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PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

The European Court of Human Rights (ECtHR) refers to the issues regarding aliens and migration on numerous occasions. These cases concern, inter alia: illegal migration, deprivation of liberty of illegal migrants, conditions of their detention, illegal migrant minors, unaccompanied migrant minors, etc. The analysis of these issues involves numerous rights and freedoms enshrined in the Convention. However, there are only three provisions of the European Convention on Human Rights (ECHR) that do focus explicitly on aliens. Those guarantees include Article 16 (prohibition of restricting the public activity of aliens) and Article 4 of Protocol No 4 to the ECHR (prohibition of collective expulsion of aliens) and Article 1 of Protocol No 7 to the ECHR (procedural guarantees regarding the expulsion of aliens).

Despite very few explicit references to ‘aliens’ in the Convention, the judicial achievements of the ECtHR in this area are extremely extensive, actually incomparable to other international mechanisms for the protection of individual rights and freedoms. ECtHR has wide jurisprudence concerning Articles 2, 3, 5, 6, 8, 13 in this regard. Most of the issues concerning alleged violations of those provisions were subjected to analysis.

However, the very provision which clearly focuses on the prohibition of collective expulsion of aliens is often omitted or treated as ‘secondary’ provision in this regard. The main aim of this article is to focus solely on Article 4 of Protocol No 4 to the ECHR

and its role in the process of protecting the rights of aliens within the European Paradigm of their protection. The article will also seek to examine the current application of this provision.

KEYWORDS

collective expulsion, European Convention on Human Rights, European paradigm of the protection of aliens, migrants

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zbiorowe wydalenie, europejska konwencja praw człowieka, europejski paradygmat ochrony cudzoziemców, migranci

I. INTRODUCTION

In many aspects of its jurisprudence, the European Court of Human Rights (ECtHR) examines the issues regarding aliens¹ and migration². These cases concern, inter alia: illegal migration, deprivation of liberty of illegal migrants, conditions of their detention, illegal migrant minors, unaccompanied migrant minors, etc. The analysis of these issues involves numerous rights and freedoms enshrined in the Convention.³ However, the provisions of the European Convention on Human Rights (ECHR) do not focus explicitly on aliens. In fact, the only provisions of the ECHR mentioning *expressis verbis* aliens are: Article 16 (prohibition of restricting the public activity of aliens),⁴ Article 4 of Protocol No 4 to the ECHR (prohibition of collective expulsion of aliens)⁵ and Article 1 of Protocol No 7 to the ECHR (procedural guarantees regarding the expulsion of aliens)⁶.

¹ Michał Balcerzak and others, *Prawo międzynarodowe publiczne* (Warszawa: Wolters Kluwer, 2023) 344-345; Wojciech Góralczyk, Karol Karski and Stefan Sawicki, *Prawo międzynarodowe publiczne w zarysie* (Warszawa: Wolters Kluwer, 19th edn, 2024), 293, 300-302.

² See, e.g. Karol Karski, 'Migration' in *International Law from a Central European Perspective* in Anikó Raisz (ed) (Miskolc-Budapest: CEA Publishing, 2022), DOI: 10.54171/2022.ar.ilfcec_10.

³ Elżbieta Karska, 'Kilka uwag o uchodźstwie jako zagadnieniu prawnym' in Elżbieta Karska (ed) *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego* (Warszawa, Cardinal Stefan Wyszyński University, 2020), 14-16, 19, 21.

⁴ European Convention on Human Rights [04 November 1950] Article 16.

⁵ *ibid*, Article 4 of Protocol No 4.

⁶ *ibid*, Article 1 of Protocol No 7.

Despite very few explicit references to ‘aliens’ in the Convention, the judicial achievements of the ECtHR in this area are extremely extensive, actually incomparable to other international mechanisms for the protection of individual rights and freedoms. This follows from a broad interpretation of the provisions of the ECHR. Article 1 of the Convention guarantees the rights and freedoms provided for in the ECHR to ‘everyone’ under the jurisdiction of Contracting Parties,⁷ and is, therefore, not limited to providing protection to nationals of Contracting Parties⁸.

The Court’s jurisprudence has been subjected to wide analysis in regard of aliens. Most of the issues concern alleged violations of Articles 2, 3 and 8 and those are subjected to analysis.⁹ However, the very provision which clearly focuses on the prohibition of collective expulsion of aliens is often omitted or treated as ‘secondary’ provision in this regard. The main aim of this article is to focus on Article 4 of Protocol No 4 to the ECHR and its role in the process of protecting the rights of aliens within the European Paradigm of their protection.

II. THE SCOPE OF ARTICLE 4 OF PROTOCOL NO 4

Protocol No 4 was adopted on 16 September 1963. Apart from the prohibition of collective expulsion of aliens (Article 4), it also guarantees the prohibition of imprisonment for debt (Article 1), freedom of movement (Article 2) and prohibition of expulsion of nationals (Article 3).

As the ECtHR stated in *Hirsi Jamaa and Others v Italy*, the *travaux préparatoires* were not explicit as regards the scope of application and ambit of Article 4 of Protocol No 4.¹⁰ According to *travaux préparatoires* on Article 4 of AP No 4, the provision initially was projected to provide for the possibility of individual expulsion of an alien ‘only if he endangers national security or offends against *ordre public* or morality’.¹¹ Such expulsion would be possible, provided an effective remedy would be guaranteed to an alien ‘who has been lawfully residing for more than two years in the territory of a Contracting Party’. An alien who has

⁷ *ibid*, Article 1.

⁸ Elżbieta Karska and others, *Human Rights in the European Paradigm of the Protection of Aliens* (Warszawa: Cardinal Stefan Wyszyński University, 2023) 24-25, DOI: 10.13166/hrQHLC7301.

⁹ *ibid*.

¹⁰ *Hirsi Jamaa and Others v Italy* [23.02.2012] app. no 27765/09 (ECtHR), § 174.

¹¹ Council of Europe, ‘Collected Edition of the „Travaux Préparatoires” of Protocol No 4 to the Convention, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto’, Strasbourg 1976, 200; <https://www.echr.coe.int/documents/d/echr/library_tp_p4_bil> accessed 25 March 2024.

been lawfully residing for more than ten years could be expelled ‘for reasons of national security’.¹² The Committee decided that Article 4 should focus on the prohibition of collective expulsion and adopted the text ‘Collective expulsion of aliens is prohibited’. The Explanatory Report clearly stresses that this provision refers also to stateless persons. It was also agreed that this provision could not be interpreted as in any way justifying measures of collective expulsion which may have been taken in the past.¹³

The final wording of Article 4 AP No 4 is very simple: ‘Collective expulsion of aliens is prohibited’. This provision is of absolute character. It cannot be subjected to any limitations, because it does not provide any limitation clause.¹⁴ It does not provide any restriction of the reasons for expulsion. According to the Explanatory Report, the Committee could not have accepted such a provision.¹⁵ The text does not explicitly mention any particular procedures for lawful expulsion, as proposed in the original draft.¹⁶ However, such procedures are required according to the ECtHR case law.

According to *travaux préparatoires* on Article 4 AP No 4, the term ‘aliens’ refers not only to those lawfully residing in the territory but ‘all those who have no actual right to nationality in a State, whether they are passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality’.¹⁷ In *Hirsi Jamaa and Others v Italy*, The Court stressed that according to the drafters of Protocol No 4, the word ‘expulsion’ should be interpreted ‘in the

¹² *ibid.*

¹³ Council of Europe, ‘Explanatory Report to Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto’, Strasbourg 16 September 1963, 11; <<https://rm.coe.int/16800c92c0>> accessed 25 March 2024.

¹⁴ Andrzej Wróbel, ‘Protokół 4’ in Leszek Garlicki (ed), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 19-59 oraz do Protokołów dodatkowych*, Vol 2 (Warszawa: C.H. Beck, 2010), 610.

¹⁵ Council of Europe, ‘Explanatory Report to Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto’ (n 13) 11.

¹⁶ *ibid.*; also ‘Collected Edition of the „Travaux Préparatoires” of Protocol No 4 to the Convention’ (n 11) 200ff.

¹⁷ *ibid.*, § 34. See also Góralczyk, Karski, Sawicki (n 1) 293; Marcin Wiącek, ‘Prawo cudzoziemca do uzyskania statusu uchodźcy w świetle Konstytucji RP’ in Elżbieta Karska (ed), *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego*, Warszawa: Cardinal Stefan Wyszyński University, 2020), 159–174. See also Elżbieta Karska, Łukasz Dawid Dąbrowski, ‘Qualifying for international and national protection under the Polish legal order: Some remarks in the context of the war in Ukraine’, (2024) *Stosunki Międzynarodowe | International Relations*, DOI: 10.12688/stomiedintrelat.17794.1; Elżbieta Karska and Bartłomiej Oręziak, ‘European Paradigm of the Protection of Aliens Categorisation of Foreigners Seeking International Protection in the European Union’ (2024) 26(3) *International Community Law Review* 211–226, DOI: 10.1163/18719732-bja10123.

generic meaning, in current use (to drive away from a place)'. This definition is contained in the section relating to Article 3 of the Protocol, but according to the ECtHR, it can also be applied to Article 4 AP No 4. It should be understood that the *travaux préparatoires* do not preclude extraterritorial application of Article 4 of Protocol No 4.¹⁸

The prohibition of collective expulsion of aliens could not be properly examined without due reference to the Court's case law, the analysis of which is crucial to the proper examination of ECtHR standards regarding domestic practices and proceedings in this regard.

III. ECTHR JURISPRUDENCE REGARDING PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS

For a number of years, the provision of Article 4 of Protocol No 4 was not raised very often. However, recurring migration crises that European countries have been facing over the recent decade, require certain developments of the ECtHR jurisprudence in this regard.

The Court perceives 'collective expulsion' under Article 4 AP No 4 as 'any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'.¹⁹ The Court further clarified in *Čonka* that it did not mean that meeting the requirement of the reasonable and objective examination of the particular case of each individual would mean that 'the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No 4'.²⁰

Article 4 AP No 4 prohibits 'collective' expulsions. In this regard, the emphasis should be placed on the amount of individuals affected by expulsion. In this regard, aliens, as a group, are compelled to leave a country, 'except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'.²¹ The Court does not voice any requirements concerning a minimum number of individuals below which the collective nature of the expulsion would be called into question. In this regard, for determining whether there has been a violation of Article 4 of AP No 4, the

¹⁸ *Hirsi Jamaa and Others v Italy*, § 174.

¹⁹ *Čonka v Belgium* [5 February 2002] app. no 51564/99 (ECtHR) § 59; see also *Andric v Sweden* [23 February 1999] app. no 45917/99 (ECtHR) § 1.

²⁰ *ibid.*

²¹ *N.D. and N.T. v Spain* [13 February 2020] app. no 8675/15, 8697/15 (ECtHR) § 193.

number of aliens affected by particular measure is irrelevant.²² The ‘collective’ character of the expulsion does not need to be based on a special characteristic or a factor defining a group. The decisive criterion in this regard is the absence of ‘a reasonable and objective examination of the particular case of each individual alien of the group’.²³

The Court stresses the fundamental importance of procedure in relation to all alleged collective expulsions. The expulsion could not be perceived as ‘collective’ if it was preceded by the ‘reasonable and objective examination of the particular case of each individual alien of the group’.²⁴ ECtHR also specifies that ‘the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis’.²⁵

The diligent procedural examination of each individual expulsion case is crucial for ensuring safeguards provided under Article 4 AP No 4. The ECtHR clearly stressed that the purpose of Article 4 AP No 4 is to prevent States from being able to remove a certain number of aliens without examining their personal circumstances and, therefore, without enabling them to put forward their arguments against the measure taken by the relevant authority.²⁶ In order to determine whether there has been a sufficiently individualised examination, it is necessary to consider the circumstances of the case and to verify whether the removal decisions had taken into consideration the specific situation of the individuals concerned.²⁷

The Court requires sufficiently individualized examination of each case to determine the lack of ‘collective’ character of expulsions. The ECtHR clarified its approach in *Khlaifia and Others v Italy*. The Court referred to its previous case law and drew the line between 4 previous violations of Article 4 AP No 4 and the *Khlaifia and Others* case. In *Čonka*, the order to leave the country made no reference to the applicants’ asylum request, whereas the asylum procedure had not yet been completed. Additionally, a number of people had been simultaneously summoned to the police station, in conditions that made it very difficult for them to contact a lawyer. In *Hirsi Jamaa and Others*, the applicants had not undergone any identity checks and the authorities had merely put the migrants onto military vessels to take them back to the Libyan coast. In *Georgia v Rus-*

²² *ibid.*, § 194.

²³ *ibid.*, § 195; see also *Khlaifia and Others v Italy* [15 December 2016] app. no 16483/12 (ECtHR) § 237ff.

²⁴ *Khlaifia and Others v Italy*, § 237.

²⁵ *Georgia v Russia (I)* [3 July 2014] app. no 13255/07 (ECtHR) § 167.

²⁶ *Sharifi and Others v Italy and Greece* [21 October 2014] app. no 16643/09 (ECtHR) § 210; *Hirsi Jamaa and Others v Italy*, § 177; *Khlaifia and Others v Italy*, § 238.

²⁷ *Hirsi Jamaa and Others v Italy*, § 183; *Khlaifia and Others v Italy*, § 238.

sia (I), ECtHR noticed a coordinated policy of arrest, detention and expulsion of Georgians, who had been arrested under the pretext of examination of their documents and expelled after courts entered into preliminary agreements to endorse such decisions, without any legal representation or examination of the particular circumstances of each case. In *Sharifi and Others*, the migrants intercepted in Adriatic ports were subjected to ‘automatic returns’ to Greece and were deprived of any effective possibility of seeking asylum.²⁸

In *Khlaifia and Others v Italy*, the Court decided that the expulsion of the applicants was not ‘collective’ within the meaning of Article 4 AP No 4. The ECtHR stated that events in question could be explained as the outcome of a series of individual refusal-of-entry orders and should be distinguished from the cases *Čonka*, *Hirsi Jamaa and Others*, *Georgia v. Russia (I)* and *Sharifi and Others*.²⁹ Contrary to these cases, the applicants in *Khlaifia and Others* underwent identification on two occasions, their nationality was established, and they were afforded a genuine and effective possibility of submitting arguments against their expulsion. The ECtHR noted that the applicants’ representatives were unable to indicate the slightest factual or legal ground which, under international or national law, could have justified their clients’ presence on Italian territory and preclude their removal.³⁰

The Court’s approach in *Khlaifia and Others* clearly shows the procedural minimum that should be satisfied in order for the expulsions not to be deemed ‘collective’. The decision should be preceded by ‘a reasonable and objective examination of the particular case of each individual alien of the group’.³¹ This means providing access to a procedure enabling analysis of individual case in order to exclude automatism or arbitrary character of the procedure. However, this element should be analyzed individually, after the examination of particular circumstances and scope of the procedure in question.

The requirement of individual examination of cases is not the only measure countering ‘collective’ expulsions. The ECtHR also analyzed the possibility of accessing the territory of a State in a legal manner. The case *N.D. and N.T. v Spain* concerned two migrants, who attempted to enter Spain by scaling the fences surrounding the city of Melilla, a Spanish enclave on the North African Coast. Immediately after crossing the fence, they were apprehended by members of the Guardia Civil who took them back to the other side of the border, without any identification procedure or opportunity to explain their personal circumstances.³²

The Court introduced the exception absolving the responsibility of a State under Article 4 AP No 4 in situations in which the conduct of persons who crossed

²⁸ *Khlaifia and Others v Italy*, § 242.

²⁹ *ibid*, § 252.

³⁰ *ibid*, § 253-254.

³¹ *Čonka v Belgium*, § 59; *Andric v Sweden*, § 1.

³² *N.D. and N.T. v Spain* [13 February 2020] app. no 8675/15 8697/15 (ECtHR) § 15-26.

a land border in an unauthorised manner, deliberately took advantage of their large numbers and used force, was such as to create a clearly disruptive situation which was difficult to control and endangered public safety.³³ The ECtHR introduced a test to examine compliance with Article 4 AP No 4 in relation to individuals crossing a land border illegally and subsequently being expelled. Firstly, the Court examines whether in the circumstances of the particular case, the respondent State provided genuine and effective access to means of legal entry, in particular border procedures. Secondly, if the respondent State provided such access, but an applicant did not make use of it, the Court will consider, in the context in issue and without prejudice to the application of Article 2 and 3, whether there were cogent reasons not to do so, which were based on objective facts for which the respondent State was responsible.³⁴ Lack of such cogent reasons might lead to being regarded as the consequence of the applicants' own conduct. This test was also applied later in similar cases.³⁵

The key issue in this two-tier test is the determination whether the individual had genuine and effective access to procedures for legal entry. In *N.D. and N.T.*, the Court stated that Spain did provide genuine and effective access to procedures for legal entry.³⁶ The ECtHR reached similar conclusions in *A.A. and Others v North Macedonia*.³⁷ In *M.H. and Others v Croatia*, the Government did not provide any specific information regarding the asylum procedures at the border with Serbia, such as the location of the border crossing points, the modalities for lodging applications there, the availability of interpreters and legal assistance enabling asylum-seekers to be informed of their rights, and information showing that applications had actually been made at those border points. Due to lack of such information, the Court was unable to examine whether the legal avenue referred to was genuinely and effectively accessible to the applicants at the time.³⁸ In *Shahzad v Hungary*, the ECtHR noted that there were only two transit zones which enabled the applicant to legally enter Hungary. They were located approximately 40 km and 84 km respectively from the location to which the applicant was returned. In this regard, the Court considered that Hungary failed to secure the applicant effective means of legal entry.³⁹

The above proves that the existing domestic regulations and measures play a key role in assessing whether the 'genuine and effective access to procedures for legal entry' was provided. The existing ECtHR case law in this regard clearly

³³ *ibid.*, § 201.

³⁴ *ibid.*

³⁵ *Shahzad v Hungary* [8 July 2021] app. no 12625/17 (ECtHR) § 59ff; *M.H. and Others v Croatia* [18 November 2021] app. no 15670/18, 43115/18 (ECtHR) § 294ff.

³⁶ *N.D. and N.T. v Spain*, § 229.

³⁷ *A.A. and Others v North Macedonia* [5 April 2022] app. no 55798/16, 55808/16, 55817/16, 55820/16, 55823/16 (ECtHR) § 122.

³⁸ *M.H. and Others v Croatia*, § 300-301.

³⁹ *Shahzad v Hungary*, § 62-65.

shows that the analysis of the existing possibilities of legal access and procedures for entry requires separate examination of each individual case.

IV. PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS: EUROPEAN PARADIGM AND CONTEMPORARY CHALLENGES

The concept of the ‘European paradigm of the protection of aliens’ is not limited only to the legal or institutional guarantees present in the European systems. Naturally, this paradigm consists of institutions and standards functioning within the structures of the Council of Europe and the European Union. This does not mean, however, that the European paradigm of the protection of aliens is shaped solely on the basis of the achievements of these two international organizations. The UN system should be seen as complementary to this paradigm.⁴⁰ In this regard, the ‘European paradigm’ should be understood as the overall sum of legal provisions, procedures and measures relating to the protection of aliens. This concerns both the international and domestic legal orders.

ECtHR focused on the prohibition of collective expulsion of aliens in the context of recent developments concerning migration crises in southern Europe and abuse of illegal migrants during the Polish-Belarusian border crisis. The migration crises concerning allegations of violation of Article 4 AP No 4 already were partly subjected to ECtHR analysis.⁴¹ The Court also examined the issue of push-backs at the Polish-Belarusian border, however, prior to the events taking place in 2021-2022.

In *M.K. and Others v Poland*, the Court examined the existence of a systemic practice of misrepresenting the statements given by asylum-seekers in the official notes drafted by the officers of the Border Guard serving at the border checkpoints between Poland and Belarus. The irregularities in the procedure concerned the questioning of foreigners arriving at the Polish-Belarusian border at the relevant time, including lack of proper investigation into the reasons for which they sought entry into Poland,⁴² which was also confirmed by the judgments of the Supreme Administrative Court.⁴³

⁴⁰ Elżbieta Karska and others (n 8) 69-70. See also Elżbieta Karska, ‘Słowo wstępne | Introduction’ in Elżbieta Karska, *Uchodźcy. Aktualne zagadnienia prawa i praktyki* (Warszawa: Cardinal Stefan Wyszyński University, 2017), 9.

⁴¹ E.g. *Hirsi Jamaa and Others v Italy*; *Khlaifia and Others v Italy*.

⁴² *M.K. and Others v Poland* [23 July 2020] app. no 40503/17, 42902/17, 43643/17 (ECtHR) § 174.

⁴³ *ibid*; Case II OSK 1752/18 26 July 2018 Supreme Administrative Court (Naczelny Sąd Administracyjny), LEX no 2529020P; Case II OSK 2766/17 17 May 2018 Supreme Administrative Court (Naczelny Sąd Administracyjny).

In respect of Article 4 AP No 4, the ECtHR stressed that even though individual decisions were issued with respect to each applicant, they did not properly reflect the reasons given by the applicants to justify their fear of persecution. The applicants were not allowed to consult lawyers and were denied access to them, even when their lawyers turned up at the border checkpoint and demanded that they be allowed to meet their clients.⁴⁴

The independent reports in this regard constituted an exemplification of a wider State policy. The reports noted a consistent practice of: holding very brief interviews, during which the foreigners' statements concerning the justification for their seeking international protection were disregarded; emphasis being placed on the arguments that allowed them to be categorised as economic migrants; and misrepresenting the statements made by the foreigners in very brief official notes, which constituted the sole basis for issuing refusal-of-entry decisions and returning them to Belarus, even in the event that the foreigners in question had made it clear that they wished to apply for international protection in Poland.⁴⁵ The applicants attempted to cross the border legally and tried to make use of the procedure for lodging applications for international protection that should have been available to them under domestic law,⁴⁶ which was different from the situation in *N.D. and N.T. v Spain*.⁴⁷

The subsequent Polish-Belarusian border crisis up to now had two phases: in 2021-2022 and in 2024. It started from an incident concerning the forced landing of a Ryanair passenger plane⁴⁸ in 2021 and following sanctions imposed by EU. At that time, the Belarusian President Alexander Lukashenko threatened EU that he would allow 'migrants and drugs' to flood into western Europe if sanctions were imposed on his country.⁴⁹ In August 2021 and subsequent months, thousands of illegal migrants attempted to cross Belarusian borders and get to Poland, Lithuania, and Latvia. Belarusian authorities aided illegal migrants in getting to their territory by air and then accompanied them to the border. A. Lukashenko admitted that the involvement of Belarusian border troops in the process is 'absolutely possible'.⁵⁰

⁴⁴ *ibid.*, § 206.

⁴⁵ *ibid.*, § 206–208.

⁴⁶ *ibid.*, § 207.

⁴⁷ *N.D. and N.T. v Spain*, § 231.

⁴⁸ E.g. 'Guterres deeply concerned over 'forced landing' and arrest of Belarus opposition journalist, as condemnation grows' UN News (24 May 2021) <<https://news.un.org/en/story/2021/05/1092642>> accessed 25 March 2024.

⁴⁹ 'Belarus dictator threatens to 'flood EU with drugs and migrants'' The Week (28 May 2021) <<https://www.theweek.co.uk/news/world-news/europe/952979/belarus-dictator-threatens-flood-eu-with-drugs-migrants-avoid-sanctions>> accessed 25 March 2024.

⁵⁰ Steve Rosenberg, 'Belarus's Lukashenko tells BBC: We may have helped migrants into EU' BBC News (19 November 2021) <<https://www.bbc.com/news/world-europe-59343815>> accessed 25 March 2024; Elżbieta Kuźelewska and Agnieszka Piekutowska, 'Belarus' Violation of Inter-

The ECtHR referred to the 2021-2022 Polish-Belarusian border situation. It communicated cases and decided to indicate interim measures in *R.A. and Others v Poland*⁵¹ and *H.M.M. and Others v Latvia*.⁵² The applicants in both cases wanted to enter Latvia or Poland, allegedly to seek international protection. However, they were unable to enter these states or return to Belarus. The applications concerned 73 individuals who, inter alia, raised violation of Article 4 of Protocols No 4⁵³ to the ECHR.⁵⁴ Recently (in June and July 2024), the Chamber of the ECtHR relinquished its jurisdiction both in *R.A. and Others v Poland* and *H.M.M. and Others v Latvia* in favour of the Grand Chamber. This means that both cases will be examined by the Grand Chamber.

In 2024, the Court also examined the case *Sherov and Others v Poland*,⁵⁵ which touched upon the issue of migrants returning from Tajikistan to Ukraine. The Court referred to its prior judgment in *M.K. and Others v Poland*⁵⁶ and similarly decided that a decision issued at border checkpoints to refuse applicants entry into Poland constituted an ‘expulsion’ within the meaning of Article 4 AP No 4.⁵⁷

The ECtHR also noted that the applicants were trying to make use of the procedure for accepting applications for international protection that should have been available to them under domestic law. They attempted to cross a border in a legal manner, using an official checkpoint and subjecting themselves to border checks as required by the relevant law. In this regard, the situation was completely different from *N.D. and N.T. v Spain*.⁵⁸ The Court stressed that the decisions refusing the applicants entry were not taken with proper regard to the individual situation of each of them and were part of a wider policy of not receiving applications for international protection from persons arriving at the Polish-Ukrainian border and of returning those persons to Ukraine, in violation of domestic and international law.⁵⁹ In this regard, the Court found violation of Article 4 AP No 4.

national Obligations in Connection with Artificial Migration Pressure on the Belarus–European Union Border’ (2023) 28(1) Białystok Legal Studies | Białostockie Studia Prawnicze 39–52, DOI: 10.15290/bsp.2023.28.01.03; Mieczysława Zdanowicz, ‘The Migration Crisis on the Polish–Belarusian Border’ (2023) 28(1) Białystok Legal Studies | Białostockie Studia Prawnicze 103–115, DOI: 10.15290/bsp.2023.28.01.06.

⁵¹ *R.A. and Others v Poland*, app. no 42120/21 (ECtHR).

⁵² *H.M.M. and Others v Latvia*, app. no 42165/21 (ECtHR).

⁵³ *ibid.*

⁵⁴ *ibid.*, see also Krzysztof Sobczak ‘ETPC nakazuje pomóc migrantom, ale nie wymaga ich wpuszczenia’, Prawo.pl (26 August 2021) <<https://www.prawo.pl/prawo/migranci-koczujacy-na-granicy-etpc-nakazuje-pomoc,510239.html>> accessed 25 March 2024.

⁵⁵ *Sherov and Others v Poland* [4 April 2024] app. no 54029/17, 54117/17 and others (ECtHR).

⁵⁶ *M.K. and Others v Poland*, § 197-205.

⁵⁷ *ibid.*, *Sherov and Others v Poland*, § 58.

⁵⁸ *Sherov and Others v Poland*, § 60; *N.D. and N.T. v Spain*, § 231.

⁵⁹ *Sherov and Others v Poland*, § 61-62.

V. CONCLUSIONS

In comparison to other rights guaranteed in the ECHR, The Court does not refer to Article 4 AP No 4 too often. However, in recent years a change in this regard could be noticed. Prohibition of collective expulsion of aliens has been raised in a substantial number of judgements. The Court also developed its case law in this regard. The importance of this provision cannot be overestimated, especially in the context of the European paradigm of the protection of aliens.

The original wording of Article 4 AP No 4 (*'Collective expulsion of aliens is prohibited'*) seems to be leaving very little room for any exceptions. However, Court's jurisprudence, e.g. *Khlaifia and Others v Italy*, clearly proves that this provision may not be interpreted in absolute terms. ECtHR case law focuses on individual approach to every illegal migrant's case and existence of effective procedural framework within the domestic legal system.

The Court will soon be facing the issue of 'weaponization' of illegal migrants by the Belarusian regime. The forthcoming Grand Chamber judgments in *R.A. and Others v Poland* and *H.M.M. and Others v Latvia*, have the potential to be important stance, both in the course of development of ECtHR jurisprudence on Article 4 AP No 4 and the European paradigm of protection of aliens. It is possible that *R.A. and Others v Poland* and *H.M.M. and Others v Latvia* will follow the Court's line of jurisprudence in *Khlaifia and Others*. However, as the Grand Chamber judgments in both cases are still yet to come, the Court will most probably seek to balance both the interest concerning protection of rights of migrants and the necessity of protection of national borders.

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