

Anna Magdalena Kosińska*

CASE OF BISTIEVA AND OTHERS V. POLAND¹

Abstract: The present commentary concerns the claims alleging a violation under Article 5 paragraph 1 (the right to liberty and security of a person) and paragraph 4 (the right to take proceedings to determine the lawfulness of the detention) of the European Convention on Human Rights and Article 8 (the right to respect for private and family life) ECHR by using detention by the Republic of Poland for the period of almost 6 months with regard to a family of third-country nationals. The applicant in the case was a national of Russia, Zita Bistieva and her three minor children. The judgement under discussion is significant from the perspective of strengthening the guarantees for the protection of the rights of irregular migrants in the system of both the Council of Europe and the European Union, on the grounds of the concept of equivalent protection adopted in EU primary law. The ruling in question also refers to the fact that the Member States do not sufficiently resort to alternative measures with regard to the detention of foreign nationals.

Keywords: detention of migrants, right to family life, irregular migrants, fundamental rights, human rights of migrants

* Dr hab., Faculty of Law, Canon Law and Administration, John Paul II Catholic University, Lublin

¹ *Bistieva and Others v. Poland*, application number 75157/14, Judgement of the ECtHR of 10.4.2018.

1. Facts and relevant law

The present commentary concerns the claims alleging a violation under Article 5(1) (the right to liberty and security of person), Article 5(4) (the right to take proceedings to determine the lawfulness of the detention) of the European Convention on Human Rights (ECHR)² and Article 8 (the right to respect for private and family life) of the ECHR by using detention by the Republic of Poland for the period of almost 6 months with regard to a family of third-country nationals. The applicant in the case was a national of Russia, Zita Bistieva, and her three minor children.

Ms Bistieva arrived in Poland in 2012 together with her husband and two children and submitted an application for international protection. The application was rejected by the Head of the Office for Foreigners, and the family received a decision expelling them from Poland. However, the family did not leave the territory of the EU, but left for Germany, where Ms Bistieva's third child was born. As a result of the implementation of the provisions of the Dublin II Regulation,³ in January 2014, Ms Bistieva, with her children, was returned to Poland. Upon their return, the court preventively ordered them to be detained pending their expulsion, and the family was placed in a guarded centre for foreigners in Kętrzyn in the family wing. After the family had been committed to detention, the Warmia and Mazury Province Governor decided that it was not possible to enforce the return of the family of Bistieva, as the return decision which had been issued before did not include the youngest child born in Germany. Therefore, the presence of the child in Poland, according to the authorities, was not illegal. At the same time, in January 2014, Ms Bistieva filed a new application for refugee status. It was rejected by the decision of the Head

² The Convention for the Protection of Human Rights and Fundamental Freedoms, drafted in Rome on 4.11.1950, amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Polish OJ 1993, No. 61, item 284), https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed: 10.7.2018].

³ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 25.2.2003, L-50, p. 1. Currently replaced by the so-called Dublin III Regulation – Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ 29.6.2013, L-180, p. 31.

of the Office for Foreigners of 19.2.2014. On the next day, Ms Bistieva's husband, who had been hospitalised in Germany, joined the family. The expulsion decision with regard to the family under the corrigendum issued by the Head of the Office was extended by the minor child born in Germany.

Simultaneously, on 4.2.2014, the district court in Kętrzyn decided to extend the detention of the family until 27.4.2014. Subsequently, the same court decided to extend the administrative detention of the applicants until 29.6.2014.

On 22.5.2014, Ms Bistieva decided to submit an application for international protection for the third time, pointing out that such protection had been granted to her parents and siblings on 25.4.2014. In June 2014, the family also lodged an application to be released from the detention centre, which resulted in issuing a positive decision, and the family was released on 29.6.2014. Due to the fact that the family had then left for Germany in August 2014, the Head of the Office for Foreigners issued a decision on the discontinuation of the asylum procedure in October 2014.

The provisions on granting international protection in Poland are to be found in the Act on granting protection to aliens⁴, and what is important is that they are an implementation of the provisions of EU directives functioning within the framework of the CEAS, i.e. the Reception Directive, Qualification Directive and Asylum Procedures Directive, as well as the Dublin Regulation. On the other hand, provisions with regard to the detention of foreign nationals in Poland (including the norm facilitating a claim for compensation on the grounds of unjustified detention) can be found in the Act on foreigners (which also implements the provisions of the so-called Return Directive 2008/115),⁵ as well as

⁴ Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland, consolidated text, Polish OJ 2008, No. 128, item 1176, as amended.

⁵ Act of 12 December 2013 on foreigners, consolidated text, Polish OJ 2017, item 1650, as amended. The basis to seek compensation on the grounds of unjustified detention can be found under Article 407 of the above Act. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 24.12.2008, L-348, p. 98.

in the implementing regulations on the conditions and rules of stay in the detention facility.⁶

In its provisions, the Return Directive clearly lays down the rules for committing third-country nationals to detention centres, when their stay in the territory of the EU is of an irregular character. In accordance with Article 15 (1), the application of a detention measure is possible when other less repressive but sufficient enough measures cannot be applied. A third-country national may be kept in detention in order to prepare and carry out their removal process if there is a risk of absconding or when “the third-country national concerned avoids or hampers the preparation of return or the removal process”. What is more, the detention measure should be applied for the shortest possible period of time and executed with due care. In Article 15(5), Directive 2008/115 states that the maximum period of detention may not exceed six months.

2. Arguments of the European Court of Human Rights

In the course of the proceedings, the Court first verified the admissibility of the complaint under Article 5 of the Convention. In the course of the proceedings, the Polish government claimed that the applicant had not exhausted the domestic remedies available, laid down in Article 407 of the Act on foreigners⁷, which may be resorted to by a third-country national in case of unjustified detention in a guarded centre. The applicant argued, on the other hand, that the measures provided for in the law were ineffective (amongst others, due to the lack of well-established case-law in Poland)⁸ or that they could not have been applied in that case (due to the applicant’s illegal stay in the territory of the Republic of Poland).

⁶ Ordinance of the Ministry of the Interior and Administration of 24 April 2015 on guarded centres and detention centres for foreigners, Polish OJ 2015, item 596. Ordinance of the Ministry of the Interior and Administration of 23 October 2015 on the by-law regulating the stay in the centres for foreigners, Polish OJ 2015, item 1828.

⁷ In accordance with Article 407 of the Act on foreigners: “1. A foreigner shall be entitled to receive compensation from the State Treasury and compensation for wrongful detention or wrongful placement in a guarded centre or in a detention centre for foreigners. 2. Proceedings in cases referred to in paragraph 1 shall be carried out under the provisions of the Code of Criminal Procedure in the area of compensation for wrongful conviction, temporary detention or arrest.”

⁸ Paragraph 50 of the judgement in the case of *Bistieva and Others*.

The Court rejected the above arguments, pointing out that Article 407 of the Act on foreigners does not provide a prerequisite of a third-country national remaining under the jurisdiction of Poland to be able to seek compensation for unjustified detention.⁹ Thus, the Court rejected the complaint under Article 5 of the Convention on the grounds of Article 35 of the Convention due to the lack of exhaustion of domestic remedies provided for in the law.

The Court then proceeded to verify the claim of the alleged violation of Article 8 of the Convention by “unjustified and disproportionate interference with the effective exercise of their family life”.¹⁰ The Polish government argued that there occurred no interference with Ms Bistieva’s right to family life, as she had not been separated from her children. In the opinion of the Court, the above argument could not be accepted, as the very fact that the family was kept in custodial conditions for almost six months constituted an “interference”. In accordance with the provisions provided for under Article 8 of the Convention, the Court concentrated on assessing whether a violation consisting in placing a family in detention was “necessary in a democratic society”¹¹ and whether it might be considered as justified.

The Court observed, first of all, that it is the duty of the State’s government to ensure balance between the interests of the individual and of society as a whole.¹²

On the one hand, the detention of the family was justified in so much as there was a risk of their absconding, with regard to the fact that they had previously gone to Germany and were returned under the Dublin system. Thus, on the basis of the existing case-law (case of *A. M. and Others v. France*,¹³ *Popov*,¹⁴ *R. K. and Others v. France*,¹⁵ *R.C. and V.C. v. France*¹⁶), the detention

⁹ Paragraph 63 of the judgement in the case of *Bistieva and Others*.

¹⁰ Paragraph 69 of the judgement in the case of *Bistieva and Others*.

¹¹ Paragraph 74 of the judgement in the case of *Bistieva and Others*.

¹² Paragraph 78 of the judgement in the case of *Bistieva and Others*.

¹³ *A. M. and Others v. France*, application number 24587/12, Judgement of the ECtHR of 12.7.2016.

¹⁴ *Popov v. France*, application numbers 39472/07 and 39474/07, Judgement of the ECtHR of 19.1.2012.

¹⁵ *R. K. and Others v. France*, application number 68264/14, Judgement of the ECtHR of 12.7.2012.

¹⁶ *R. C. and V. C. v. France*, application number 76491/14, Judgement of the ECtHR of 12.7.2012.

of the family would have been justified on the grounds of the “pressing social need”.¹⁷ Moreover, the outcome of the evaluation of the conditions of detention in the Kętrzyn centre carried out by the Helsinki Foundation was positive.

On the other hand, the Court distinctly emphasised that it is the responsibility of State institutions – parties to the Convention – to act in accordance with the best interest of the child and in such a way as to protect his rights. In the opinion of the Court, such actions cannot be limited in the present case to merely ensuring that the family in detention is not separated. The State’s authorities – parties to the Convention – should act in the direction of limiting the detention of families with minor children. According to the Court, the State’s institutions had not taken into account the possibility of using alternatives to detention. What is more, the detention lasted exceptionally long – 5 months and 20 days, and the authorities failed to prove that this was justified. Thus, the Court held that a breach of Article 8 of the Convention occurred.

3. Significance of the judgement in the case of *Bistieva and Others* for the protection of migrants’ fundamental rights

Firstly, it should be emphasised that the judgement under discussion is significant from the perspective of strengthening the guarantees for the protection of the rights of irregular migrants in the system of both the Council of Europe and the European Union, on the grounds of the concept of equivalent protection adopted in EU primary law. In accordance with Article 6(3) of the Treaty on European Union: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”¹⁸ Moreover, in accordance with Article 52 (3) of the Charter of Fundamental Rights:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights

¹⁷ Paragraph 83 of the judgement in the case of *Bistieva and Others*.

¹⁸ The Treaty on European Union, OJ 7.6.2016, C-202, p. 13.

shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.¹⁹

The judgement under discussion is, in my view, of particular importance to the realisation of the EU's humanitarian policy in the area of asylum and return, mainly for two reasons:

Firstly, it concerns a very important issue of the detention of children and families with children. The detention of families with children is a situation which is difficult to accept, especially in view of the fact that in international law, including European Union law, there are many provisions relating to the obligation of protecting the rights of the child. The fundamental legal acts in this area include the UN Convention on the Rights of the Child²⁰ and Article 24 of the Charter of Fundamental Rights of the European Union, in accordance with which: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."²¹

The Return Directive itself in Article 17 holds that families with children may be placed in detention only as a last resort and for the shortest possible period of time. The period of 5 months and 20 days, which the three children spent in the guarded detention centre, can hardly be deemed as the shortest possible period of time. Article 17 of Directive 2008/115 additionally ensures the guarantees of respect for the child's best interest as the primary issue during the period of detention, the guarantees of respect for family privacy and the guarantees for children's participation in recreational and educational activities during their stay in detention. Article 401 of the Polish Act on foreigners in paragraph 4 also includes a principle to the effect that: "When examining a request to place a foreigner in a guarded centre, along with a minor foreigner under his/her custody, a court of law shall be guided by the wellbeing of a minor."

Detention of children is especially criticised by institutions and activists dealing with the protection of human rights²², and the judgement

¹⁹ The Charter of Fundamental Rights of the European Union, OJ 7.6.2016, C-202, p. 389.

²⁰ United Nations Convention on the Rights of the Child, adopted by General Assembly resolution of 20.11.1989, Polish OJ 1991, No. 120, item 526.

²¹ Article 24 (2) of the Charter of Fundamental Rights.

²² Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22

under discussion seems to be another voice pointing out the dubious moral dimension of this practice. The European Union Agency for Fundamental Rights (FRA) prepared a report on this subject entitled “European legal and policy framework on immigration detention of children”,²³ whereas the European Commission, on 12.4.2017, published a communication entitled: “The protection of children in migration”.²⁴ In accordance with the data analysed by the FRA, only a few Member States – Cyprus, Denmark, German Federal Republic, Estonia, Spain, Italy, Malta, Sweden, Slovenia, the United Kingdom – did not use detention with regard to children in the period from 31.12.2015 till September 2016. On the other hand, the figures with regard to Poland are disturbingly high in comparison with other EU countries – in the analysed periods, from a few up to several migrants’ children were held in Polish guarded detention centres.²⁵ The longest periods of detention of children in the analysed period were those in Lithuania (241 days) and Poland (151 days).²⁶

It is worth observing that, at present, within the framework of the Council of Europe, there is ongoing work on the codification of the principles with regard to the administrative detention of migrants.²⁷

(2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16.11.2017; Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16.11.2017. Documents available on the website: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=7&DocTypeID=11 [accessed: 11.8.2018]. See, for instance – Handbook on European law relating to the rights of the child, European Union Agency for Fundamental Rights 2017, p. 171 et seq., <http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights> [accessed: 11.8.2018].

²³ European legal and policy framework on immigration detention of children, European Union Agency for Fundamental Rights 2017, <http://fra.europa.eu/en/publication/2017/child-migrant-detention> [accessed: 11.08.2018].

²⁴ Communication from the Commission to the European Parliament and the Council, The protection of children in migration, Brussels, 12.4.2017, COM(2017) 211 final.

²⁵ European legal and policy framework on immigration detention of children, p. 14.

²⁶ European legal and policy framework on immigration detention of children, p. 15.

²⁷ European Committee on Legal Co-Operation (CDCJ). Codifying instrument of European rules on the administrative detention of migrants 1st Draft. Draft text

Currently, consultations are underway on the draft of rules for the project. Under point B14, a regulation entailing children detention as a last resort measure is provided for. It states that: “Children shall not be held in administrative detention, except as a measure of last resort and for the shortest possible period of time, and after having established that other less coercive alternative measures cannot be applied effectively. All efforts shall be made to release the detained children and place them in accommodation suitable for children. In the case of children with adult family members, the authorities should verify that placement of the family with the children in administrative detention is a measure of last resort for which no alternative is available.” The adoption of such a document and searching for solutions at an international level is an attempt at collecting the existing guarantees of international law and case-law of the ECtHR. It is worth adding that, so far, the ECtHR has ruled on the violation of the rules of the convention in the cases of detention of minors in cases such as *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,²⁸ *Muskhadzhiyeva and Others v. Belgium*²⁹, as well as *Kanagaratnam and Others v. Belgium*.³⁰

Secondly, the ruling in question also refers to the fact that the Member States do not sufficiently resort to alternative measures with regard to the detention of foreign nationals. In paragraph 78 of the judgement in question, the Court distinctly observed that, in accordance with the international standards for the protection of the rights of the child, if a need for detention occurs, alternatives to detention should always be considered.

In accordance with Article 15 of Directive 2008/115, detention may be applied: “Unless other sufficient but less coercive measures can be applied effectively in a specific case.” The catalogue of measures as alternatives to detention is of an open character, and Member States decide on which measures can be applied in a specific State. In its analysis entitled “Alternatives to detention for asylum seekers and people in return procedures”, the FRA groups alternatives to detention in the following

submitted to key stakeholders and civil society for comment: <https://www.coe.int/en/web/cdcj/activities/administrative-detention-migrants> [accessed: 11.8.2018].

²⁸ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application number 13178/03, Judgement of the ECtHR of 12.10.2006.

²⁹ *Muskhadzhiyeva and Others v. Belgium*, application number 41442/07, Judgement of the ECtHR of 19.1.2010.

³⁰ *Kanagaratnam and Others v. Belgium*, application number 15297/09, Judgement of the ECtHR of 13.10.2011.

way: obligation to surrender passports or travel documents, residence restrictions, release on bail and provision of sureties by third parties, regular reporting to the authorities, placement in open facilities with caseworker support and electronic monitoring.³¹ In Polish law, alternatives to detention include reporting at specified intervals to the Polish Border Guard authority, lodging a security deposit, surrendering the travel document for custody and residing at the place indicated in the ruling.³² The said alternatives can be applied individually or jointly.

The above alternatives are less cumbersome for foreign nationals, and their application minimises the risk of violating migrants' fundamental rights. NGOs have been postulating for many years that the application of measures alternative to detention should be increased.³³ The Ombudsman for Children was guided by similar standards when, on 7.12.2017 in the general address to the Commander-in-Chief of the Border Guard, he asked for the data on the use of detention with regard to minors.³⁴

Poland's active effort in applying alternatives to detention was noted by the FRA, in whose annual report it is emphasised that: "In Poland, apprehended migrants in an irregular situation include a significant number of families with children. The percentage of decisions imposing an alternative to detention increased from 11% in 2014 to over 23% in 2017."³⁵

³¹ Alternatives to detention for asylum seekers and people in return procedures, study by the FRA, pp. 1-2. Study available on the website: ww.fra.europa.eu [accessed: 10.8.2018].

³² See also: A. Kosińska, T. Sieniow, *Applying Alternatives to Detention of Foreigners in Poland* (2014-2015), "Історико-Правовий Часопис", no. 1 (9) 2017, Łuck, ISSN 2409-4544, pp. 166-177.

³³ An analysis of legal provisions relating to the use of alternatives to detention against children of foreign nationals, Warsaw, 20.11.2014, the Association for Legal Intervention, analysis available on the website: <http://docplayer.pl/6874530-Analiza-przepisow-dotyczacych-stosowania-srodkow-detencyjnych-wobec-dzieci-cudzoziemcow-1.html> [accessed: 20.08.2018], The use of alternatives to detention in Poland in the years 2014-2015, Assessment report, T. Sieniow, The Rule of Law Institute, Lublin 2016.

³⁴ Speech of the general Ombudsman for Children Mr Marek Michalak of 7.12.2017 – <http://brpd.gov.pl/aktualnosci-wystapienia-generalne/w-trosce-o-los-dzieci-cudzoziemcow> [accessed: 20.8.2018].

³⁵ Fundamental Rights Report 2018, European Union Agency for Fundamental Rights, Luxembourg: Publications Office of the European Union 2018, p. 184. Report available on the website: <http://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018> [accessed: 10.7.2018].

Research and promotion of alternatives to detention can also be observed at the European level – it is worth mentioning here the published reports of the PACE³⁶ or the EMN of 2015, summarising the current state of using alternatives to detention in EU Member States.³⁷ The UNHCR, in the guidelines relating to the global strategy “Beyond Detention”, also aimed at bringing an end to the detention of persons seeking international protection, emphasises that alternatives to detention are equally effective in protecting security and public order.³⁸

Beyond doubt, the case-law of the ECtHR promoting the need to consider and apply alternatives to detention provides an added value in all activities undertaken for the purpose of ensuring effective protection of the rights of migrants in an irregular situation.³⁹

Bibliography

1. Kosińska A., Sieniow T., *Applying Alternatives to Detention of Foreigners in Poland* (2014-2015), “Історико-Правовий Часопис”, No. 1 (9) 2017

³⁶ A study of immigration detention practices and the use of alternatives to immigration detention of children, PACE 2017, p. 49. Report available on the website: <http://website-pace.net/documents/19863/3390925/2017-ImmigrationDetentionPracticesStudy-EN.pdf> [accessed: 10.7.2018].

³⁷ The use of detention and alternatives to detention in the context of immigration policies. Synthesis Report for the EMN Focussed Study 2014, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network_en [accessed: 10.7.2018].

³⁸ 2014-2019, Beyond Detention. A Global Strategy to support governments to end the detention of asylum-seekers and refugees, UNHCR, p. 5; www.unhcr.org/53aa929f6.pdf [accessed: 10.7.2018]. See also: Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, UNHCR 2012, Guideline 4.3: Alternatives to detention need to be considered, p. 22.

³⁹ See also a commentary by Mr Marcin Sośniak, Head of the Rights of Migrants and Minorities Unit, Department of Equal Treatment – <https://www.rpo.gov.pl/pl/content/w-dniu-10-kwietnia-2018-r-europejski-trybuna%C5%82-praw-cz%C5%82owieka-wyda%C5%82-wyrok-w-sprawie-bistieva-i-inni-0> [accessed: 10.07.2018].