

Poland, Supreme Administrative Court, pushback case, II OSK 2749/22, supreme, 9th January 2024

Member State

 Poland

Topic

mutual trust

Sector

Asylum

Deciding Court Original Language

Naczelny Sąd Administracyjny

Deciding Court English translation

Supreme Administrative Court

Registration N

II OSK 2749/22

Date Decision

9th January 2024

ECLI (if available)

N/A

National Follow Up Of (when relevant)

N/A

EU legal sources and CJEU jurisprudence

Charter on Fundamental Rights – art. 19 p.2;

Geneva Convention – art 33.1; 4 Protocol to the Convention.

Subject Matter

Ombudsman (Commissioner of Human Rights legitimacy in administrative proceedings - pushbacks (the practice of turning away foreigners at the border) on Polish/Belarusian border – application of EU law in »border cases« - non-refoulement rule

Legal issue(s)

On 9 January 2024, the Supreme Administrative Court rejected three cassation appeals filed by the Prosecutor's Office (case no. II OSK 2749/22), which questioned the legitimacy of the CHR to file a complaint in the circumstances of the case. The Supreme Administrative Court sided with the CHR and the Voivodeship Administrative Court, stating that the CHR's complaint was admissible.

Request for expedited/PPU procedures

N/A

Interim Relief

N/A

National Law Sources

Constitution of Poland – art. 56.1; Law on Administrative Courts – art. 50 § 1, 53 § 2,3;

Law on Commissioner on Human Rights – art. 14; 18;

Governmental decree on border issues - § 3 p 2b;

Facts of the case

The Voivodeship Administrative Court in Białystok, in its judgments of 15 September 2002, supported the position of the CHR and declared the ineffectiveness of the return of the group of foreigners to the state border. It recognised that the pushbacks carried out by the BG were contrary to Polish and international law.

Prosecutor's appeal in cassation: The Public Prosecutor's Office filed three cassation appeals with the Supreme Administrative Court against these judgments, claiming that the Voivodeship Administrative Court in Białystok "wrongly assumed that the CHR's complaint was legitimate and possible in the circumstances of the case". The Prosecutor's Office argued that the CHR could not file a cassation appeal in a case where the court had previously dismissed another person's complaint in which the CHR had intervened. The Prosecutor's Office also questioned the Voivodeship Administrative Court's argument that EU law could apply to the BG's pushbacks. The Prosecutor's Office requested that the CHR's complaints be dismissed.

Supreme Administrative Court rejected three cassation appeals filed by the Prosecutor's Office which questioned the legitimacy of the CHR to file a complaint in the circumstances of the case, but in fact also confirmed the decision on the court of lower instance.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Voivodeship Court reasoning:

The Court further referred to the principle of non-refoulement under Article 33(1) of the Geneva Convention. According to the Court, this principle also extends to the prohibition of refusal of entry at the border. It stated that neither a national legal provision nor the factual circumstances (including a migration crisis at the EU's external border caused by external factors) could exclude an order for a Member State to apply the principle of non-refoulement, even to aliens crossing the borders of the Republic of Poland illegally. In the context of the case under review, this means that § 3(2b) of the Border Ordinance, which constitutes the exclusive legal basis for the contested action, cannot be applied automatically and autonomously, i.e. ad hoc and in disregard of the international and EU law provisions cited by the Court, as well as national law provisions of statutory rank harmonised with those provisions. In the Court's view, this provision should not have been applied. This is because it is in conflict with the norms of statutory rank, as well as with Article 56(1) of the Constitution of the Republic of Poland.

In the opinion of the Court, due to the principle of primacy of EU/international law, it was the duty of the authority to disregard § 3(2b) of the Border Ordinance and apply the norms of statutory rank, reflecting the provisions of EU law and respecting the provisions of international agreements binding Poland. In the Court's view, the mere application by an authority of a provision of a lower rank, while ignoring, at the same time, irreconcilable statutory regulations, EU law and provisions of international agreements, constitutes a material breach of law justifying a finding that the contested action was ineffective.

The removal of the applicant from the territory of the Republic of Poland on the basis of § 3(2b) of the Border Ordinance had the practical effect of making it impossible for her to apply for international protection (irrespective of whether the applicant actually applied for such protection at the time), and ultimately potentially exposing her and her minor children to the dangers described in Art. 33(1) of the Convention relating to the Status of Refugees, drawn up in Geneva on 28 July 1951 (OJ 1991 No. 119, item 515; hereinafter: 'Geneva Convention') and Article 19(2) of the Charter of Fundamental Rights of the European Union (OJ EU C 202/389 of 7 June 2016; hereinafter: 'CFR'), constituting a material breach of the principle of non-refoulement. Indeed, the competent authority of the Border Guard did not in any way verify the applicant's individual situation, nor did it establish her legal position and the facts of the case (no evidence in this regard). As stressed, the obligation to examine the case of each foreigner seeking protection on an individual basis (also in the event of a mass influx of foreigners), with particular regard to the situation in the country to which refoulement would take place, flows moreover from the prohibition of collective expulsion contained in Article 19(1) of the CFR and Article 4 of Protocol No. 4 to the Convention (OJ 1995, No. 36, item 175/2; hereinafter: 'Protocol No. 4').

SAC reasoning:

First of all, it should be noted that in the cassation appeal, the Public Prosecutor did not challenge the ruling of the Provincial Administrative Court in Białystok as regards the decision itself on the recognition of the act of returning the foreigner to the state borderline. The appellant in cassation did not in any way challenge the Court's position that the implementation of the contested action constituted a violation not only of hierarchically higher legal norms, i.e. specific provisions of the Protection Act and the Aliens Act but also constituted a substantial violation of the Constitution of the Republic of Poland, as well as the provisions of EU and international law. In view of the appeal limits set out in the cassation appeal, the issue of the legality of the application to the applicant foreigner of the procedure for turning back to the state border line pursuant to § 3(2b) of the

Border Regulation could not be a point of reference when examining the legality of the appealed judgment.

Relation of the case to the EU Charter

Supporting the reasoning. Only in the VAC reasoning. Omitted by SAC.

Relation between the EU Charter and ECHR

N/A

Use of Judicial Interaction technique(s)

disapplication of national law in favour of EU law

The Supreme Administrative Court affirmed the primacy of international law and found the court's reasoning correct - dismissing the prosecution's cassation. The primacy was underlined by the VAC.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

N/A

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

N/A

Strategic use of judicial interaction technique (purpose aimed by the national court)

A reminder of the primacy of EU law.

Impact on Legislation / Policy

N/A

Notes on the national implementation of the preliminary ruling by the referring court

N/A

Did the national court take into account national case law on fundamental rights?

No

Impact on national case law from the same Member State or other Member States

N/A

Connected national caselaw / templates

N/A

(Link to) full text

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