which the latter had imposed against Belarus. Indeed, the Belarusian authorities themselves had publicly admitted to doing so and had facilitated the entry into Belarus of foreign nationals, notably through simplified and flexible visa procedures and by promoting organised travel arrangements. Those measures had been further supported by targeted promotional campaigns conducted in the countries of origin of the foreign nationals. Nor had it been disputed that, in 2021 and 2022, the number of attempts to illegally enter Polish territory had increased several times compared to the preceding years.

The Court had, in the past, dealt with situations of sudden mass arrivals of asylum-seekers and migrants at the Contracting States. Regardless of whether the situation involved instrumentalisation, any State experiencing a sudden mass arrival of irregular migrants and potential asylum-seekers faced challenges in maintaining border control,

as well as the risk of its migration and asylum procedures being overwhelmed. However, what distinguished the present case from the situations of mass irregular migration which the Court had previously examined was the fact that the irregular border crossings into Poland had been orchestrated by the Belarusian authorities in pursuit of their own political goals. They had sought to weaken Poland's ability to exercise sovereignty over its borders and to control the entry of aliens into its national territory. By such actions they had endangered not only the national security and public order of Poland but also those of the Council of Europe area as a whole.

Any attempt to exploit the Convention in that manner went entirely against its object and purpose and threatened its basic structure. Allowing third States to abuse the Convention by taking advantage of the Parties' obligations under the Convention so as to weaken their ability to protect their borders and, as a consequence, their ability to perform essential State functions, to maintain law and order, to safeguard their national security, and ultimately to fulfil those obligations, would undermine the effectiveness of the protection of fundamental rights which is a cardinal consideration underpinning the whole Convention. As a constitutional instrument of European public order (*ordre public*), the Convention enshrined fundamental values of European democracy. It was therefore the role of the Court to protect its integrity and to prevent any attempt by hostile States to exploit the Convention by instrumentalising individuals.

When assessing the compliance of State authorities with their obligations under the Convention and the Protocols thereto, the Court had to have regard to the general context of the case at both the domestic and the international or regional levels.

In the present case, as in the cases of *H.M.M. and Others v. Latvia* and *C.O.C.G. and Others v. Lithuania*, the Court was called upon to examine complaints lodged by individuals who, at the time of instrumentalisation of migration by the Belarusian authorities, had crossed the borders illegally from Belarus into the neighbouring countries, from which they had been then returned to Belarusian territory.

The Court reiterated that Contracting States had the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. The Convention guaranteed safeguards to aliens who were within the jurisdiction of one of the Contracting States for the purposes of Article 1, including Article 3, which prohibited the return of any alien to a State in which he or she faced a real risk of being subjected to inhuman or degrading treatment or even torture, and Article 4 of Protocol No. 4, which prohibited the collective expulsion of aliens. Neither of those provisions, nor any other provision of the Convention or its Protocols, granted a self-standing right to aliens to enter the territory of a Contracting State. Nor was a right to political asylum contained in either the Convention or its Protocols.

The respondent State was also a member State of the European Union and its borders were also in part external borders of the latter. As a member State of the European Union, it was bound by the relevant obligations under EU law, including duties relating to the control and management of the external borders as well as those relating to the right to asylum that was guaranteed by the Charter of Fundamental Rights of the European Union. In that connection, the Court reiterated that, in accordance with Article 53 of the Convention, its interpretation of the Contracting States' obligations under the Convention could not have the effect of limiting any obligations incumbent on those States under relevant EU law, including the Charter. It also reiterated that it was not competent to rule formally on compliance with domestic law, other international treaties or EU law.

(b) *The Court's approach in cases of instrumentalisation of migration by a third State* – The Court proceeded to clarify the Contracting States' obligations under the Convention in the specific and novel context of instrumentalisation of migration by a third State. In

that connection, it set out the approach that it would follow in cases where individuals who had attempted to illegally enter a Contracting State's territory and had been returned in a summary manner to the instrumentalising State complained that that had entailed a violation of their rights under Article 3.

In migration cases which the Court had previously decided it had been confronted with crises or difficulties relating to what it had described as "migratory flows". That phenomenon, which represented a deliberate threat to the State, needed to be distinguished from the instrumentalisation of migration by a third State.

The Court had consistently affirmed the right of States to establish their own migration policies. It had also emphasised the importance of managing and protecting borders and acknowledged that the Contracting States might in principle put arrangements in place at their borders designed to allow access to their national territory only to persons who fulfilled the relevant legal requirements. In that connection, the Court made it clear that neither the Convention nor the Protocols thereto precluded the States from restricting entry by aliens through their borders or even fully closing those borders.

At the same time, the Court had carefully identified the limits to the States' rights in that respect resulting from the obligations laid on them by Article 3 which did not permit a State to remove an individual to a country where substantial grounds had been shown for believing that he or she would face a real risk of being subjected there to treatment contrary to that provision. That obligation corresponded to the essence of the protection against ill-treatment that had to be afforded to all individuals, including those who had entered the territory of the State illegally as a result of the instrumentalisation of migration. A Contracting State could not be absolved of its substantive obligations under Article 3.

From the substantive guarantee of protection against ill-treatment the Court had derived certain procedural safeguards that served to rendered that guarantee practical and effective; they represented the Contracting States' procedural obligations under Article 3. The Court had held that, in those cases where the authorities sought to return an asylum-seeker to an intermediary third country without examining the merits of his or her asylum claim, they had to assess whether the individual would have access to an adequate asylum procedure in that country. The Court considered that, in the specific context of instrumentalised migration, where the instrumentalising State sought to exploit third-country nationals or stateless persons by encouraging, facilitating or forcing their movement to a Contracting State's territory, an assessment of whether those individuals would have access to an adequate asylum procedure in the instrumentalising State lacked pertinence, in view of the purpose of such a policy and the manner of its implementation.

As to the assessment that national authorities were required to carry out under Article 3 before removing an individual in the specific situation where the Contracting State was being targeted by instrumentalised migration, the Court considered that in order to preserve the effectiveness of the protection afforded by that provision, the national authorities had an obligation to detect those individuals who would be particularly at risk of suffering or enduring ill-treatment. Those individuals fell into two categories: (i) those who presented evident personal vulnerabilities (for example, owing to age, ill health or disability), and (ii) those with a specific basis for claiming that removal to the instrumentalising State would evidently expose them to a real and immediate threat to life or a real and immediate risk of ill-treatment reaching the threshold of severity under Article 3. Regarding the second category, the burden of proof would be on the person concerned, who had to adduce such prima facie evidence as might be reasonably expected in the circumstances. Accordingly, applicants who then complained before the Court of having been subjected to removal in violation of that provision had to be able to demonstrate that had come within one of those categories.

The Court recognised the difficulties facing applicants in gathering evidence in the circumstances created by instrumentalisation of migration and would therefore be attentive to any valid reasons that were given as to why such evidence had not been put forward. Reports and statements from reputable sources that described the general situation at the material time, while relevant, could not in themselves constitute prima facie evidence, in the absence of a detailed, specific and consistent account by applicants or any other relevant elements relating to their individual circumstances.

It followed that, in a situation of instrumentalised migration, the removal of a foreign national to the instrumentalising State would not, as such, constitute a violation of Article 3. It was only those individuals with evident personal vulnerabilities, or who could show a specific basis for the claim that, if removed to the instrumentalising State, they would be evidently exposed to a real and immediate threat to life or a real and immediate risk of severe ill-treatment, who needed to be detected by the national authorities with a view to assessing their need for protection and taking appropriate action to comply with their obligations under Article 3.

The Court emphasised that it was the domestic authorities' primary responsibility to secure the rights and freedoms defined in the Convention and its Protocols. That applied all the more in the migration context, when it came to ensuring protection against severe ill-treatment, as was required by Article 3. While it would be for the Court, in the final instance, to determine whether, through the actions or failings on the part of the State, an individual had been denied the protection of that provision, the international machinery set up under the Convention was subsidiary to the protection of human rights that had to be secured primarily at the national level. Moreover, it was not the Court's role to substitute itself for the domestic authorities in the exercise of their right to control the entry, residence and expulsion of aliens. In any event, the Court clarified that the above approach was without prejudice to any obligations that might be incumbent on the Contracting States under relevant international law or, where applicable, under EU law, in particular those relating to the right to asylum.

(c) *Application of the above approach in the present case* – The first applicant had complained that his removal from the respondent State on 20 October 2021 had been carried out without any assessment of his individual situation.

The Court thus had to ascertain, having regard to the approach set out above, whether the first applicant had come within one of the categories of individuals that the national authorities had been required to detect with a view to assessing their need for protection and taking appropriate action to comply with their obligations under Article 3.

The Court did not discern, and the first applicant had not alleged, any evident personal vulnerabilities that would have brought him within the first category. The question was thus whether he should have been detected as a person falling within the second category. The Court found, in the circumstances of the case, that all the factual elements put forward by the first applicant, which referred to extremely difficult material conditions during the period spent in the makeshift camp, were not sufficient in themselves to demonstrate that he came within the second category. However, given the factual context of the case, the interim measure granted by the Court on the date of his removal, indicating that he should not be returned to Belarus, provided that he was on Polish territory, had required the national authorities to detect the first applicant as having a specific basis for claiming that he would be evidently exposed to a real and immediate threat to life or a real and immediate risk of ill-treatment in the event of removal to Belarus. Before the removal the first applicant had been under the control of the Polish border guards for several hours which had been a sufficient period of time for those authorities to have been apprised of the interim measure in force. Therefore, there had been an obligation on the authorities to assess his need for protection and to take

appropriate action to comply with their obligations under Article 3, which they had not done.

Furthermore, the Polish authorities had failed to demonstrate that they had put in place an effective procedure enabling the first applicant, who should have been detected as belonging to the second category, to benefit from the protection required by Article 3 before his removal to Belarus.

Conclusion: violation (unanimously).

Article 4 of Protocol No. 4 and Article 13 in conjunction with Article 3 and Article 4 of Protocol No. 4:

Having clarified the interpretation of Article 3 in the context of instrumentalised migration, the Court held, unanimously, that it was not necessary to examine separately the admissibility and merits of the first applicant's complaints under Article 4 of Protocol No. 4 to the Convention the requirements of which did not, in the present and specific context go beyond those of Article 3. The Court also held, unanimously, that it was not necessary to examine the related complaints raised under Article 13 taken in conjunction with Article 3 and Article 4 of Protocol No. 4.

(3) *Alleged failure to comply with the interim measures indicated by the Court* –

Article 34:

Firstly, in order to comply with the indications given by the Court on 27 September 2021 regarding the applicants' access to a lawyer, the Polish Government could have either allowed direct contact between the applicants and their lawyers, provided that the applicants had been on Polish territory, or allowed the applicants' lawyers access to the Polish border near to the applicants' whereabouts at the time. The Court noted that while it had been established in the present judgment that the applicants had indeed been on the territory of Belarus when they had been in the camp, the Government still had had the possibility of complying with the second of the two measures indicated by the Court. The respondent State's failure to comply with that interim measure had complicated the exchanges between the applicants and their lawyers and had deprived the applicants of the possibility of actively participating in the proceedings before the Court. In particular, the lawyers in question had been apprehended on 28 September 2021 by Polish officers at the entrance to the border zone covered by the state of emergency. The officers had thus prevented them from going any further despite being aware that the lawyers had been intervening in accordance with the Court's above-mentioned decision. The applicants had thus been unable to discuss their situation with their lawyers and, in particular, had been unable to provide them with any information that have might been useful for the proper conduct of the proceedings before the Court. The Government had not shown that there had been any objective impediment preventing them from complying with the interim measure.

Secondly, on 20 October 2021, approximately one month after the Court had indicated the interim measure that the Government should not expel the applicants, the first applicant had been removed by force from Polish territory to Belarus. The Court noted that the interim measure and the non-refoulement obligation contained therein had not been conditional on legal entry through a border crossing point.

Accordingly, the Court concluded that, by preventing the lawyers of the first and second applicants from having access to their clients on 28 September 2021, and by returning the first applicant to Belarus, on 20 October 2021, Poland had failed to discharge its obligations under Article 34 of the Convention.

Conclusion: violation (unanimously).

Lastly, the Court declared inadmissible, unanimously, the first applicant's complaints under Article 3 (alleged ill-treatment by Polish officers), under Articles 2 and 3 (material and sanitary conditions in the camp) and under Article 13 in conjunction with Articles 2 and 3 (alleged lack of effective remedies in relation to the conditions).

Rule 39: In view of the information transmitted by the applicants that they were currently residing in Afghanistan, the Court lifted the interim measures that had been indicated on 25 August 2021 and 27 September 2021.

Article 41: EUR 20,000 to the first applicant and EUR 5,000 to the second applicant in respect of non-pecuniary damage.

(See *M.K. and Others v. Poland*, 40503/17 et al., 23 July 2020, Legal Summary; *H.M.M. and Others v. Latvia* [GC], 42165/21, 24 November 2026, Legal Summary; *C.O.C.G. and Others v. Lithuania* [GC], 17764/22, 24 November 2026, Legal Summary)

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