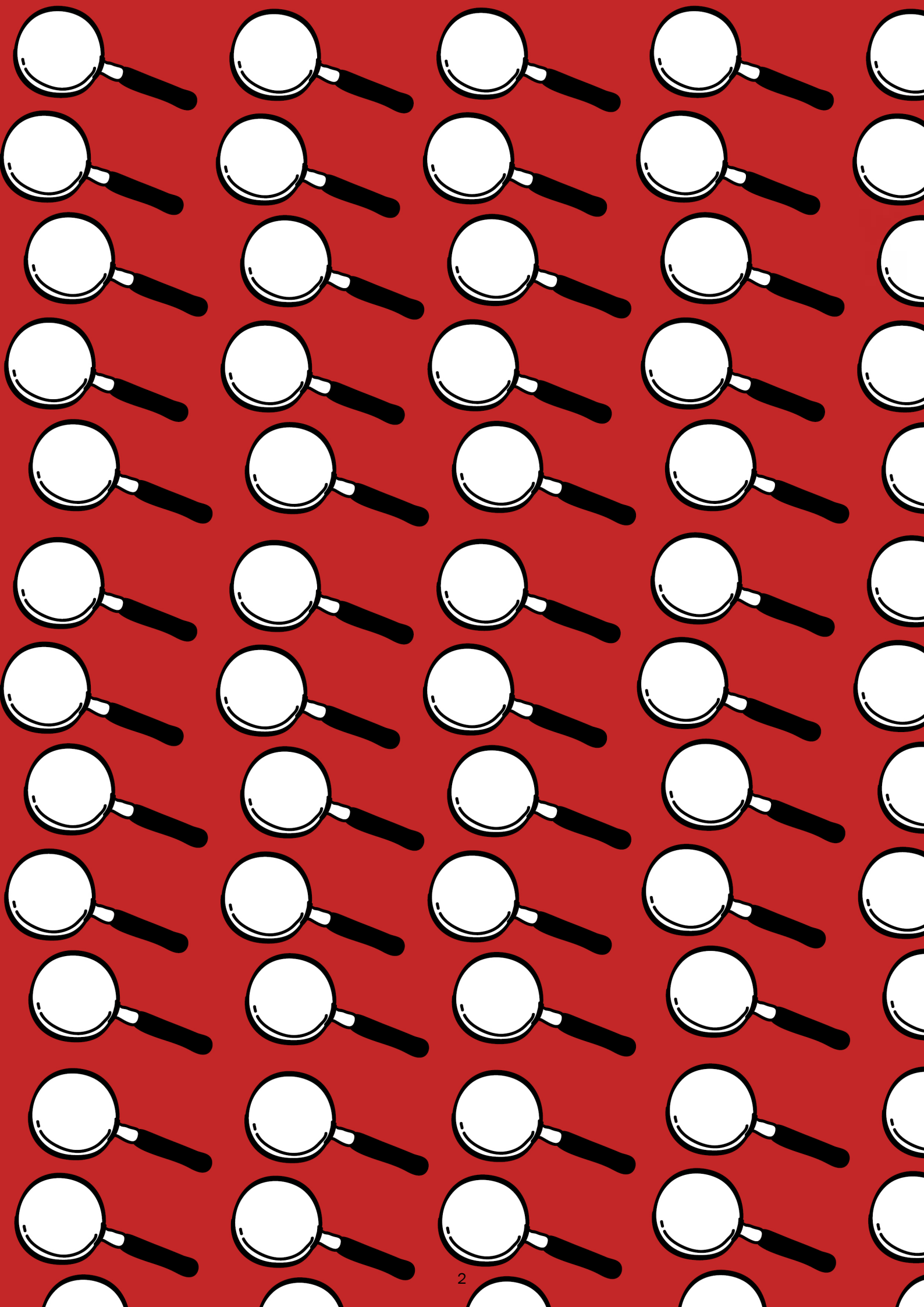
Stowarzyszenie
Interwencji
Prawnej

SIP in action

The rights of migrants in Poland in 2019

Aleksandra Chrzanowska | Olga Dobrowolska | Małgorzata Jaźwińska
Patrycja Mickiewicz | Aleksandra Pulchny | Magdalena Sadowska

REPORT



About the report

Our annual report regarding our activity connected with protecting the rights of migrants constitutes a concise summary of cases which our lawyers and integration advisers collaborating with the Association for Legal Intervention worked on in 2019. It also contains an overview of key issues which we tried to tackle, both domestically and internationally, in our striving to ensure better protection of the rights of refugees and migrants.

Our activity has been possible thanks to the invaluable support of a number of grant-giving organisations and private donors. We would like to express our sincerest thanks for your help.

If you support our values and what we do, you can help us by making a one-time donation or contributing regular payments to the account number below. All funds we receive are used to help refugees and migrants.

Stowarzyszenie Interwencji Prawnej
Siedmiogrodzka st. 5/51
01–204 Warsaw

(+48) 22 621 51 65
biuro@interwencjaprawna.pl
www.interwencjaprawna.pl

Support our actions!
63 2030 0045 1110 0000 0307 2610

Stowarzyszenie
Interwencji
Prawnej

FB Stowarzyszenie Interwencji Prawnej

Our goals

The Association for Legal Intervention is a social organisation whose statutory objective is to take steps aimed at ensuring that human rights are respected and that there is no unequal treatment. Our main mission is to make sure that there is social cohesion by means of promoting the equality of all people in the face of the law. We extend our support chiefly to refugees and migrants in Poland. As of now, they form a group which runs a considerable risk of being socially excluded or discriminated against.

OUR ACTIVITIES

There are many ways in which we strive to achieve our goals:

- We provide **free of charge legal assistance** to migrants and refugees in Poland.
- When fundamental rights of migrants are in danger, **we represent them** before Polish courts and the European Court of Human Rights and we also make third-party interventions in pending proceedings.
- We take an active part in social consultations related to legal acts pertaining to the situation of migrants in Poland. **We respond to any breaches of their rights** as soon as possible.
- **We help** migrants navigate in a new reality in Poland. We work to improve their **integration**, as well as access to **medical, social** and **housing** assistance in Poland.
- We conduct research, carry out **watchdog activities** and prepare expert opinions in the sphere of migration.
- We actively participate in conferences in Poland and abroad, as well as in meetings of international organisations monitoring the observance of human rights in Poland, **notifying them of main threats** to the rights of migrants in Poland.

Ladies and Gentlemen,

Katarzyna Słubik

What follows is another annual report summarising the status of observance of migrants' rights in Poland in 2019 from the perspective of lawyers and integration assistants from the Association for Legal Intervention.

The situation of migrants in Poland – a country which has failed to develop a new migration-related policy for 4 years after the cancellation of the previous one – did not improve in 2019. Refugees fleeing persecution were still not able to cross the Polish border and those who succeeded in doing that had little chance of finding safety and protection. Migrants staying in Poland on account of their work, due to studying at a university in Poland, or because of having family members in Poland found it even more difficult to legalize their stay in Poland than in preceding years. The state administration was still unprepared to handle applications for residence permits which resulted in record-breaking extension of official procedures and in offices resorting to practices blatantly infringing the rights of parties to the relevant proceedings. Migrants were placed in immigration detention centres more often than in 2018, in spite of the fact that the number of children deprived of their liberty had dropped for the first time in several years.

Facing such realities and odds, the Association for Legal Intervention employees and volunteer activists strived to address all areas where the rights of migrants were being infringed: we provided **1933** pieces of advice to **769** people. We took part in **51** court proceedings and we filed **4** appeals with the European Court of Human Rights. We provided people with advice at our office, at the Targówek Refugee Centre (centre for asylum seeking single women and women with children), and at guarded centres for migrants – that in addition to accompanying migrants during their visits to official establishments such as offices, hospitals, and schools.

We often intervened in cases involving **detention for migration-related reasons**: it is to such people that our complaints filed with the European Court of Human Rights and applications for compensation for such unlawful detention pertained. Poland has an important lesson to learn as far as this is concerned and our lawyers do their utmost to draw the attention of the authorities to unjustified application of detention to children and people belonging to other particularly vulnerable groups.

The rights of children who have experienced migration have been one of our top priorities for several years now. Last year, we continued our efforts to make the 500+ and 300+ benefits available to as many people as possible and we have fought many court battles to ensure that the rights of children are respected in the course of return procedures (i.e. to ensure that families are granted the right to stay in Poland for humanitarian reasons if the child's best interests so require).

In 2019, legalization procedures became so drawn-out that it breached not only procedural rights of migrants but also had a considerable negative impact on their dignity as human beings. Taking this into account, we resorted to any and all legal measures at our disposal to exert pressure on the failing state administration. The results are yet to be seen.

Our task is far from completed and there are new challenges ahead of us. Polish law lacks mechanisms and policies ensuring effective protection for migrant women survivors of gender-based violence and for migrant employees who have fallen prey to dishonest employers. Also, migrants affected by prejudice-based crimes still cannot count on justice being served swiftly and efficiently. The level of protection Poland extends to migrant children is insufficient to ensure their optimal development. Undocumented migrants still live on the margins of the society and have no access to basic services and facilities. The foregoing are some of the matters which we intend to address this year.

In the meantime, please read the following report to learn more about what we have achieved in the preceding year.

Table of contents

I. Proceedings for granting international protection (asylum)

Aleksandra Pulchny

1. ACCESS TO THE PROCEDURE

In 2019, like in preceding years, the Association for Legal Intervention systematically received information about illegal practices consisting in refusing to accept applications for asylum at the Polish land border, particularly at the border crossing in Terespol.

In 2019, the Association for Legal Intervention, together with the Polish Ombudsman, intervened on behalf of, among other people, a pregnant woman from Chechnya. The woman, clearly in advanced pregnancy, tried to apply for asylum at the border with Belarus and ended up in hospital in Biała Podlaska on two occasions due to a sudden and dramatic deterioration of her health. In the meantime, other members of her family, including a disabled child, were sent back to Brześć. While in hospital, the woman communicated to the Border Guard orally that she would like to apply for asylum but she was denied the right to do that. On the first occasion, the woman, after her condition became stable, was escorted by the Border Guard to the border with Belarus. On the second occasion, she made use of the option to apply for asylum via means of communication at a distance – such an option being available to pregnant women and people in hospitals.[1] She e-mailed her declaration of intending to file the application. In spite of that, she was escorted to the border once more. She attempted to enter Poland once more and her application – covering her entire family – was eventually accepted by the Border Guard.

Also in 2019, a case regarding international protection for a journalist married couple from Tadzhikistan came to an end. The Association for Legal Intervention intervened at the border a year before that. The Border Guard had denied those people the right to enter Poland many times, stating that they were economic migrants in spite of them having presented evidence confirming that they were refugees. Those journalists were granted refugee status in Poland in 2019. SIP represented them from the beginning of the relevant court proceedings. This clearly demonstrates that applications for international protection from people who actually need protection are not accepted.

There is also the issue of infringements of the non-refoulement principle at Polish borders. This was raised by the Association for Legal Intervention before the UN Committee Against Torture. In 2019, the Association submitted to the Committee a report presenting a situation in a way different from the report drawn up by Polish authorities.[2] In its final comments pertaining

Applications for international protection from people who actually need protection are not accepted.

1. *Article 28 (2) of the Act on granting international protection to aliens on the territory of the Republic of Poland*
2. *Association for Legal Intervention, shadow report to the Polish state party report to the UN Committee Against Torture, https://interwencjaprawna.pl/komentarz-sip-sprawozdanie-polski-przed-komitetem-przeciwko-torturom-onz/*

to Poland's report regarding the implementation of the Convention Against Torture, the Committee expressed its concern about the fact that people in need of international protection do not always have access to Polish territory enabling them to apply for international protection. This issue applies particularly to the border crossings in Terespol and Medyka and affects members of particularly vulnerable groups.[3]

3. UN Committee against Torture, Concluding observations on the seventh periodic report of Poland, 29 August 2019, CAT/C/POL/CO/7, p. 9

Małgorzata Jaźwińska
Magdalena Sadowska

2. SURVIVORS OF VIOLENCE

Asylum seekers in Poland often indicate that they are afraid of violence or that they have experienced violence in their countries. This applies to violence perpetrated by public officials, organized armed groups and the local community, as well as domestic violence.

Violence perpetrated by public officials

The Association for Legal Intervention observed that administrative asylum authorities started to argue that the violence perpetrated by public officials (police or secret service officers) is a criminal offence and police misconduct, and not a reason to grant international protection.

In 2019 we assisted an asylum seeker – survivor of violence inflicted by police officers - in court proceedings. Administrative authorities did not question the fact that he is a survivor of violence, yet they claimed that it is not a basis to grant international protection. The Supreme Administrative Court in the ruling of 6 March 2019, case no. II OSK 2572/18, stated that severe beatings by public officials could be treated as inhuman and degrading treatment. Additionally, the Court highlighted that if the administrative authorities established that the alien had been a victim of physical or psychological violence in his home country, they should also establish that in case of return, he or she could face a real risk of suffering serious harm. This assumption could be rebutted if the authorities proved that there were justified reasons to assume that the acts of inflicting serious harm would not repeat. Those facts have to be established in administrative and not judicial proceedings. The case was remanded back to the administrative authority of the first instance and is still pending.

If the administrative authorities established that the alien had been a victim of physical or psychological violence in his home country, they should also establish that in case of return, he or she could face a real risk of suffering serious harm.

Gender-based violence

In 2019, lawyers of the Association for Legal Intervention represented a migrant from North Caucasus in asylum proceedings. She was afraid of returning to her country as she survived gender-based violence in the past and was afraid that the violence would reoccur upon her return.

According to observations of the Association for Legal Intervention, in 2019, as well as in 2018, the main reason for refusing international protection in cases, where applicants relied on gender-based violence, was the issue of credibility. When asylum seeking women idicated that they were survivors of violence or that they would suffer serious harm upon return (e.g. separation from a child by a former husband or his family members), administrative authorities questioned the credibility of their testimonies.[4] One of the reasons for such findings was the fact that, after submitting an asylum application in Poland, they traveled to another EU country. According to asylum authorities, this demonstrates the economic nature of migration.[5] It is also often indicated in administrative court rulings that the low credibility of the testimonies of asylum seekers derives from the fact that they were "evolving at subsequent stages of the proceedings towards convention premises"[6] and are "vague, unconfirmed, incoherent, sometimes mutually exclusive, altogether unreliable in an obvious degree."[7]

In the judgment of the Voivodeship Administrative Court in Warsaw of 10 October 2019, the Court stated that when assessing the credibility of the applicant's testimony concerning the risk of domestic violence, such as honor killing or separation with a minor child, the authority should make an "in-depth and thorough explanation of this issue, not just a brief and arbitrary treatment of it".[8] The Court stressed that asylum authorities must take into account current studies on the situation of women in the North Caucasus. As the Voivodeship Administrative Court in Warsaw highlighted, this requirement was not met by the "laconic and unverifiable statement of the Refugee Board that, in the light of the available information and studies of the Department of Country of Origin Information of the Office for Foreigners, taking the children away from the mother by a husband in the event of divorce is not an absolute rule."[9]

In order to deem the deposition of an asylum seeker as unreliable, the authorities are thus obliged to confront it with up-to-date, precise and reliable information on the situation of women in a given region. Only then will the discretionary, true and fair evaluation of the deposition of asylum seekers be feasible.

In some cases, in which the administrative authorities considered depositions of asylum seeking . omen regarding past violence as credible, they justified the decision to refuse to grant them international protection by the lack of link between the experienced violence and fleeing country. The Refugee Board claimed, for example, that the lack of such link can be established by the fact that the asylum seeker left her country, not immediately after surviving domestic violence for many years, but only after she got divorced. The Refugee Board stated that she is no longer at risk of domestic violence from her ex-husband.[10]

In many cases, the asylum authorities hold that the mere occurrence of the risk of serious harm is not sufficient to receive international protection in Poland. They claim that an asylum seeker has to prove that she or he sought help from relevant law enforcement agencies or non-governmental organizations before fleeing the country.[11]

4. Decision of the Head of the Office for Foreigner, no. DPU.420.1048.2018
5. Decision of the Refugee Board, no. RdU-551-2/S/17
6. Decision of the Refugee Board, no. RdU-481-1/S/18
7. Decision of the Refugee Board, no. RdU-481-1/S/18
8. Judgement of the Voivodship Administrative Court in Warsaw of 10 October 2019, case no. IV SA/Wa 1457/19
9. Ibidem
10. Decision of the Refugee Board, no. RdU-274-1/S/18
11. Decision of the Refugee Board, no. RdU-258-1/S/2018

According to the Head of the Office for Foreigners, if an asylum-seeking women obtained assistance from her next of kin, it proves that the protection offered in her country is sufficient.[12] The Refugee Board holds that if an asylum-seeking women voluntarily withdrew a criminal complaint against her abusive husband, she fails to prove that she "was unable to access protection offered by the law enforcement authorities in her own country".[13]

While assessing evidence, asylum authorities do not take into account the cultural background of asylum seekers from the Caucasus. Women there usually cannot or are afraid to report violence to law enforcement authorities or to submit criminal complaints against perpetrators of domestic violence, who are their next of kin. There are also situations when law enforcement authorities discourage from lodging criminal complaints or refuse to conduct the investigation claiming that domestic violence is a private matter.[14]

When asylum-seeking women justified their asylum application by the risk of forced separation with their children, who would be taken away by their former spouse or members of his family, administrative authorities correctly assessed that in the North Caucasus one of the most common forms of violence experienced by women is forced separation with children after the divorce and the denial of her parental rights, including the right to participate in the upbringing of the child. Yet, despite those findings, in cases where asylum-seeking women feared forced separation from their children by their ex-husbands, administrative decisions indicated that they have the possibility to fight for custody under Russian law. In consequence, asylum seekers were denied international protection.[15] Asylum authorities did not examine whether in practice those women had access to effective state protection regardless of the support of other male family members.

In the North Caucasus one of the most common forms of violence experienced by women is forced separation with children after the divorce and the denial of her parental rights, including the right to participate in the upbringing of the child.

In one of the cases in which an asylum seeker was a survivor of violence and expressed that she was at risk of suffering serious harm by the forced separation with her children upon return, the Head of the Office for Foreigners deemed her deposition credible. Despite this, her asylum application was considered in an accelerated procedure and then she was refused international protection. The asylum authority pointed to the incidental (one-time) nature of the domestic violence and forced separation from her children by the husband's family.[16] The Association for Legal Intervention appealed the decision. The case is pending.

In 2019, there was a case of a migrant woman who was afraid that upon return her children would be forcibly taken away by her abusive husband. All legal interventions turned out to be futile. The family (mother with children) was forcibly deported to Russia. Upon their return, according to the information obtained from the woman, the children were in fact forcibly taken away by the father. Children are subject to domestic violence perpetrated by their father.

12. Decision of the Head of the Office for Foreigner, no. DPU.420.1177.2019
13. Decision of the Refugee Board, no. RdU-274-1/S/18
14. EASO, Report on country of origin information. Chechnya. Women, marriage, divorce and custody, Luxembourg 2014, https://coi.easo.europa.eu/administration/easo/PLib/BZ0414843PLN_PDFweb.pdf
15. Decision of the Head of the Office for Foreigner, no.DPU.420.1738.2018; Decision of the Refugee Board, no. RdU-130-1/S/18
16. Decision of the Head of the Office for Foreigner, no. DPU.420.1177.2019

In a few cases, in which the authorities deemed the deposition of the survivor of domestic violence credible, the possibility of an internal relocation was evoked, and thus the international protection was refused.[17] The asylum authorities indicated that asylum-seeking women could live in another part of their country. Yet, the authorities did not sufficiently analyze the risk of being found by members of the family nor the possibility to support themselves without the assistance from their social network.

To sum up, despite adequate laws, asylum seekers fleeing from gender-based violence from the North Caucasus still face serious difficulties in obtaining protection in Poland. Their credibility is questioned and the violence suffered is belittled. The asylum authorities do not properly take into account cultural differences, which results in unjust deprivation of international protection of asylum seekers.

Identification of survivors of violence

The issue of the lack of proper mechanism for the identification of the survivors of violence is still unresolved. It was noted amongst others by the UN Committee Against Torture in the concluding observations of 29 August 2019, CAT/C/POL/CO/7. The Committee was concerned by the insufficient capacity to identify asylum seekers, refugees and other persons in need of international protections who are survivors of torture, along with the lack of adequate protection and care for survivors of sexual and gender-based violence (par. 25).

The Association for Legal Intervention observes that Polish administrative authorities still do not have sufficient and adequate mechanisms of identification of the survivors of violence. Even if a migrant declares that he or she is a survivor of violence, they are not promptly examined by a doctor. Medical injury reports are not carried out ex officio even if the violence was inflicted relatively recently or if a migrant still has marks on his body after the violence. If a migrant presents a medical report or medical injury report from their home country, those documents are often only assessed against his or her general credibility assessment.[18] There is no additional medical examination which could support or rule out declared symptoms and their potential origin.

Polish administrative authorities still do not have sufficient and adequate mechanisms of identification of the survivors of violence. Even if a migrant declares that he or she is a survivor of violence, they are not promptly examined by a doctor.

According to the information provided by the Head of the Office for Foreigners[19] and the Refugee Board[20], in 2019 Polish asylum authorities did not appoint a single expert in the course of asylum proceedings. The administrative asylum authorities do not collect adequate evidence in order to determine the key fact in an asylum case, that is, whether an asylum seeker is a survivor of violence. As a consequence, vulnerable asylum seekers who are survivors of torture or other inhuman or degrading treatment, are often not properly identified and do not receive the protection due.

17. Decision of the Refugee Board, no. RdU-130-1/S/18
18. Decision of the Refugee Board, no. RdU-124-1/S/19
19. Ibidem
20. Response of the Refugee Board of 16 January 2020 to the request of the Association for Legal Intervention for public information

Identification of the survivors of violence is most commonly confined to the psychological evaluation conducted directly before an asylum interview. As a result of the evaluation, the psychologist assesses whether an asylum seeker needs psychological support during the interview and whether he or she should contact a doctor, a psychiatrist or a psychologist. If the need for psychological support during the asylum interview is recommended, the psychologist participates in the interview. Psychologist's role during the interview is confined to providing psychological support. He or she does not conduct a thorough psychological evaluation nor does he or she prepare a psychological report assessing whether the symptoms displayed by the asylum seeker could have developed as a result of the violence inflicted. The role of the psychologist is confined to providing emotional support during the interview, and not to providing expert information necessary for the proper identification of the survivors of violence.

In practice the identification of the survivors of violence depends on their credibility assessment of an asylum seeker made after the asylum interview.

In practice the identification of the survivors of violence depends on their credibility assessment of an asylum seeker made after the asylum interview. The identification is conducted only during the decision making phase.

There is no systemic evaluation of the effectiveness of the current mechanism for the identification of the survivors of violence. The Office for Foreigners does not gather information concerning the number of vulnerable asylum seekers, their special reception needs, special reception needs that were provided to them, the promptness of the identification mechanism nor the number of asylum seekers assessed by the doctor with the purpose of their identification.[21] Without this basic data it is almost impossible to introduce a regular and systemic evaluation and improvement of the mechanism of the identification and support for vulnerable asylum seekers.

Poland still lacks an efficient and proper mechanism for prompt identification of survivors of violence. It has a negative impact on the level of support provided to them, and can negatively influence the accessibility of adequate legal representation in asylum and deportation procedures. It can lead to an unjust refusal to grant international protection in Poland.

21. Response of the Head of the Office for Foreigners of 20 January 2020, no. BSZ.074.1.2020/ED, to the request of the Association for Legal Intervention for public information

Aleksandra Pulchny

3. LGBT persons

The Head of the Office for Foreigners does not keep the statistics about the number of LGBT asylum seekers.[22] As in the previous year, in 2019 the percentage of LGBT asylum cases in the Association for Legal Intervention was slight. The LGBT asylum seekers assisted by the Association were nationals of Russia (Chechnya), Iran and Ukraine. Problems which LGBT persons are facing while applying for asylum have been described in SIP report 2018.[23] Unfortunately, they have not lost their relevance in 2019. The Association for Legal Intervention still observes that LGBT asylum seekers face difficulties when it comes to collecting and evaluating evidence in their asylum procedures. Furthermore, the possibility of their internal relocation is inappropriately assessed.

The non-governmental organizations monitoring the observance of rights of LGBT persons in the North Caucasus confirm, that there exists a threat of homicide, arbitrary deprivation of life, deprivation of liberty, forced enrollment in oppressive religious schools and a threat of forced marriage both from state and non-state actors.

One of the cases monitored by the Association for Legal Intervention in 2019 concerned an asylum seeker from Chechnya. She fled from Russia as she was persecuted by her family members for reasons of her sexual orientation. She survived prolonged domestic violence. She could not rely on the protection of the Chechnya's authorities – not only they do not protect LGBT people, but also they themselves persecute non-heterosexuals.[24] The asylum seeker could not relocate to another part of Russian Federation, as she would face a high risk of tracing her by her family members supported by the Russian law enforcement agencies. Moreover, her escape from her family in North Caucasus might result in putting her into the list of missing people. It would give the authorities the right to follow her (by tracking her purchases, for example). As a result, the authorities could apprehend her and hand her over to her family members[25], who most probably would kill her for dishonoring the family.[26]

As her life was threatened, she fled Russia with assistance from a Russian organization supporting women belonging to sexual minorities. Her case is pending at the Head of the Office for Foreigners.

The non-governmental organizations monitoring the observance of rights of LGBT persons in the North Caucasus confirm, that there exists a threat of homicide, arbitrary deprivation of life, deprivation of liberty, forced enrollment in oppressive religious schools and a threat of forced marriage both from state and non-state actors.[27]

---

22. Response of the Head of the Office for Foreigners of 20 January 2020, no. BSZ.074.1.2020/ED, to the request of the Association for Legal Intervention for public information
23. As O. Dobrowolska, O. Hilik, M. Jaźwińska, P. Mickiewicz, A. Pulchny, M. Sadowska, K. Słubik, SIP w działaniu. Prawa cudzoziemców w Polsce w 2018 r., Association for Legal Intervention, Warsaw 2019, https://interwencjaprawna.pl/wp-content/uploads/2019/05/raport_sip_w_dzialaniu_2019R.pdf
24. M. Szczepanik, Republika strachu. Prawa człowieka we współczesnej Czeczenii, Warsaw 2019, p. 25, http://www.hfhr.pl/wp-content/uploads/2019/01/Czeczenia-raport-COI-2019-FIN.pdf
25. Ibidem, p. 27
26. Ibidem, p. 22
27. Violence against lesbian, bisexual and transgender women in the North Caucasus region of the Russian Federation, The "Queer Women of the North Caucasus" Project, Moskwa 2018, p. 16-33

Aleksandra Pulchny

4. RUSSIAN CITIZENS

Russian citizens of Chechen nationality for years have been the largest community of asylum seekers by the number of asylum applications, yet only a few of them receive any form of international protection. In 2019, 2586 Russian nationals applied for asylum. The Head of the Office for Foreigners granted refugee status to 8 Russians and granted subsidiary protection to 68 persons from the Russian Federation. The Refugee Board did not grant refugee status to any asylum seeker from Russia, whereas they granted subsidiary protection to 5 persons.[28] In Poland, in 2019, only around 3% of Russian asylum applicants received some form of international protection.

An asylum seeker from Russia, whose case was run by the Association for Legal Intervention, received a subsidiary protection in 2019. In 2016, the Head of the Office for Foreigners refused him any form of international protection. The asylum seeker claimed that he had survived torture from the Chechen authorities. Polish administration authorities established this information as credible. While refusing the protection, the Head of the Office for Foreigners held that the violence was a criminal offence and police misconduct, and not a reason to grant international protection. Furthermore, according to the administrative authority, the violence was inflicted during "the operational intelligence activities and their purpose was mainly to obtain relevant information by public authorities".[29] In the appeal, the asylum seeker, with the help of the Association, indicated that although gathering information about citizens in relation to on-going investigations is lawful, arbitrary arrests and torture can never be justified as they constitute a severe violation of human rights and justify submitting an asylum application in another country.

The Refugee Board repealed the decision of the Head of the Office for Foreigners and granted the asylum seeker subsidiary protection. The Refugee Board ruled that „the arbitrary arrest of the asylum seeker, keeping him in the basement, submitting him to physical violence and intimidation prove that his human rights were violated (...) The sequence of events indicates that the decision to flee the country was not a rash one, but was the result of subsequent traumatic experiences and the lack of possibility to obtain an effective protection. Indeed, the inefficiency of the state authorities, corruption and widespread organized crimes, is not of itself a persecution nor a serious harm. (...) Yet, if those elements lead to the individual violation of human rights, they should, in an individual case, be dubbed a persecution, or – as in the present case – a serious harm (...)".[30]

In 2019, 2586 Russian nationals applied for asylum. The Head of the Office for Foreigners granted refugee status to 8 Russians and granted subsidiary protection to 68 persons from the Russian Federation.

Regarding the violence of public officials towards its citizens, in 2019, the Supreme Administrative Court expressed its position. According to the Court, severe beatings by public officials could be treated as inhuman and degrading treatment.[31] The Supreme Administrative Court held that, if the administrative authorities established that the migrant was

28. *Office for Foreigners, Yearly statistics for 2019, accessible on: https://udsc.gov.pl/statystyki/raporty-okresowe/zestawienia-roczne/*
29. *Case no. DPU-420-2277/SU/2016*
30. *Decision of the Refugee Board, no. RdU-13-3/S/2017*
31. *Case no. II OSK 2572/18*

a victim of physical or psychological violence in his home country, they should also establish that in case of return he or she could face a real risk of suffering serious harm. This assumption can be rebutted if the authorities prove that there are justified reasons to assume that the acts of inflicting serious harm will not be repeated upon return.

In 2019, the Association for Legal Intervention monitored a case of a Chechen whose return would pose a high probability that he would be subject to torture in his country. The extensive psychological and medical documentation, prepared by psychologists and doctors collaborating with the Office for Foreigners, indicated that the migrant suffered from the full-blown post-traumatic stress disorder due to the trauma experienced. The evidence collected in the case indicated that the asylum seeker should be treated as a member of a vulnerable group due to his psychological condition and the fact that he is a survivor of torture. Additionally, the asylum seeker declared that as a result of torture his ribs, finger and nose had been broken. He was hospitalized in a mental institution several times.

Due to his poor mental condition, the Head of the Office for Foreigners postponed the asylum interview for over two years. In the end, his deposition was taken in writing.

The Head of the Office for Foreigners refused him international protection. According to the administrative authority, the asylum seeker was not credible, and the body injury could have been inflicted during his martial arts workout. As to his psychological condition, the administrative authority held that it is not contested, but that it has no bearing in establishing whether he had been persecuted or survived inhuman treatment in Russia. The Head of the Office for Foreigners only analyzed whether Russia provides medical treatment for persons diagnosed with post-traumatic stress disorder.[32] The case is pending before the Refugee Board.

The vast percentage of asylum cases concerning Russian citizens, for whom the Association for Legal Intervention provides legal or social assistance, concerns women – victims of gender-based violence. More about those cases in the section: “Gender-based violence”(p. 9).

32. Case no. DPU.420.521.2017

Magdalena Sadowska

5. UKRAINIAN CITIZENS

In 2019 the Head of the Office for Foreigners issued 628 decisions concerning asylum applicants from Ukraine. In terms of the number of asylum applications, Ukrainians (after Russian citizens) are the second most numerous group. In 8 cases regarding Ukrainian citizens the Head of the Office for Foreigners granted refugee status, and in 13 cases subsidiary protection.[33]

The majority of asylum seekers from Ukraine were refused international protection by asylum administrative authorities of both instances (the Head of the Office for Foreigners and the Refugee Board).

In cases monitored by the Association for Legal Intervention the most common reason for seeking international protection by Ukrainian citizens was an unstable situation in the place of their permanent residence, i.e territory of the Donetsk People's Republic and Lugansk People's Republic (including their frontier territories controlled by the Kiev government), and the lack of the possibility to return to Crimea. Asylum seekers highlighted that they cannot settle in areas that are not war-torn parts of Ukraine due to the threat of discrimination based on their habitual residence (occupied territories), nationality, political beliefs, ability to speak only Russian, low Ukrainian language ability, and religion (i.e. less popular Christian groups). Many also fear conscription. Asylum seekers frequently indicated that before leaving their country, they had tried to live in the part of Ukraine not affected by the conflict. As they did not receive there adequate help in finding accommodation and employment, and due to the discrimination of their children at school, they had to flee.

According to the observations of the Association for Legal Intervention, in 2019, the majority of asylum seekers from Ukraine were refused international protection by asylum administrative authorities of both instances (the Head of the Office for Foreigners and the Refugee Board).[34]

The Head of the Office for Foreigners assessed that members of vulnerable groups can relocate inside Ukraine, i.e: elderly women, whose daughter together with her family received international protection in Poland[35], survivors of trauma who developed psychological disorders (diagnosed post-traumatic stress disorder)[36], persons diagnosed with chronic disease despite the medical certificate prohibiting the cessation of therapy as it would constitute a threat to health[37], and persons diagnosed in Poland with advanced stage cancer.[38]

In two Ukrainian cases run by the Association for Legal Intervention, the Refugee Board granted refugee status to asylum seekers.[39] It should be noted that decisions of the Refugee Board were issued after both cases were remanded back to the administrative

33. https://migracje.gov.pl/statystyki/zakres/polska/typ/decyzje/widok/wykresy/typSprawy/4/rok/2020/rok2/2019/kraj/UA/
34. Statistics published by the Office for Foreigners show that in 2019 in 357 cases concerning Ukrainian citizens international protection was denied or an application was declared inadmissible, available at: https://migracje.gov.pl/statystyki/zakres/polska/typ/decyzje/widok/wykresy/typSprawy/4/rok/2020/rok2/2019/kraj/UA/
35. Decision of the Head of the Office for Foreigner, no. DPU.420.94.2019
36. Decision of the Head of the Office for Foreigner, no. DPU-420-1923/SU/2014
37. Decision of the Head of the Office for Foreigner, no. DPU.420.658.2019
38. Decision of the Head of the Office for Foreigner, no. DPU.420.1541.2018
39. Decision of the Refugee Board, no. RdU-248-6/S/14; Decision of the Refugee Board, no. RdU-247-3/S14

authorities by the Supreme Administrative Court (ruling of 29 May 2018, case no. II OSK 2399/17 and ruling of 11 April 2018 case no. II OSK 2448/17). The Supreme Administrative Court held that during the assessment of the possibility of an internal relocation the Refugee Board has to take into consideration the individual situation of an asylum seeker and not only the general human rights situation in the country. The Supreme Administrative Court ruled that the individual personal circumstances of an asylum seeker, such as the religion observed, have to be examined.[40] Asylum seekers were longtime members of a religious group. All other members of that group received international protection or residence permit for humanitarian reasons in Poland. This religion group was registered only in Crimea or outside Ukraine. Taking this into consideration, the Supreme Administrative Court held, that upon return to Ukraine, asylum seekers would not be able to continue their religious practices.

In 2019 the Head of the Office for Foreigners[41] issued asylum decisions in an accelerated procedure to asylum seekers fleeing Donetsk Republic.[42] Examination of an asylum application in an accelerated procedure can be conducted if the applicant has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of subsidiary protection or refugee status (well-founded fear of persecution for conventional reasons or real risk of suffering serious harm). The Association for Legal Intervention advocates that asylum applications of persons fleeing from Donbass or Crimea should not be examined in an accelerated procedure. Situations where an asylum seeker from Donbass or Crimea does not raise issues concerning war-related security threats, which he or she faces in the place of permanent residence, are extremely rare. In all other cases, due to the ongoing occupation of Crimea and a military conflict in Donbass, mere residence in those areas could constitute a serious threat to life or health.

40. More about judgments of the Supreme Administrative Court from 29 May 2018, case no. II OSK 2399/17 and from 11 April 2018, case no. II OSK 2448/17 in: Association for Legal Intervention, Report SIP in action. The rights of migrants in Poland in 2018, p.16

41. Decision of the Head of the Office For Foreigners, no. DPU.420.528.2019

42. Article 39 (1) (1) of the Act on granting international protection to aliens on the territory of the Republic of Poland

Aleksandra Pulchny

6. TAJIK NATIONALS

In 2019 the citizens of Tajikistan submitted 113 asylum applications in Poland. In the same year the Head of the Office for Foreigners issued 8 decisions on granting refugee status and 21 decisions on granting subsidiary protection regarding the above-mentioned group. Tajikistan nationals still remain the third largest community by the number of asylum applications[43], albeit the number of positive decisions has increased (in comparison to 2018).[44]

Problems which Tajikistan nationals are facing while applying for asylum have been described in Association for Legal Intervention report 2018[45], but unfortunately they are still ongoing. Nevertheless a slight increase should be noted in the number of positive decisions compared to previous years.[46]

In one of the cases conducted by the Association for Legal Intervention in 2019, a journalist couple from Tajikistan received a refugee status from the first instance authority without the need of submitting an appeal. The Association was engaged in that case since the moment they tried to lodge an application at the Polish-Belarusian border. Border Guard repeatedly declined to accept their applications, claiming that they are economic migrants, even though the couple had various documents confirming their fear from persecution. After many interventions, after 16 times being declined, the journalists were allowed to enter Poland and successfully lodged an asylum application.

Prolonged repression of opposition activists and their families

The human rights situation in Tajikistan deteriorated in 2019.[47] The allegations in last year's report concerning the illegal imprisonment of people peacefully opposing government policy, the use of torture, forcing activists residing in Belarus and Russia to return to the country, and the persecution of members of the Islamic Renaissance Party of Tajikistan (IRPT) and their families remain unchanged.[48]

Although decisions to refuse asylum in Poland in 2019 claimed that only high-ranking activists of the IRPT, known by name, are exposed to persecution in Tajikistan[49], in the studies from last year, known to

In the studies from last year, known to the authorities ex officio, it was indicated that people who are not members of the Party, but only its supporters, are also sentenced to imprisonment.

43. https://migracje.gov.pl/statystyki/zakres/polska/typ/decyzje/widok/mapa/rok/2019/organ/810/?x-=0.4377&y=1.0673&level =1
44. According to the publicly available statistics for 2019, Tajik nationals were the second largest (after the citizens of the Russian Federation) group of aliens, who received international protection in Poland, available at: https://bit.ly/32vi1w5
45. O. Dobrowolska, O. Hilik, M. Jaźwińska, P. Mickiewicz, A. Pulchny, M. Sadowska, K. Słubik, Report SIP in action. The rights of migrants in Poland in 2018, Association for Legal Intervention, Warsaw 2019, available at: https://interwencjaprawna.pl/wp-content/uploads/2019/05/raport_sip_w_dzialaniu_2019R.pdf
46. https://migracje.gov.pl/statystyki/zakres/polska/typ/decyzje/widok/mapa/rok/2018/rok2/2019/organ/810/kraj/TJ/?x=0.521 3&y=1.1205&level=1
47. https://www.hrw.org/world-report/2020/country-chapters/tajikistan
48. Ibidem
49. Decision of the Head of the Office for Foreigners, no. DPU-420-1993/SU/2016

the authorities ex officio, it was indicated that people who are not members of the Party, but only its supporters, are also sentenced to imprisonment. An example can be the trial of four men who were sentenced by the district court of Wilajat Sughd to 6 years' imprisonment for talking about IRPT activities and openly supporting the idea of this Party.[50] Furthermore, a man who was not a member of the IRPT was sentenced to 9.5 years' imprisonment for watching and "liking" and "sharing" on his social media profile information about the Party. He was officially found guilty of "inciting extremism and overthrowing the Tajik government, as well as working for a party whose activities were banned by the authorities".[51]

Another evidence of the Tajik regime's intensification of its actions is the establishment of a list of "terrorist-related persons" in October 2019. The list was published on the Emomali Rahmon regime-related website of the Financial Monitoring Department under the National Bank of Tajikistan[52], for the prosecution of oppositionists and those who are opposed to the ruling regime. At the top of the list is the name of Muhiddin Kabiri, the chairman of the IRPT in exile in Europe (also considered terrorist by the Tajik authorities). Several clients of Association for Legal Intervention have been included by the Tajik authorities in the aforementioned register. The publication of the list of persons connected with terrorism is an example of the way in which the Tajik authorities act, which, under the guise of the anti-terrorism campaign, prosecute and sentence IRPT members and their relatives to many years' imprisonment. Likewise, the recent National Alliance (founded by Tajik oppositionists belonging to four different parties) has been recognized by the Tajik authorities as a terrorist and extremist organization[53] and has been included in the list of fugitive oppositionists sought by Interpol.[54]

The publication of the list of persons connected with terrorism is an example of the way in which the Tajik authorities act, which, under the guise of the anti-terrorism campaign, prosecute and sentence IRPT members and their relatives to many years' imprisonment.

Deportation to Tajikistan

In 2019, the Polish Border Guard deported a member of Group 24 (an opposition group) to Tajikistan. This was the first time that a Tajik oppositionist was deported from an EU country.[55]

A migrant has been applying for asylum since 2016 (in 2017 he was a client of the Association for Legal Intervention). Despite requests from Tajik oppositionists and the indication that he could be tortured and illegally imprisoned due to his political activities if he returned to his country of origin, the Polish authorities decided that he had not proved his activity in Group 24, and then denied him refugee status and issued a return decision obliging him to return to Tajikistan.

---

50. Country of origin information prepared by the Office for Foreigners of 10 January 2019, p. 9
51. Ibidem, p. 7
52. https://nbt.tj/tj/financial_monitoring/perechni.php In order to access the list you have to enter the section: „Рӯйхати шахсони вобаста, ки аз ҷониби Ҷумҳурии Тоҷикистон ҳамчун бо терроризм алоқаманд эътироф шудаанд"
53. https://www.currenttime.tv/a/tajikistan-supreme-court-opposition/30215775.html
54. Until April 2019, Tajikistan issued 2528 co-called red notices in the Interpol for, among others, Muhiddin Kabiri – the leader of the major opposition party, according to: https://www.journalofdemocracy.org/articles/weaponizing-interpol/
55. A. Zygiel, Media: Polska deportowała tadżyckiego aktywistę, RMF, 27 September 2019, https://bit.ly/2SD59Rm

Assessment of evidence

The report on the Association for Legal Intervention legal activities in 2018[56] describes the case of a prominent IRPT activist represented by the Association, who was refused international protection due to the fact that, according to the Head of the Office for Foreigners, he did not prove his involvement in the opposition activity and the documents indicating his activity in the party were created for the purposes of asylum proceedings because he presented them only at the appeal stage. In 2019, the case was decided by the Voivodeship Administrative Court in Warsaw, repealing the decision of the Refugee Board refusing to grant him international protection.[57] In the opinion of the administrative court, the Refugee Board did not fully and fairly examine the evidence gathered in the case because, during its examination, it completely disregarded the relevant evidence submitted by the party within the appeal proceedings. One month before the second instance authority issued the decision, a lawyer from the Association for Legal Intervention acting on behalf of an asylum seeker submitted a letter with applications for evidence. The evidence included material showing that the asylum seeker is actively involved in politics and that a return to Tajikistan in connection with political activities may lead to his persecution. There is a risk of being tortured, inhumanly or degradingly treated or punished if returned. This is due to the fact that current activists of this opposition party are regularly persecuted in Tajikistan. The evidence presented also showed that a family of the asylum seeker is repressed in the country because of him.

The Voivodeship Administrative Court in Warsaw found that the circumstances, in respect of which motions for evidence were filed, are relevant in the proceedings in question. According to the judgment: "By means of the reported evidence, the party wanted to prove and substantiate the fact that family members were being persecuted because of the migrant's political activities, as well as the threat of persecution in case of return to the country of origin". In the Court's opinion, "The failure found could have had a significant impact on the outcome of the decision, since the party invoked new evidence relating to its current situation, resulting from its political activities after the decision of the first instance authority, claiming to be persecuted by the Tajik authorities".[58] The Association for Legal Intervention acted in the case before the Voivodeship Administrative Court in Warsaw as a social organization allowed to participate in the proceedings.

Last year's report also highlighted that it is very difficult to prove membership of the IRPT due to the fact that the certificates issued for this circumstance are being challenged by the asylum authorities.[59] Because of signs of non-recognition of certificates, the IRPT management changed the way they were issued in 2019, tightening the criteria for obtaining them.

---

56. O. Dobrowolska, O. Hilik et. al., SIP w działaniu. Prawa cudzoziemców w Polsce w 2019 r., Association for Legal Intervention, Warsaw 2018, p. 30

57. Judgement of the Voivodship Administrative Court in Warsaw of 10 December 2019, case no. IV SA/Wa 446/19

58. Ibidem

59. O. Dobrowolska, O. Hilik et. el.., SIP w działaniu ... rap.cyt., p. 20

Małgorzata Jaźwińska

7. NATIONALS OF THE DEMOCRATIC REPUBLIC OF CONGO

According to data from the Office for Foreigners in the first half of 2019 only one person from the Democratic Republic of Congo applied for asylum in Poland. In this period only three asylum decisions were issued to Congolese (one negative decision, one decision to discontinue the proceedings and one decision of the Refugee Board to quash the decision and refer the case back to the authority of the first instance).[60]

In 2019 the Association for Legal Intervention represented an asylum seeker from the Democratic Republic of Congo. Administrative authorities deemed her not credible. Despite of this fact, the Refugee Board indicated that due to the extremely precarious human rights situation of single women in Congo, the possibility to grant her subsidiary protection should be re-examined. The Refugee Board indicated that women, especially young, single and deprived of men's care, are one of the group which is especially susceptible to the violation of their rights. They referred to the standard of protection of women set by the European Court of Human Rights. The Refugee Board indicated that the degree and the character of potential risk faced by young, single and deprived of males care women in Congo has to be re-examined. For those reasons the Refugee Board quashed the decision and referred the case back to the Office for Foreigners.[61]

In Congo, women, especially young, single and deprived of men's care, are one of the group which is especially susceptible to the violation of their rights.

60. Office for Foreigners, Statistics on the number of proceedings concerning aliens in the first half of 2019, available at: https://udsc.gov.pl/statystyki/raporty-okresowe/zestawienia-roczne/
61. Decision of the Refugee Board, no. RdU-88-1/S/2018

Magdalena Sadowska

8. CESSATION OF INTERNATIONAL PROTECTION

In 2019, the Head of the Office for Foreigners initiated 12 proceedings on the cessation of refugee status and 117 proceedings on the cessation of subsidiary protection.[62] In 6 cases the authority of first instance issued 6 decisions on the cessation of refugee status[63] and 100 decisions on the cessation of subsidiary protection (all persons came from Russia).[64]

In 2019, lawyers from the Association for Legal Intervention represented migrants before the Refugee Board in proceedings on the cessation of a refugee status or subsidiary protection.

The most common reason for the cessation of a refugee status in cases monitored by the Association was a voluntary return to the country of origin. The voluntary return was proved by the possession of a new document issued in the country of origin, or at its embassy, or by the laconic and vague testimony given during the proceedings on the cessation of refugee a status, that the migrant (citizen of Russia) after leaving Poland lived in the territory of Belarus or Ukraine, while indirect evidence pointed towards their departure to the country of origin. The administrative authority of second instance held that the departure to Russia in order to provide care for a sick mother by her only child constituted a voluntary return to the country of origin, and thus should result in the cessation of a refugee status. According to the authorities the refugee voluntarily accepted the protection of her country of citizenship. The decision indicated that the return was voluntary as the migrant "after an analysis of her family situation and the existence of a possible danger in her country of origin made a conscious and independent decisions (without any pressure from authorities or other entities) to return to her country of origin."[65]

The most frequent reason for the cessation of subsidiary protection in cases monitored by the Association was a voluntary return to the country of origin. The voluntary return was proved by the possession of a new document issued in the country of origin (e.g. birth certificates of children, internal passport, valid certificate of residence in the territory of the republic of origin).

According to established case law of the Refugee Board, the fact that a passport was issued by the authorities of a country of origin to a recognized refugee, and he or she used such passport while travelling is "equivalent to the [refugee's] voluntary reacceptance of the protection of the country of origin".[66]

62. *Response from the Office for Foreigners of 20 January 2020, inf. cyt.*
63. *5 citizens of Russia, 1 citizen of Belarus*
64. *According to article 22 (2) (1) of the Act on granting international protection to aliens on the territory of the Republic of Poland, an alien is deprived of subsidiary protection if after the protection was granted, the circumstances mentioned in article 19 (1) (3) (a or b), or in article 20 (1) (2) (b or c) of the aforementioned act changed. Under article 19 (1) (3) (a or b) of the aforementioned act the refugee status is denied to an alien if there are serious grounds to believe that he or she committed a crime against peace, a war crime or a crime against humanity within the meaning of international law, or that he or she is guilty of actions contrary to the aims and rules of the United Nations as indicated in the Preamble and articles 1 and 2 of the United Nations Charter. According to article 20 (1) (2) (b or c) of the aforementioned act, an alien is denied the subsidiary protection if there are serious grounds to believe that he or she committed a crime in the territory of the Republic of Poland or committed outside this territory an act that is a crime under Polish law or that poses a danger to the security of the country or society*
65. *Decision of the Refugee Board, no. RdU-13-1/S/19*
66. *Decision of the Refugee Board, no. RdU-12-1/S/19; decision of the Refugee Board, no. RdU-139-2/S/13*

The most frequent reason for the cessation of subsidiary protection in cases monitored by the Association was a voluntary return to the country of origin. The voluntary return was proved by the possession of a new document issued in the country of origin (e.g. birth certificates of children, internal passport, valid certificate of residence in the territory of the republic of origin). The second most frequent reason for the cessation of subsidiary protection of Chechens was the fact that the circumstances which led to the granting of subsidiary protection status have ceased to exist, as the security situation in the country of origin improved. According to the established case law of administrative authorities, "the current situation in the Republic of Chechnya underwent stabilization (...). In Chechnya there is currently no armed conflict with a broad scope, in which the civilian population would be threatened due to ongoing activities".[67] Given the above, the administrative authorities assume that the circumstances that justified granting protection in the past "have completely changed, and this change has been so significant and long-lasting that protection is no longer necessary".[68]

The asylum authorities of both instances are obliged to carry out proceedings concerning the cessation of international protection on an individual basis. However, as is apparent from the Association's observations, both the Head of the Office for Foreigners and the Refugee Board after obtaining information that a citizen of Russia, who was a beneficiary of refugee status or subsidiary protection in Poland, returned to his or her country, automatically withdraw the international protection. The authorities rely solely on general country of origin information, and they do not analyze the entirety of evidence gathered in a given case on the basis of the individual situation.

Such actions give rise to the risk of cessation of international protection in relation to persons who, upon return, would face the risk of persecution or serious harm for other reasons than the ones that initially led to the granting of international protection.

It also needs to be indicated that after the lapse of 5 years of uninterrupted stay in Poland a beneficiary of a refugee status or a subsidiary protection may apply for a permanent residence permit.[69] After obtaining such a permit, the migrant may as a rule travel to his or her country of origin or its diplomatic post without incurring the risk of losing the right of residence in Poland.

67. Decision of the Refugee Board, no. RdU-72-1/S/19
68. Ibidem
69. Article 195 (1) (6a) of the Act on foreigners

Magdalena Sadowska

9. SUBSEQUENT ASYLUM APPLICATIONS

An asylum application can be considered as inadmissible if among others the application is a subsequent application and no new elements or evidence relating to the examination of whether the applicant qualifies as a beneficiary of international protection, which would significantly increase the probability of granting international protection, have arisen or have been presented by the asylum seeker.[70]

Both the Head of the Office for Foreigners and the Refugee Board almost automatically consider every subsequent application as inadmissible.

The Association for Legal Intervention observes that both the Head of the Office for Foreigners and the Refugee Board almost automatically consider every subsequent application as inadmissible. This is also the case when an asylum seeker during the subsequent proceedings indicates different, new reasons for applying for asylum (when new elements arose after the previous negative asylum decision was issued)[71] or when, after receiving previous negative asylum decision, he or she returns to his or her country of origin and once again flees to Poland, presenting different reasons for applying for asylum.[72] Moreover, the authorities do not view a drastic deterioration of a migrant's health[73] or a significant deterioration of the situation in his or her country as a new, significant element of the case, which could alter the assessment made as to the possibility of an internal relocation.[74]

What frequently remains a contentious issue in subsequent asylum proceedings, is whether the new evidence submitted only in the subsequent proceedings do indeed significantly increase the probability of granting international protection. Consequently, one has to emphasize the importance of the judgment of the Voivodeship Administrative Court in Warsaw of 18 April 2019, issued in proceedings conducted with the participation of the Association for Legal Intervention. The judgment indicates that all evidence can be considered as significant for such cases as long as they „provide the possibility of establishing factual circumstances differently than in the appealed decision"[75] of the authority of first instance. The Administrative Court found that the administrative authority had been under the obligation to make reference in the justification of the decision "to the submitted evidence, even if this evidence was not admitted and provide reasons for the non-admittance." As a result of the abovementioned reasoning, the Voivodeship Administrative Court in Warsaw held that "a change of the circumstances of the case regarding as much as one of the elements of international protection, concerning both the situation in the country of origin and the individual situation of the asylum seeker, meant that the subsequent application to grant international protection cannot be seen as based on the same grounds", and thus should be considered as admissible and decided on the merits.

70. Article 38 (2) (3) of the Act on granting international protection to aliens on the territory of the Republic of Poland
71. Decision of the Head of the Office for Foreigners, no. DPU.420.1467.2017
72. Decision of the Head of the Office for Foreigners, no. DPU.420.2877/SU/2016
73. Decision of the Head of the Office for Foreigners, no. DPU.420.1541.2018; decision of the Head of the Office for Foreigners, no. DPU.420.645.2019
74. Decision of the Head of the Office for Foreigners, no. DPU.420.275.2019
75. Judgment of the Voivodship Administrative Court in Warsaw of 18 April 2019, case no. IV SA/Wa 3394/18

Identical judgments were issued by the Voivodeship Administrative Court in Warsaw on 10 April 2019[76], 11 April 2019[77] and 10 September 2019[78] in cases initiated by complaints of the applicant's family members. In the judgment of 11 April 2019 the Warsaw Court found that it cannot be considered as a sufficient evaluation of evidence when the authority simply mentions the name of a piece of evidence without referring to its contents.[79] As the Court indicated in the judgments of 10 April 2019 and 10 September 2019, such action on the part of the authority might give rise to doubts whether the Refugee Board „analyzed (...) the evidence [submitted by the party] and also why it denied credibility to this evidence"[80], and thus it shows that the authority had foregone „a proper assessment on the merits".[81]

All of the judgments referred to above are final and binding.

76. Judgment of the Voivodeship Administrative Court n Warsaw of 10 April 2019, case no. IV SA/Wa 3400/18
77. Judgment of the Voivodeship Administrative Court in Warsaw of 11 April 2019, case no. IV SA/Wa 3393/18
78. Judgment of the Voivodeship Administrative Court in Warsaw of 10 September 2019, case no. IV SA/Wa 3396/18
79. Judgment of the Voivodeship Administrative Court in Warsaw of 11 April 2019, case no. IV SA/Wa 3393/18
80. Judgment of the Voivodeship Administrative Court in Warsaw of 10 September 2019, case no. IV SA/Wa 3396/18
81. Judgment of the Voivodeship Administrative Court in Warsaw of 10 April 2019, case no. IV SA/Wa 3400/18

Magdalena Sadowska

10. SUSPENSION OF THE EXECUTION OF THE NEGATIVE ASYLUM DECISION DURING THE ADMINISTRATIVE COURT'S REVIEW

During 2019 the Association for Legal Intervention monitored and run cases in which asylum seekers lodged complaints to the administrative courts against the negative asylum decision. With the complaints the asylum seekers requested the suspension of the execution of the decision. As described in the report "SIP in action. Rights of migrants in Poland in 2018", asylum seekers waiting for the court's review of their asylum case are not automatically protected against deportation.

Asylum seekers waiting for the court's review of their asylum case are not automatically protected against deportation.

In complaints addressed to the Voivodeship Administrative Court in Warsaw against the negative asylum decisions (including the inadmissibility decisions) the Association for Legal Intervention requested the suspension of the execution of those decisions.

In 2019 administrative courts changed its case law in order to guarantee more adequate protection of the rights of asylum seekers. Administrative courts started once again to suspend the execution of the negative asylum decisions.

In 2019 administrative courts changed its case law in order to guarantee more adequate protection of the rights of asylum seekers. Administrative courts started once again to suspend the execution of the negative asylum decisions.

The Voivodeship Administrative Court in Warsaw held that "in the period between the issuance of the decision refusing to grant international protection and lodging the complaint against the return decision with the request to suspend the execution of the return decision, the migrant is left without any protection" against refoulement.[82] Although non-compliance with the obligation to leave Poland within 30 days from the day that the negative asylum decision became final in the administrative procedure is not a direct reason for forceful expulsion, it can nevertheless lead to the issuance of the return decision, which could be forcibly executed. The Court found that the *interim measure* (temporary protection against the expulsion) "guarantees that asylum seekers have a right to an effective remedy according to Article 46 (3) of the procedural directive 2013/32/EU, since the return procedure could not be initiated until the court's ruling upholding the negative asylum decision becomes final".[83] According to the aforementioned judgement, the "procedural directive"[84] guarantees that an asylum seeker can remain in the territory of Poland during the administrative court's procedure at first instance.

82. Decision of the Voivodeship Administrative Court in Warsaw of 17 July 2019, case no. IV SA/Wa 1457/19
83. Ibidem
84. According to Article 46 (5) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast): "(...) Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy"

Additionally, in the subsequent ruling of the Voivodeship Administrative Court in Warsaw[85], the Court found that if an asylum seeker did not lodge a complaint against the return decision, he or she could be deported despite the asylum case being reviewed by the Administrative Court. The Court highlighted that the protection against refoulement starts only after lodging the complaint against the return decision with the request to suspend the execution of the decision. According to the Court there is a risk that the administrative judicial review of the return decision upholding the decision ends before the administrative judicial review of the asylum case. As the suspension of the execution of the decision concerns only the proceedings, in which the *interim measure* was granted, it does not automatically cover the asylum procedure. The Voivodeship Administrative Court in Warsaw held that the refusal to suspend the execution of the asylum decision is contrary to Article 46 (5) of the procedural directive 2013/32/EU and the judgement of the Court of Justice of the European Union of 26 September 2018 in the case C-180/17. It is unacceptable to forcibly return an asylum seeker before the judicial review at first instance of the negative asylum decision.

All in all, in 2019 there was a change in the case law of administrative courts of both instances concerning the suspension of the execution of negative asylum decisions. Administrative courts followed the case law of the Court of Justice of the European Union and the European legislation, thus guaranteeing asylum seekers the right to remain on the territory of Poland during the judicial review of their asylum case.

85. Decision of the Voivodeship Administrative Court in Warsaw of 6 November 2019, case no. IV SA/Wa 1480/19

Olga Dobrowolska
Małgorzata Jaźwińska
Aleksandra Pulchny

11. PROCEDURAL GUARANTEES

During the asylum proceedings still not all standards of just procedure are respected by the asylum administrative authorities. It can result in an unjust refusal of protection to persons who are indeed in danger in their country.

Gathering evidence

The Association for Legal Intervention holds the view that the administrative asylum authorities still do not use, to the full extent possible, tools that are in their disposal and would allow them to collect all relevant pieces of evidence in asylum cases.

The Office for Foreigners, despite being formally equipped with such a possibility, does not register (neither the sound nor the video) asylum interviews even on the request of an asylum seeker or his or her representative. It puts an undue hardship on, or in certain cases makes it impossible for an asylum seeker to later successfully challenge the accuracy of the protocol from the asylum interview (prepared in Polish). Inconsistencies in the protocol can have a far-reaching negative consequence for an asylum seeker. Despite the fact that legally the possibility to register asylum interviews was introduced in 2015, the Office for Foreigners states that they do not see the need to register those interviews. In 2019 no interview was registered.[86]

The success rate in the appeal procedure in 2019 was only 3,5%.

The usage of means of distant communication for asylum interviews is still a matter of concern. Those interviews are conducted with detained asylum seekers, even with those requiring special treatment due to their psychological dysfunction or the fact that they are survivors of violence. The Association for Legal Intervention holds the view that asylum interviews conducted by means of distant communication do not allow to establish and maintain a sufficiently safe atmosphere of trust with an asylum seeker, especially a vulnerable one, necessary to allow him or her to freely present his or her asylum case. In consequence, it can negatively influence his or her credibility assessment.

The Association for Legal Intervention observes that administrative asylum authorities still do not appoint an expert, especially an expert doctor or a psychologist, frequently enough. In 2019 neither the Head of the Office for Foreigner[87] nor the Refugee Board[88] appointed a single expert in asylum cases. It prevents efficient and prompt identification of survivors of violence and can lead to unjust asylum decisions. Poland still lacks an efficient mechanism for the identification of survivors of violence.

The Association for Legal Intervention observes that the Office for Foreigners no longer requests the psychological reports from psychologists taking part in asylum interviews of vulnerable asylum seekers. Psychologists do not prepare reports after the asylum

86. *Decision of the Voivodeship Administrative Court in Warsaw of 6 November 2019, case no. IV SA/Wa 1480/19*
87. *Ibidem*
88. *Response of the Refugee Board of 16 January 2020 to the request of the Association for Legal Intervention for public information*

interview nor do they evaluate asylum seekers as to the symptoms typical for survivors of violence. It is yet another barrier preventing Polish asylum authorities from properly collecting and assessing evidence in asylum cases.

Another barrier for asylum seekers is an insufficient system of legal aid. The majority of evidence is collected by the asylum authority of first instance. During this phase an asylum seeker is interviewed, country of origin information is collected, and witnesses are heard. During the asylum proceedings in the first instance an asylum seeker has no right to free of charge legal representation, regardless of his or her financial situation. It can result in mistakes difficult or impossible to convalidate at a later stage of the asylum procedure.

All of the abovementioned shortcomings in the Polish asylum system lead to an unfair asylum procedure and unjust decisions. In the first half of 2019 the recognition rate of the asylum applications in the first instance was 6,5%, whereas the success rate in the appeal procedure in 2019 was only 3%.[89] In 2019 the success rate of the complaints to the Voivodeship Administrative Court in Warsaw in asylum cases was 8%.[90] This is one of the lowest recognition rate in European Union. In the EU in 2018 the average recognition rate in asylum cases was 38%.[91] According to the Association for Legal Intervention those differences cannot be explained solely by differences in the demographic structure of asylum seekers in Poland. The abovementioned shortcomings of an asylum system in Poland contribute to the growing discrepancies between Poland and the rest of the European Union.

Asylum interview in a written form

The Act on granting international protection to aliens on the territory of the Republic of Poland does not regulate in detail the rules of conducting the interview with an asylum seeker, despite it being an obligatory and crucial element of collecting evidence in an asylum procedure. The Act does not implicitly allow a written form of an asylum interview. However, the experience of the Association for Legal Intervention shows that, based on the regulation concerning the vulnerable asylum seekers, in exceptional situations an asylum seeker can make a written deposition instead of an oral hearing. During such a deposition he or she fills in a protocol of an asylum interview himself or herself.[92]

Due to the lack of accessible statistics, the Association for Legal Intervention cannot assess the frequency of asylum interviews carried out in a written form. In 2019, the Association for Legal Intervention led two cases, in which, due to the psychological condition of asylum seekers, they gave their deposition in a written form

In the first case, the asylum seeker had both the medical and psychological documentation confirming his mental disorder which could impair his ability to recall past experiences during the asylum interview. Both psychiatrist and psychologist (conducting the psychological evaluation of the necessity for a special procedure) recommended

89. Based on the statistics of the Office for Foreigners.
90. Response of the Refugee Board of 16 January 2020, op.cit.
91. Calculations based on the statistics available at Eurostat for 2018. On the date of publishing the report there were no available statistics for 2019
92. Article 69 (1) (1) of the Act on granting international protection to aliens in the territory of the Republic of Poland

postponing the date of the asylum interview due to the recurring symptoms of PTSD. "Both the psychiatric and psychological assessments unequivocally indicate that the current psychological state of the patient does not allow him to participate in the asylum interview". In light of those conclusions, the Head of the Office for Foreigners repeatedly postponed the date of the asylum interview. Subsequently, the psychologist cooperating with the Office for Foreigners repeatedly recommended to collect statements of the asylum seeker" in a different form, i.e. in writing".[93] As a result, the asylum interview was conducted in a written form in the premises of the Office for Foreigners two years after lodging the asylum application. The psychologist assisted an asylum seeker during the written interview. All questions for the asylum seeker were written in the protocol. The asylum seeker had to answer them in writing. No further questions were asked.

In the second case run by the Association for Legal Intervention, the standard asylum interview before the Refugee Board was stopped, after psychological consultation due to the sudden deterioration of the psychological state of an asylum seeker caused by the highly intense stress while recollecting traumatic memories. The Refugee Board decided that the asylum seeker would answer questions later in writing and send them to the asylum authority via post.[94] The Refugee Board has not yet sent the list of questions to the asylum seeker.

Legal aid in the asylum procedure

Asylum seekers have a right to free legal assistance and representation in the appeals procedures. However, this right is insufficient. What is more, in 2019 the state funds for legal assistance and representation started to be limited.

The legal assistance and representation is restricted to the appeals procedures. Yet, the crucial evidence is gathered in the administrative procedure of first instance. It is during the administrative procedure at first instance that the asylum seeker is interviewed, the country of origin information is collected and the witnesses are heard. During the administrative asylum procedure of first instance asylum seekers do not have a right to free legal assistance and representation regardless of their financial situation. It could negatively affect the process of collecting and assessing the evidence in a way that might be difficult or impossible to rectify at a later stage. It happens that the evidence gathered only after the consultations with a lawyer and presented by the applicant during the appeal procedure are considered not credible. The administrative authority claim that the asylum applicant should have presented them at an earlier stage, that is, during the administrative proceedings of the first instance. The fact that the asylum seeker was not represented by a professional lawyer during the administrative procedure at first instance and had no knowledge about the kind of evidence that could be relevant is not taken under consideration.[95]

The legal assistance and representation is restricted to the appeals procedures. Yet, the crucial evidence is gathered in the administrative procedure of first instance.

93. Case no. DPU.420.521.2017
94. Case no. before the Refugee Board RdU-452/S/16
95. Decision of the Refugee Board, no. RdU-124-1/S/19

The Association for Legal Intervention provides asylum seekers a state-funded legal assistance and representation in the appeals procedures (to asylum seekers who were refused international protection or whose protection status ceased). According to the law, the state refunds the salary and the documented and necessary costs of commutes and of translations.[96] In 2019, the Office for Foreigners began to contest the costs of translation of the meetings with asylum seekers incurred by the Association for Legal Intervention. The lack of refunds for the translation costs often makes any contact with a client impossible, and, in consequence, an asylum seeker might not receive the information and legal assistance due. It is only the asylum seeker who can explain the reason for his or her flight from the country. Therefore, without proper translation, legal assistance and representation can become inadequate and no longer guarantee the proper protection of the rights of an asylum seeker. The dispute between the Association for Legal Intervention and the Office for Foreigners is pending.

Length of asylum procedure

According to the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection the asylum procedure should be concluded within 6 months of the lodging of the application. This period can be exceeded up to 15 months where complex issues of facts or law are involved or where the delay can clearly be attributed to the failure of an asylum seeker to comply with his or her obligations. The examination of an asylum application shall never exceed 21 months (Article 31 (3-5) of the Directive 2013/32/EU).

In 2019 asylum proceedings in Poland were concluded on average in 5 months. There is still a relatively high proportion of cases in which the asylum proceeding lasted longer than the directive states. In 2019 there were 1269 asylum cases that were concluded over 6 months, 141 cases lasted more than 15 months and 24 cases lasted more than 22 months.[97] Taking into account that in 2019 only 4100 asylum applications were made, there is a significant number of cases exceeding the timeframes from the directive.

Prolonged asylum procedures often strengthen the feeling of the lack of stability for asylum seekers. Asylum seekers, not rarely the survivors of violence or other traumatic events, are afraid for their safety, legal safety included. Prolonged asylum procedure can obstruct their successful psychological or psychiatric treatment and negatively influence their ability to integrate.

Refusal to allow the Association for Legal Intervention to participate in the proceedings before the Administrative Court

For years, the Association for Legal Intervention has participated as a social organization in proceedings before administrative authorities and Administrative Court. In 2019, the Association for Legal Intervention was not allowed by the Voivodeship Administrative Court in Warsaw to participate in the proceedings.

96. Article 69l (1) of the Act on granting international protection to aliens on the territory of the Republic of Poland
97. Response of the Head of the Office for Foreigners of 20 January 2020, no. BSZ.074.1.2020/ED, to the request of the Association for Legal Intervention for public information

According to the law, a social organization, such as the Association for Legal Intervention, can notify its participation in the administrative court proceedings in a matter involving another person if such participation is justified by its statutes.[98] In the motion to allow the Association for Legal Intervention to participate in the proceedings, the Association indicated that its statutory objective is to provide free of charge legal assistance, including legal representation before administrative courts, to refugees and asylum seekers, as well as to defend public interest in the court proceedings.

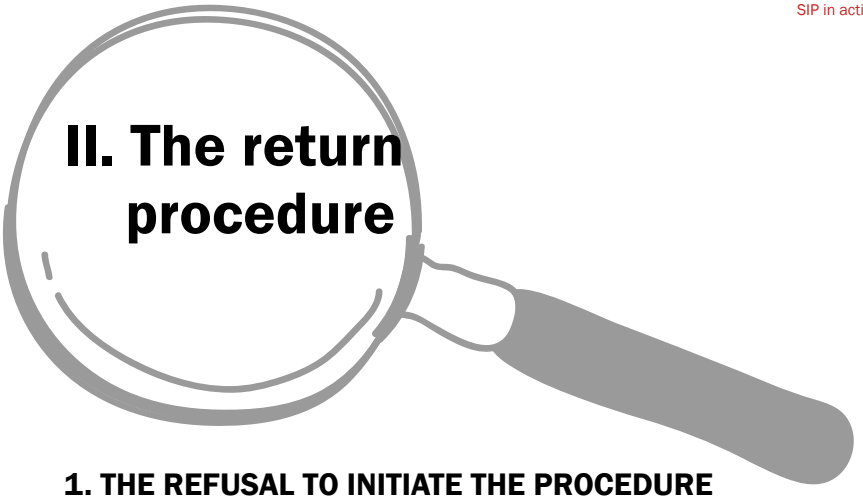
The Voivodeship Administrative Court in Warsaw ruled that the Association for Legal Intervention shall not be allowed to participate in the proceedings, as there is no need to defend public interest in the asylum proceedings. Asylum cases involve an individual and do not affect society as a whole. According to the Court, the actions of the Association for Legal Intervention have no and could not have any meaning for the public interest.

In the present case, the Association for Legal Intervention lodged a complaint to the Supreme Administrative Court. In the complaint, it was raised that the Association is a public benefit organization and its statutory objective is to take action aimed at ensuring observance of human rights and preventing acts of discrimination. Its mission is to guarantee social cohesion by undertaking activity to the benefit of the equality of all people before the law. Migrants and asylum seekers are part of society. They benefit from constitutional rights and freedoms, including the guaranteed right for an asylum. In consequence, the protection of the rights of asylum seekers constitutes an inherent element of the protection of public interest, that is, to guarantee the observance of constitutional rights and freedoms of every person.

The Association for Legal Intervention achieves its objectives by means of taking part in the administrative court proceedings. The Association points out the infringements of procedural guarantees and substantive law, thus contributing to the more comprehensive rulings and the observance of the rights of migrants. As a result, not only is the statutory objective of the Association achieved, but also the respect is strengthened for the rule of law, human rights and procedural guarantees. The Association also exercises the social control of administrative and court proceedings, and thus acts in defense of the public interest.

The Voivodeship Administrative Court in Warsaw eventually modified its ruling of its own accord and allowed the Association to participate in the proceedings.[99]

98. Article 33 §2 of the Law on proceedings before the administrative courts
99. Decision of the Voivodeship Administrative Court in Warsaw of 4 July 2019, case no. IV SA/Wa 3396/18



II. The return procedure

Aleksandra Pulchny
Magdalena Sadowska

1. THE REFUSAL TO INITIATE THE PROCEDURE

In 2019, the Association for Legal Intervention witnessed the continuation of the practice described in the report "SIP in action. Rights of migrants in Poland in 2018", that is, the inaction in initiating ex officio the procedure for a residence permit for humanitarian reasons even though the circumstances of the case would justify the initiation of such proceedings. Consequently, migrants who may have had a well-founded fear of their humans rights being violated in case of return to their country of origin were not provided an adequate legal protection against expulsion.

Migrants who may have had a well-founded fear of their humans rights being violated in case of return to their country of origin were not provided an adequate legal protection against expulsion.

The first case known to the Association concerns a migrant who has never been a subject of a return procedure. He informed the Border Guard in writing about the existing grounds for initiating such a procedure ex officio, that is his illegal stay in Poland. A migrant wanted to apply for a residence permit for humanitarian reasons, which can be obtained within the return procedure. He indicated that he led a family and private life in Poland. Several years previously he had married another migrant who had a permanent residence status in Poland. He also claimed that his return would violate the children's rights to an extent that seriously threatens their psychophysical development. Together with his spouse, they have been raising a child together. Due to those circumstances, from July 2017, he applied three times for a residence permit for humanitarian reasons. The Border Guard did not respond to his applications and did not initiate any proceedings. Due to the lack of response on the part of the Border Guard, the Association for Legal Intervention, acting as a social organisation, requested pursuant to Article 31(1)(1) of the Code of Administrative Procedure to initiate the proceedings and consider the possibility to grant the migrant a residence permit for humanitarian reasons. The Commander of the Border Guard Warsaw-Okęcie refused to initiate the requested proceedings. The Association lodged a complaint. As a result, the Head of the Office for Foreigners decided to repeal the contested decision and order that the Commander of the Border Guard Warsaw-Okęcie to initiate the return procedure.[100]

In the case concerning the refusal to initiate proceedings to grant a residence permit for humanitarian reasons described in SIP report 2018[101], the Border Guard initiated the procedure at the request of the Ombudsman for Children. Currently, the case is still

100. Decision of the Head of the Office for Foreigners, no. DL.WIPO.412.887.2019.JPP
101. SIP w działaniu. Prawa cudzoziemców w Polsce w 2018 r., autorki: O. Dobrowolska, O. Hilik, M. Jaźwińska, P. Mickiewicz, A. Pulchny, M. Sadowska, K. Słubik , Warszawa 2019, https://interwencjaprawna.pl/wp-content/uploads/2019/05/raport_sip_w_dzialaniu_2019R.pdf , dalej: Raport SIP za 2018 r., p. 26

pending. The Association was allowed to participate in the proceedings. The proceeding concerns a right of residence of a migrant who, together with his wife (of a religious marriage), has been raising children from his partner's previous marriage. The children established a strong emotional connection with their stepfather. According to the Association for Legal Intervention, separating them would violate children's rights, as well as the right to a family life.

The last of the cases described in last year's report in which the Border Guard did not initiate ex officio proceedings to grant a residence permit for the humanitarian reasons concerned a client of the Association for Legal Intervention from Afghanistan.[102] It ended in obtaining a residence permit for humanitarian reasons by the migrant in 2019. Interestingly, the Commander of the Border Guard, while granting a residence permit for humanitarian reasons due to a threat to his health or life in case of return to Afghanistan, referred not to the latest UNHCR reports stating a significant deterioration in the situation in the country over the last year, but only to the 2015 and 2016 reports, which had been known to the authority ex officio long before the migrant was previously informed about the lack of grounds to initiate the proceedings.[103] In addition, the Commander of the Border Guard noted that the migrant, living in Poland continuously since 2011, has integrated with the Polish society, established private contacts and "his social relations have taken on the characteristic longevity only upon issuance of the decision to grant him residence permit for humanitarian reasons.[104] In the opinion of the Association for Legal Intervention, it is a cause for concern that the Border Guard initiates the relevant procedure only upon receiving a binding request from the Polish Ombudsman[105], whereas previously they aimed to deport the migrant and ignored the information known to them ex officio, as well as the information obtained from the migrant and social organizations indicating that in case of the deportation, the rights of the migrant would be violated. The Association for Legal Intervention holds that the Border Guard, as a rule, should itself take appropriate action to prevent the deportation of a migrant to a country where his or her life or health may be endangered, as well as, when he or she fulfils a condition to grant a stay in Poland.

102. O. Dobrowolska, O. Hilik et. al., SIP w działaniu. Prawa cudzoziemców w Polsce w 2019 r., Association for Legal Intervention, Warsaw 2018, p. 20
103. Studies of the Country of Origin Information Department of the Office for Foreigners of 22 January 2015, 13 October 2015 and 28 December 2016
104. Decision of the Commander of the Border Guard Warszawa-Okęcie on granting a residence permit for humanitarian reasons on the territory of the Republic of Poland, no. NW-WA/2352/D-ZPH/2018
105. Article 14 (6) of the Act on Ombudsman

Aleksandra Pulchny

12. THE CHILDREN'S RIGHTS

One of the grounds for obtaining a residence permit for humanitarian reasons is the risk that the return to the country of origin would violate children's rights to the extent that seriously threatens their psychophysical development. If the return decision would result in the violation of such rights, a residence permit for humanitarian reasons on the territory of Poland should be granted to a migrant.[106] Each year the Association for Legal Intervention runs or monitors several or more cases concerning the protection of children's rights in case of the deportation.

In 2019, the case run by the Association for Legal Intervention, which concerned a migrant woman from Chechnya and her disabled underage son, concluded. The family left Chechnya because of the fear of blood feuds and the lack of possibility to treat the child's progressive disease. The boy received medical and psychological treatment in Poland and was admitted to a special school. During his four-year stay in Poland, he got to know the Polish language and established relationships with his peers. In the case file there was, inter alia, a psychological opinion indicating that his return to his country of origin will have a negative impact on his development and psychophysical state.

In 2018, the Border Guard issued a return decision to another migrant. In the decision the Border Guard held that in case of their return to Chechnya, there will be no violation of the child's rights, as "(...) the boy had had access to a sufficient medical care during his stay in Russia and he'll have access to it if he returns".[107]

In the appeal, the Association for Legal Intervention alleged that the Border Guards, among others, did not establish the degree the child's integration into the Polish society or risks to his psychophysical state in case of return, and failed to assess the actual situation of visually impaired children living in Chechnya, with particular regard to the availability of their treatment.

The Head of the Office for Foreigners allowed the appeal, repealed the decision of the Border Guard and granted the family the residence permit for humanitarian reasons. According to the decision: "The obligation for the child to leave Poland after a four-year uninterrupted stay would result in the cessation of an effective medical and psychological treatment which was undertaken in Poland. It could negatively influence, to a significant degree, further psychophysical development of the boy".[108]

The obligation for the child to leave Poland after a four-year uninterrupted stay would result in the cessation of an effective medical and psychological treatment which was undertaken in Poland. It could negatively influence, to a significant degree, further psychophysical development of the boy.

106. Article 348 (3) of the Act on Foreigners
107. Decision of the Commander of the Border Guard Warsaw-Okęcie, no. NNW-WA/3138/D-ZDP/2017
108. Decision of the Head of the Office for Foreigners, no. DL.WIPO.412.1321.2018.HJ

Aleksandra Pulchny

3. THE RIGHT TO LIFE, FREEDOM AND PERSONAL SECURITY

One of the grounds for granting a residence permit for humanitarian reasons is the risk that the return to the country of origin would pose a threat to life, freedom and personal security of a migrant.[109]

The report "SIP in action. Rights of migrants in Poland in 2018" described the case of an Afghan citizen applying for a residence permit for humanitarian reasons due to the risk of suffering serious harm if returned to his country. The Afghan was to be deported in October 2018 based on the return decision which had been issued 5 years previously. In the meantime, the situation in Afghanistan had significantly deteriorated, in particular the situation of the Khazar ethnic group, to which the migrant belongs. There has been a significant increase in intimidation, kidnapping and homicide of members of the Khazar minority by the Taliban, the so-called Islamic State and other anti-government forces.[110]

As a result of the intervention of the Association for Legal Intervention and the ombudsman, the Border Guard initiated the proceedings to grant a residence permit for humanitarian reasons, and in 2019 granted him the permit in question. The Border Guard held that his return to Afghanistan could put him at risk of loss of life, freedom or personal security: "It should be taken under consideration that the situation in Afghanistan has deteriorated in the last few years, there is particularly a growing the threat to the security of ethnic minorities, including Khazars. Additionally, it should be noted that being continuously in Poland since 2011, the aforementioned has integrated with the Polish society, established private contacts and his social relations have become durable".[111]

In 2019, in order to protect the right to life, freedom and personal security, deportations to certain countries were not carried out. Due to the generally dangerous situation in Syria, Eritrea, and Yemen, the Border Guard did not transfer migrants to those countries.[112]

109. Article 348 (1) of the Act on Foreigners
110. UN High Commissioner for Refugees (UNHCR), UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 30 August 2018, available at: https://www.refworld.org/docid/5b8900109.html
111. Decision of the Commander of the Border Guard Warszawa-Okęcie, no. NW-WA/2352/D-ZPH/2018
112. Response of the Headquarters of the Border Guard of 18 January 2020, no. KG-OI-III.0180.1.2020 B.Z, to the request of the Association for Legal Intervention for public information

Patrycja Mickiewicz

4. IMPOSSIBILITY TO ENFORCE THE RETURN DECISION

In 2019, the Association for Legal Intervention assisted a migrant who was staying in Poland for 15 years and had a permit for tolerated residence, which was granted due to the lack of possibility to enforce the return decision for reasons beyond the control of both the authority and the migrant. He wanted to obtain a document allowing him to travel beyond Poland. The document held by the migrant confirms his or her identity during the residence in Poland, but does not confirm citizenship. The document "tolerated stay" does not entitle to cross the border.[113]

It should be clarified that a migrant who has been granted a tolerated residence due to the impossibility to enforce the return decision - regardless of the fact that the situation is not his or her fault, which is a prerequisite for granting this form of residence - finds themselves in an exceptionally difficult legal situation. Such a person is not be entitled to obtain any document issued by the Polish authorities authorizing him or her to cross the border.[114] Moreover, migrants who were issued a permit for tolerated residence are deprived of the possibility to apply for a temporary residence permit and the status of a long term resident of the European Union or in the territory of Poland – such proceedings cannot be initiated[115], whereas migrants holding a permit for tolerated residence due to the impossibility of deportation are additionally excluded from the group of migrants entitled to obtain a permanent residence permit.[116] In consequence, such migrants are not be able to apply for Polish citizenship in an administrative procedure.

A migrant who has been granted a tolerated residence due to the impossibility to enforce the return decision – regardless of the fact that the situation is not his or her fault, which is a prerequisite for granting this form of residence - finds themselves in an exceptionally difficult legal situation.

The case of the migrant was subjected to a preliminary legal analysis from the point of view of the possibility to apply for a residence permit for humanitarian reasons. The situation of persons holding a permit for tolerated residence granted due to the lack of possibility to enforce the return decision for reasons beyond the control of the authority and the migrant was reported to the Committee for the Elimination of Racial Discrimination in an alternative report submitted by the Association for Legal Intervention in July 2019.

113. Article 274 of the Act on Foreigners
114. Documents issued to migrants and entities entitled to obtain them are specified in Article 226 and subsequent of the Act on Foreigners
115. Article 99 (1) (4) and Article 213 (1) (1) (e) of the Act on Foreigners
116. Article 195 (1) (6) (b) of the Act on Foreigners

Małgorzata Jaźwińska

5. MIGRANT CONSIDERED A THREAT TO THE SECURITY OR SAFETY

Protection offered to migrants considered a threat to national or public security or safety is significantly limited, be it procedural guarantees (more in the section: Procedural guarantees) or the possibility to obtain legal residence in Poland.

In those type of cases, the key issue is to determine when a migrant can be considered a threat to the security or safety. Is a mere suspicion that he or she committed a crime sufficient for such a determination? Does every crime, regardless of the accompanying circumstances and the offence level, automatically mean that a migrant should be considered a threat? Can a criminal court assess that a migrant is fully rehabilitated and is no longer a threat to others, whereas he or she is deemed a threat to public safety or security in the return proceedings?

In 2019 the Association for Legal Intervention participated as a social organization in a return procedure before the Head of the Office for Foreigners. The migrant had a family living legally in Poland.[117] Seven years ago he had been sentenced to imprisonment for an offence against property. He served his custodial sentence and benefitted from an early parole. The penitentiary court ruled that he had been successfully rehabilitated and obtained a positive criminological prognosis. Despite this, the migrant was served with a return decision. The Association for Legal Intervention holds the view that in the democratic state under the rule of law, unless there is new evidence, it is unacceptable for one public authority to hold that a person no longer poses a threat to the society and for the other one to claim otherwise. The return decision could violate the migrant's right to a family life and the children's rights. The case is pending.

In the democratic state under the rule of law, unless there is new evidence, it is unacceptable for one public authority to hold that a person no longer poses a threat to the society and for the other one to claim otherwise.

The Association also represents another migrant who was deprived of international protection few years previously. Polish authorities claimed that he no longer needed protection due to the improvement of the situation in his country and the fact that he posed a threat to public safety in Poland. In consequence, the Border Guard initiated the return procedure and on the same date issued him with immediately enforceable return order. The migrant indicated that his return to Russia would pose a threat to his human rights, including the prohibition of torture. The Association highlighted that regardless of the fact whether a migrant posed a threat to the public security of safety, it is unacceptable to deport him or her to a country where he or she could be subject to torture, inhuman or degrading treatment or killed. Currently his case is pending in the administrative court and the application to the European Court of Human Rights was lodged (application no. 9323/19).

117. Proceedings before the Head of the Office for Foreigners, case no. DL.WIPO.412.116.2019

Małgorzata Jaźwińska
Patrycja Mickiewicz

6. PROCEDURAL GUARANTEES

In the course of the return proceedings not all the guarantees of a fair procedure are sufficiently respected by the authorities. Occasionally, the Border Guard issues a return decision within one day, even for children who have managed to successfully integrate in Poland or whose return to the country could endanger their psychophysical development.[118] The Border Guard does not always collect the relevant evidence thoroughly and fairly. It can lead to issuing a return decision to a migrant, whose return would violate his or her human rights or the rights of the child. In the course of the proceedings, a number of procedural guarantees are violated, which may result in a defective decision or the infringement of migrants' rights.

Occasionally, the Border Guard issues a return decision within one day, even for children who have managed to successfully integrate in Poland or whose return to the country could endanger their psychophysical development.

Lack of an effective access to case files

Due to the organization of the work of the Office for Foreigners, lack of an effective access to case files in return and humanitarian procedures remains a problem. Migrants and their representatives are often deprived of an adequate access to case files before the issuance of the decision.

In legalization cases, the waiting period for getting acquainted with the case files in the Office for Foreigners (administrative authority of the second instance) significantly exceeded the standard 7-day deadline for expressing the collected evidence in the case. In the period from 1 January to 31 December 2019, the waiting period to review the files in the Office for Foreigners was around 1,5 months.[119]

In 2019, the Association for Legal Intervention requested the Head of the Office for Foreigners to improve the work of the office by organizing a reading room modeled after court reading rooms or by increasing the number of hours and designating new rooms for viewing case files. In response, the Head of the Office for Foreigners claimed that by the end of 2019 a reading room will be introduced in the office.[120] Unfortunately, these works were not completed by the expected date and the waiting period to review case files is still several weeks long.

In response to questions, the Head of the Office for Foreigners did not directly answer at what stage were the works regarding the introduction of the reading room at the Office. The Head of the Office for Foreigners has only indicated that they introduced an online registering system for file review, that there are restrictions on the number of cases you can review at once (maximum 5 cases), hours during which it is possible to review case files, and the fact that a maximum of 2 people can review files simultaneously within one

118. According to the statistics of the Office for Foreigners, in 2019 the average period of proceedings in return proceedings is 9 days (including proceedings before competent Border Guard authorities), while the average duration of appeals proceedings only is up to 409 days. Information based on: Response from the Office for Foreigners of 20 January 2020, inf. cyt.
119. Ibidem
120. Response of the Office for Foreigners of 19 August 2019, inf. cit.

hour.[121] From the answer obtained, it can be concluded that the Head of the Office of Foreigners did not abandon plans to introduce the reading room on the model of court reading rooms that would allow migrants and their representative an effective access to case files. However, there is no information at what stage of implementation these plans are.

Legal assistance during the administrative procedure

Persons subject to return proceedings or the proceedings to grant the residence permit on humanitarian grounds are not entitled to be assisted by an attorney-at-law or other professional lawyer. The proceedings are conducted in Polish. An appeal against a negative decision must also be made in Polish.

Persons subject to return proceedings or the proceedings to grant the residence permit on humanitarian grounds are not entitled to be assisted by an attorney-at-law or other professional lawyer.

Regardless of the financial resources available, as well as the knowledge of the Polish language, a migrant may not apply for a free of charge legal assistance and representation in these proceedings. Consequently, he or she must handle independently the letters in Polish received from the authorities, with an appeal and a complaint to the court, which must always be written in Polish.

Only before the administrative court, where evidence is no longer collected, can he or she request the appointment of a free of charge attorney-at-law, if he or she cannot afford to bear the costs of a legal representation. A request for a court appointed attorney must also be made in Polish.

In order to effectively defend their rights, migrants, especially those who do not speak Polish, must consult a professional lawyer. Therefore, they often ask non-governmental organizations for help in preparing appeals and clarifying their legal situation. Due to the lack of a stable, reliable and sufficient source of financing, the non-governmental organizations cannot provide adequate assistance to all migrants in need. This has a negative impact on the effectiveness of the protection of migrants' rights in the course of administrative proceedings. In 2019, in the return proceedings, the effectiveness of the appeals was approximately 17%[122], whereas in the first instance the Border Guard authorities granted humanitarian protection to migrants in less than 1% of cases.[123]

Right to active participation in the proceedings

The Association for Legal Intervention was deeply concerned by the arguments presented by the Supreme Administrative Court in the reasons for the judgment dismissing the cassation appeal filed in the case of one of our female clients, in which the Court expressed its views regarding the infringement of the Article 10 of the Code of Administrative Procedure.

121. Response from the Office for Foreigners of 20 January 2020, inf. cyt.
122. Ibidem
123. In 2019, the Border Guard authorities granted a humanitarian residence permit to 90 foreigners, while in the same period 29 408 decisions obliging to return were issued. Based on: Response of the Headquarters of the Border Guard of 18 February 2020, inf. cit.

The case concerned the decision issued by the Head of the Office for Foreigners, upholding the return decision. The Head of the Office for Foreigners did not provide the migrant's attorney with the right to access the case files, despite the fact that the latter notified the authority of its intention not only to familiarize themselves with the evidence collected, but also - and above all - to submit further motions and requests in the case. The authority set a seven-day time limit for the representative to access the case files, after which, although being informed of the impossibility to access the case file in the given timeframe for reasons attributable to the authority, the administrative authority issued a decision. The decision was issued even before the expiry of the time limit set to access the case files. In the opinion of the Association for Legal Intervention, the action of the administrative authority deprived the migrant of her fundamental right to actively participate in the proceedings. As a consequence, the lack of possibility to submit evidentiary motions had a significant impact on the outcome of the case. The Association for Legal Intervention was allowed to participate in the case before the administrative courts as the social organization.

Dismissing the complaint, the Voivodeship Administrative Court in Warsaw held[124] that there was undoubtedly a breach of the principle of an active participation in the proceedings. Yet, taking into consideration the migrant's claim that the breach of that principle affected the outcome of the case, the Court ruled that it was unfounded, since the evidence collected in the case had been known to the migrant and her attorney.

If a party clearly indicates its willingness to submit new evidence motions, and is deprived of this possibility by the defective action on the part of the authority, it infringes the Article 10 par. 1 of the Code of Administrative Procedure to the extent significantly affecting the outcome of the case.

Taking into consideration the fact that one of the fundamental procedural guarantees was breached, the Association for Legal Intervention lodged a cassation appeal, claiming, among other things, that if a party clearly indicates its willingness to submit new evidence motions, and is deprived of this possibility by the defective action on the part of the authority, it infringes the Article 10 par. 1 of the Code of Administrative Procedure to the extent significantly affecting the outcome of the case. It was indicated that an administrative court cannot pre-judge that a party's statements and motions would be irrelevant to the case when they concern the material facts of the case.

The Supreme Administrative Court did not agree with the arguments presented in the cassation appeal. The court held that "(...) it is up to the administrative authority to decide whether the evidence collected in the case is sufficient to decide the case. In the present case, the administrative authority of second instance considered that the circumstances relevant to the determination of the case were established on the basis of the evidence known to the party and the addition of further circumstances would not alter the decision".[125] In the opinion of the Association for Legal Intervention, such an understanding of the guarantee specified in the Article 10 of the Code of Administrative Procedure is difficult to understand and justify, in particular in cases where - such as this one - the circumstances change dynamically and the party declared its willingness to submit new evidence. The Association for Legal Intervention

124. Judgment of Voivodeship Administrative Court of 12 March 2019, file no.: IV SA/Wa 1796/18
125. Judgment of the Supreme Administrative Court of 11 December 2019, file no. II OSK 2099/19

continues to maintain the view that since the law enumerates the situations in which the administrative authorities are entitled to waive the obligation specified in Article 10 of the Code of Administrative Proceedings, the right of a party to the proceedings gained a special character, which should be respected by the state authorities. It is difficult to determine - as the Supreme Administrative Court did in the judgment under discussion - that submitting new evidence would not change the decision. In the opinion of the Association for Legal Intervention, it is not possible to assess the evidence that has not been submitted in the case.

Stay of the execution of the deportation order by the court

Administrative courts still do not always offer sufficient protection against refoulement. It can lead to the deportation of a migrant before his return decision becomes final. It is especially disturbing in situations when a migrant holds that his or her deportation could violate his or her human rights.

In 2019 the Association for Legal Intervention assisted a migrant who feared forceful separation from her child upon her return to country. She requested to be granted an interim measure by the administrative court thus stopping her deportation for the duration of the court's proceedings.

The Supreme Administrative Court issued an interesting ruling in favour of the applicant. The Supreme Administrative Court stayed the execution of the return decision[126] arguing that if the complaint was upheld, it would be difficult for the applicant to return to Poland due to her difficult financial situation, lack of effective state aid to single mothers in her country of origin and the lack of possibility to receive aid from her family. According to the court those circumstances justified granting the interim measure for the duration of the court's proceedings.

Interim measure granted by the European Court of Human Rights in return cases

In 2019 the Association for Legal Intervention requested twice the European Court of Human Rights to grant an interim measure based on the Article 39 of the Rules of the Court. In both cases the European Court of Human Rights was asked to stop the execution of the return order. The Court granted an interim measure in one of those cases.

A few minutes before the departure of the plane, the applicant was led out from the airplane and, in the end, was not returned to Russia.

The first case concerned the request to stop an immediately enforceable return order. There was a real threat that upon return to Russia, the applicant would be subject to humiliating treatment. He was suspected of collaborating with terroristic organizations. Reports from international organizations indicate that migrants returned to Russia, who are suspected of supporting terrorism, were arrested immediately upon return and were tortured or faced humiliating treatment in prison. The European Court of Human Rights granted a temporary interim measure prohibiting the deportation of the applicant to Russia (application no. 9323/19).

126. Decision of the Supreme Administrative Court of 30 January 2019, case no. II OZ 20/19

Despite the *interim measure* preparations were made to remove the applicant. He was transported from detention center, where he was held, to the airport. Next, he was taken to the airplane heading to Russia. The Association for Legal Intervention intervened with the Headquarters of the Border Guards and with the Ministry of Foreign Affairs. A few minutes before the departure of the plane, the applicant was led out from the airplane and, in the end, was not returned to Russia.[127]

The second case concerned the deportation of a family (single mother with children) from Chechnya. She feared that upon her return, she would be forcefully separated from her children by her ex-husband. She claimed that she would be deprived of any contact with her children. She and her children were survivors of domestic violence perpetrated by her ex-husband. The applicant held that in North Caucasian Republics there is no effective mechanism to protect against domestic violence. The European Court of Human Rights refused to grant an interim measure in this case. The family was deported to Russia. According to the information obtained from the applicant after her deportation, she was forcefully separated from her children.

Lack of an effective remedy in deportation procedure

If a migrant receives a deportation order with a writ of immediate execution, he or she can be forcibly deported from Poland before the appeal or the complaint to the court is heard. It can put him or her at risk of torture, other inhumane or degrading treatment, or in extreme cases can lead to his or her death.

According to the well-established European human rights standard, an effective remedy in deportation cases means that the deportation of a migrant, whose basic human rights (right to life, freedom from torture) could be violated in his or her country, should be automatically stayed for the duration of the appeal proceedings.

The Association for Legal Intervention points out that Polish system is not in conformity with the standard set by the European Court of Human Rights as to migrants who received a deportation order with a writ of immediate execution.

The Association for Legal Intervention points out that Polish system is not in conformity with the standard set by the European Court of Human Rights as to migrants who received a deportation order with a writ of immediate execution. For this reason, in 2019, the Association for Legal Intervention assisted a migrant in filing an application to the European Court of Human Rights indicating this issue (application no. 9323/19). The case was not yet communicated to the Polish government.

Even though the appeal instance can stay the execution of the deportation order with a writ of immediate execution, this guarantee is insufficient. Firstly, the European human rights standard requires an automatic suspensive effect of an appeal. Secondly, between lodging the appeal and the issuance of the decision to stay the execution of the deportation order a migrant is not protected against the deportation. In one case led by the Association for Legal Intervention, the appeal instance stayed the execution of the deportation order. It took almost 9 months from lodging the appeal to staying the execution of the deportation order.[128] It does not guarantee sufficient protection of migrants, whose rights could be violated by the deporta-

127. M.K. Nowak, Czeczen bez zarzutów ani możliwości obrony. Notatka ABW wystarczy, żeby wydać człowieka na tortury?, https://oko.press/notatka-abw-wystarczy-zeby-wydac-na-tortury/
128. Decision of the Head of the Office for Foreigners, no. DL.WIPO.412.116.2019/JPP

tion. It should also be highlighted that administrative authorities rarely stay the execution of deportation orders. In 2019 the Head of the Office for Foreigners stayed only one execution of the deportation order.[129]

Monitoring of deportations

Return decisions must be enforced in such a way that returnees are treated humanely and with full respect for their fundamental rights and dignity. Union law introduces an obligation for Member States to ensure an effective system of forced return monitoring.[130] An effective forced-return monitoring mechanism may allow for immediate identification and improvement of any problems that may arise.

In Poland, the mechanism for monitoring forced returns cannot be considered as an effective one.

While the Directive does not impose an automatic obligation on Member States to cover all costs incurred by the monitoring entity, Member States are obliged to organize the forced-return monitoring system in such a way as to make it effective in practice. The evaluation of the effectiveness of the mechanism provided should take into account the frequency of the monitoring carried out in relation to all effected returns.[131]

In Poland, the mechanism for monitoring forced returns cannot be considered as an effective one. Representatives of non-governmental or international organizations dealing with assistance to migrants are entitled to monitor forced returns; however, the scope of financing such activities has been significantly limited.[132] Taking into account the lack of sufficient resources to implement forced return monitoring, as well as the financial difficulties faced by the NGOs providing legal assistance to migrants, the frequency of the forced return monitoring cannot be considered as sufficient. In 2019, return decisions were enforced against 826 migrants. 429 persons were deported by air and 397 by land. During this period, only one migrant was monitored along the entire route, while the monitoring only in the premises of the airport was conducted in relation to the deportation of 3 migrants. No monitoring of the return process carried out overland has been conducted. Even after taking into account the incomplete monitoring system, which took place only in the premises of the airport, less than 0.5% of return operations were monitored.[133] Considering these data, the mechanism provided for monitoring forced returns cannot be considered an adequate one.

129. Response of the Head of the Office for Foreigners of 20 January 2020, no. BSZ.074.1.2020/ED, to the request of the Association for Legal Intervention for public information
130. Article 8 (6) of 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
131. Return handbook, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/ proposal-implementation -package/docs/return_handbook_en.pdf
132. Article 333 of the Act on Foreigners
133. Response of the Headquarters of the Border Guard of 18 February 2020, no. KG-OI-III.0180.1.2020 B.Z, inf. cit.

III. Immigration detention

Małgorzata Jaźwińska

1. IMMIGRATION DETENTION OF SURVIVORS OF VIOLENCE

The Act on Foreigners and the Act on granting international protection to aliens on the territory of the Republic of Poland prohibits the detention of migrants whose physical and/or psychological condition justifies the presumption that he or she was subjected to violence.

In 2019, the internal document of the Border Guard, "Rules of conduct of the Border Guard with migrants in need of special treatment", was updated. The document is still contrary to the Polish legislation. According to the internal rules of the Border Guard only a migrant who can show evident symptoms that he or she was subject to serious forms of violence resulting in his or her psychophysical state being significantly below norms cannot be detained. The internal document introduces additional conditions in relation to the law in force. The document restricts the prohibition of detention only to serious forms of violence, to people showing evident symptoms of the violence and whose psychophysical state is significantly below norms. Furthermore, the updated rules of conduct did not solve the constant problem of the lack of proper mechanism of the identification of survivors of violence. The mechanism restricts the necessity to examine detained migrants only to those of them who:

1. had to seek medical assistance during the arrest,
2. could be in a state threatening their life or health,
3. declared that they need constant or periodic medical assistance which termination could threaten their life or health,
4. are suspected of being a carrier of an infectious disease.

In consequence, migrants who declared during their arrest that they were survivors of violence are not automatically nor immediately examined by the doctor for medical injury report nor by the psychologist in order to determine whether they suffered from any symptoms typical for the survivors of violence. It precludes rapid and fair identification of survivors of violence and consequently could lead to their false imprisonment. In 2019 in district courts competent in the prolongation of the migration detention, in Biała Podlas-

ka[134], Grójec[135], Kętrzyn[136], and Krosno Odrzańskie[137], courts did not appoint any expert in the field of psychology or psychiatry. In the district court in Przemyśl[138] and in Białystok[139] only in one case in each of those courts was an expert appointed. In all those courts, in 2019, 714 detention cases were heard. In 2019, in regional courts (courts of second instance) competent in the prolongation of the immigration detention, in Białystok[140], Lublin[141], Zielona Góra[142] and Radom[143] no expert was appointed, whereas in Olsztyn[144] and Przemyśl[145] experts were appointed in two cases total (one case in each court). In 2019 all those courts heard in total 158 appeals against immigration detention. In all district and regional courts competent in the prolongation of immigration detention, an expert witness was heard in less than 0,5% of cases.

In 2019, only in one case handled by the Association for Legal Intervention did the court appoint an expert in order to determine whether a psychophysical state of a migrant justified the presumption that he had been subject to violence (Regional Court in Przemyśl, case no. II Kz 91/19). It was the only expert heard in the immigration detention cases in this court. In consequence, the migrant was released from the detention. The regional court indicated that the medical information obtained from the Head of the Medical Unit in the Border Guard Division, who is a Border Guard officer, can be questioned, as it can hardly be objective or impartial. The Court also highlighted that the Border Guard should immediately ex officio examine the claim made by the migrant that he was a survivor of violence. The Border Guard failed to do so.

The updated rules of conduct did not solve the constant problem of the lack of proper mechanism of the identification of survivors of violence.

The Association for Legal Intervention observes that courts rarely appoint experts in order to help them establish whether the psychophysical state of a migrant justifies the presumption that he or she was subjected to violence. Courts rely mostly on the information obtained from the Border Guard. It results in false immigration detention of survivors of violence and could lead to their re-traumatisation.

The Association for Legal Intervention represents survivors of violence who were falsely detained in national proceedings for compensation, as well as in proceedings before the European Court of Human Rights.

134. Response of the Chief Judge of the District Court in Biała Podlaska of 15 January 2020, no. Adm. 061-1/2020, to the request of the Association for Legal Intervention for public information
135. Response of the Chief Judge of the District Court in Grójec of 15 January 2020, no. Adm. 063-2/20, to the request of the Association for Legal Intervention for public information
136. Response of the Chief Judge of the District Court in Kętrzyn of 16 January 2020, no. A-05-2/20, to the request of the Association for Legal Intervention for public information
137. Response of the Chief Judge of the District Court in Krosno Odrzańskie of 16 January 2020, no. OAP 061-7/20, to the request of the Association for Legal Intervention for public information
138. Response of the Chief Judge of the District Court in Przemyśl of 14 January 2020, no. A-0153-2/20, to the request of the Association for Legal Intervention for public information
139. Response of the Chief Judge of the District Court in Białystok of 19 February 2020, no. A-057-2/20, to the request of the Association for Legal Intervention for public information
140. Response of the Chief Judge of the Regional Court in Białystok of 14 January 2020, no. A-61-1/20, to the request of the Association for Legal Intervention for public information.
141. Response of the Chief Judge of the Regional Court in Lublin of 13 January 2020, no. A-95-7/20, to the request of the Association for Legal Intervention for public information
142. Response of the Chief Judge of the Regional Court in Zielona Góra of 18 February 2020, no. OA-0131-40/20, to the request of the Association for Legal Intervention for public information
143. Response of the Chief Judge of the Regional Court in Radom of 14 February 2020, no. Adm. 056-16/20, to the request of the Association for Legal Intervention for public information
144. Response of the Chief Judge of the Regional Court in Olsztyn of 14 January 2020, no. A-63-1/20, to the request of the Association for Legal Intervention for public information
145. Response of the Chief Judge of the Regional Court in Przemyśl of 15 January 2020, no. A-0173-1/20, to the request of the Association for Legal Intervention for public information

In 2019, the Association for Legal Intervention assisted a survivor of sexual violence falsely detained in immigration detention centre for three months. As a result, the Regional Court in Olsztyn awarded her 20,000 PLN as a compensation (ruling of 29 July 2019, case no. II Ko 280/18). The Court highlighted that no migrant who was a survivor of violence can be held in immigration detention. While determining the amount of compensation, the Court took into account the fact that the detention resulted in re-traumatization causing the deterioration of the health of the asylum seeker. The court made that finding despite the fact that the detention center provided medical and psychological assistance. Another important factors indicated by the Court were cultural difficulties and a language barrier. The asylum seeker did not know Polish and in the detention center there were no people speaking her language fluently. It made her detention additionally difficult.

In all district and regional courts competent in the prolongation of immigration detention, an expert witness was heard in less than 0,5% of cases.

In the second case, the Regional Court in Warsaw dismissed the action for compensation for wrongful detention in its entirety (ruling of 24 September 2019, case no. XVIII Ko 5/18). The court questioned whether a migrant was actually a survivor of violence, despite his post-traumatic stress disorder (PTSD) diagnosis confirmed by the psychologist and a psychiatrist. The ruling is not yet final and was appealed in its entirety.

In 2019, the Association for Legal Intervention lodged two complaints to the European Court of Human Rights concerning the violation of the right to liberty of migrant survivors of violence. One of them has already been communicated to the Polish government (case no. 47888/19). It concerns the immigration detention of a rape survivor. Neither the credibility of the applicant nor the fact of the rape were questioned by domestic courts. The second case (case no. 20567/19) has not yet been communicated to the Polish government. It concerns the detention of a migrant who documented the fact that he was subject to physical violence. This circumstance was deemed credible in his asylum procedure. The migrant was diagnosed with post-traumatic stress disorder (PTSD).

Małgorzata Jaźwińska

2. IMMIGRATION DETENTION OF CHILDREN

The Association for Legal Intervention has been advocating for years to ban immigration detention of children.[146] According to the research, children in immigration detention centers often exhibit symptoms of anxiety, behavioral problems, nocturnal enuresis, sleeping disturbances and impaired cognitive development. Some of them display symptoms of post-traumatic stress disorder (PTSD), including mutism or eating disturbances. Immigration detention of children can also result in the anxiety disorder and depression.[147] Immigration detention of children might have negative consequence for their later lives.[148]

Children in immigration detention centers often exhibit symptoms of anxiety, behavioral problems, nocturnal enuresis, sleeping disturbances and impaired cognitive development.

In 2019, 131 children were held in immigration detention in Poland. This is less than half compared to 2018. In each detention centre where children were placed, their average detention period was shorter than in 2018. Yet, in 2019, children were held in immigration detention for 83 days on average. The Association for Legal Intervention stresses that such a period is still too long. Additionally, the divergence in the average period of immigration detention of children in each detention center is also a cause of concern. In immigration detention center in Przemyśl the average detention of children is 62 days, whereas in Biała Podlaska the detention period is over twice that long (125 days). Furthermore, the average period of immigration detention of all migrants in the immigration detention center in Biała Podlaska is shorter that the average immigration detention of children there.[149] It can indicate that the best interest of children is not properly considered by courts competent for Biała Podlaska.

The Association for Legal Intervention observes that courts are still not properly taking into account the best interest of children. In Poland, children are placed in immigration detention in 3 detention facilities (Kętrzyn, Biała Podlaska, Przemyśl). Courts deciding on the prolongation of their detention rarely analyze the effect of immigration detention on the psychophysical health and development of children. In 2019, the district courts competent for the prolongation of the immigration detention asked for an expert opinion only once, whereas the competent regional courts appointed an expert witness in two cases (the Association does not have information as to whether the expert witnesses were appointed in cases concerning the immigration detention of children).[150] In order to determine the influence of immigration detention on the development of a child, an expert psychologist or psychiatrist should be appointed by the court. Insufficient use of experts by courts points to the fact that this circumstance is not properly examined. It results in prolonged immigration detention of children, which can lead to serious psychological disorders.

146. Association for Legal Intervention and Helsinki Foundation for Human Rights, Migracja to nie zbrodnia. Raport z monitoringu strzeżonych ośrodków dla cudzoziemców, 2012; Wciąż za kratami. Raport z monitoringu strzeżonych ośrodków dla cudzoziemców przeprowadzonego przez Helsińską Fundację Praw Człowieka i Stowarzyszenie Interwencji Prawnej, 2014

147. IDC, Captured childhood. Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and irregular migrant children affected by immigration detention, p. 48-57, available at: https://bit.ly/37XQUMy

148. Australian Human Rights Commission, The Forgotten Children. National inquiry into children in immigration detention, p. 197-206, available at: https://bit.ly/34xvYK6

149. Response of the Headquarters of the Border Guard of 18 February 2020, inf.cit.

150. Response of the Chief Judge of the District Court in Przemyśl of 14 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Kętrzyn of 16 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Biała Podlaska of 10 January 2020, inf. cit.; Response of the Chief Judge of the Regional Court in Przemyśl of 15 January 2020, inf. cit.; Response of the Chief Judge of the Regional Court in Olsztyn of 14 January 2020, inf. cit.; Response of the Chief Judge of the Regional Court in Lublin of 13 January 2020 r., inf. cit.

The Association for Legal Intervention helped file an application to the European Court of Human Rights concerning the violation of the prohibition of arbitrary detention of a migrant family with children. During the detention the psychological state of one of the children significantly deteriorated. His prolonged detention threatened his health/life. In 2019 the case was communicated to the Polish government (case no. 11247/18).

In 2019, a single mother with the help of the Association for Legal Intervention lodged a compensation claim for wrongful immigration detention. The family was detained for a year and three months. We indicated that such a prolonged immigration detention violates rights of the child and human rights. Courts prolonging the detention often did not analyze the impact of the detention on the child or simply stated that a certain level of discomfort related with immigration detention is intrinsically linked with their illegal stay. The case is pending.

The Association for Legal Intervention observes that courts do not appoint state lawyers for unaccompanied minors while deciding on their immigration detention.

Also in 2019, in one case led by the Association for Legal Intervention concerning the compensation for wrongful immigration detention of children, the court dismissed the case in its entirety. The case concerned, among others, a child, whose psychophysical state deteriorated so significantly during the detention that his prolonged detention constituted a threat to his life/health. Courts prolonging the detention did not analyze this aspect, despite the information on the son's health problems provided by his parents. In the judgement dismissing the action for compensation, the Regional Court in Warsaw (judgement of 24 September 2019, case no. XVIII Ko 5/18) did not determine whether the immigration detention of children was in conformity with the obligation to secure the best interest of children or whether the courts prolonging the detention took into account the best interest of children. The regional court acknowledged that the detention could have a negative impact on the well-being of children, yet the court took the view that it does not influence the assessment as to the legality of the immigration detention. The ruling is not yet final and was appealed in its entirety.

Another important issue is the immigration detention of unaccompanied minors. In 2019 there were 24 unaccompanied minors in the detention center in Kętrzyn – 16 from Afghanistan and 8 from Vietnam. It is 4 more detained unaccompanied minors than in 2018.[151]

The issue of securing the interests of unaccompanied minors in immigration detention is still not researched enough.

According to the information obtained from the district and regional courts competent in the prolongation of immigration detention in Kętrzyn, where unaccompanied minors are detained, in 2019 no appeal prepared by the court-appointed child's guardian was lodged.[152] One district court informed that they had placed an unaccompanied minor in immigration detention, and only later did they appoint a child's guardian.[153]

151. Response of the Headquarters of the Border Guard of 18 February 2020, no. KG-OI-III.0180.1.2020 B.Z, inf. cit.
152. Response of the Chief Judge of the Regional Court in Olsztyn of 14 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Kętrzyn of 16 January 2020, inf. cit.
Response of the Chief Judge of the District Court in Krosno Odrzańskie of 16 January 2020, inf. cit.

It would mean that during the detention proceedings in the court, the unaccompanied minor was not properly represented and his rights were not protected. The lack of activity on the part of the court appointed guardians, who are not filing the appeals against the detention decisions, questions the effectiveness of the mechanism of the protection of unaccompanied minors in Poland. In 2019, the Association for Legal Intervention expressed to the Headquarters of the Border Guard their willingness to be appointed children's guardians in the immigration detention proceedings in Warsaw. In 2019, the Association for Legal Intervention did not receive any request to be appointed as such a guardian.

The Association for Legal Intervention observes that courts do not appoint state lawyers for unaccompanied minors while deciding on their immigration detention. Unaccompanied minors often are not served with courts' decisions. It restricts their possibility to seek an effective legal help.

Currently, immigration detention of children does not seem to efficiently protect rights, including procedural rights, of migrant children.

Małgorzata Jaźwińska

3. IMMIGRATION DETENTION IN ASYLUM PROCEDURE

The Association for Legal Intervention observes that one of the most common reasons for immigration detention of asylum seekers is the necessity to determine those elements on which the asylum application is based which could not be obtained in the absence of detention.

Neither the Border Guard initiating the detention proceedings, nor the court deciding on the immigration detention assess asylum cases. Without the relevant information from the authorities issuing the asylum decisions (Head of the Office for Foreigners or the Refugee Board) they cannot know when and what evidentiary proceedings are planned nor what information is to be obtained from an asylum seeker. In 2019, the Head of the Office for Foreigners did not inform the Border Guard about the need to detain an asylum seeker in order to determine those elements on which the asylum application is based which could not be obtained in the absence of detention.[154] Therefore, it is not clear on what basis did the Border Guard and courts assess that, in the individual case, the immigration detention was necessary in order to obtain necessary information from an asylum seeker in his or her asylum proceeding.

The Association for Legal Intervention is not aware of any situation where a court would request the Head of the Office for Foreigners or the Refugee Board to provide such information. On the contrary, despite motions prepared by the Association for Legal Intervention to ask the authority competent in the asylum procedure to indicate whether there are any evidentiary proceedings planned with the presence of the asylum seeker required, all those motions were dismissed.

In 2019, the Association for Legal Intervention helped prepare an application to the European Court of Human Rights concerning among others the arbitrary detention of an asylum seeker. An asylum seeker was placed in immigration detention in order to determine those elements on which the asylum application is based which could not be obtained in the absence of detention. However, apart from an asylum interview no other evidentiary proceedings was conducted with her required presence. The case was communicated to the Polish government (case no. 47888/19). The second case lodged in 2018, concerning the same issue, was communicated to the Polish government in 2019 (case no. 11247/18).

In 2019 the Head of the Office for Foreigners released significantly more asylum seekers from immigration detention.

Also in 2019, the Association for Legal Intervention assisted an asylum seeker in the compensation proceedings. An asylum seeker was detained in order to determine those elements on which the asylum application is based which could not be obtained in the absence of detention. No evidence was heard with the presence of the asylum seeker within the whole duration of his immigration detention. The action was dismissed in its entirety by the Regional Court in Warsaw (judgement of 20 December 2019, case no. XII Ko 59/18 AWW). The ruling is not yet final and was appealed in its entirety.

154. Response from the Office for Foreigners of 20 January 2020, inf. cit.

In 2019, the Association for Legal Intervention helped lodge another action for compensation for wrongful immigration detention of an asylum seeker detained in order to determine those elements on which the asylum application is based which could not be obtained in the absence of detention. No information nor evidence was obtained from her during her detention. The case is pending.

In 2019 the Head of the Office for Foreigners released significantly more asylum seekers from immigration detention. The Head of the Office for Foreigners can release an asylum seeker from detention if there is a high probability that he or she will obtain refugee status or subsidiary protection. In 2019 the Head of the Office for Foreigners released 112 asylum seekers[155], whereas in 2018 only 66 people were released.[156]

155. Response from the Office for Foreigners of 20 January 2020, inf. cit.
156. Response from the Office for Foreigners of 25 March 2019, no. BSZ.0656.4.2019/RW, to the request of the Association for Legal Intervention for public information

Małgorzata Jaźwińska

4. IMMIGRATION DETENTION IN THE DEPORTATION PROCEEDINGS

In 2019, in all immigration detention centres, 1539 migrants were deprived of liberty (in asylum or return procedures).[157] It is 83 more persons than in 2018. In each immigration detention center, except for Lesznowola, the average detention period was shorter than in 2018. Migrants can be deprived of their liberty while waiting for the issuance or the execution of the return decision or asylum decision.

The Association for Legal Intervention holds the position that immigration detention in return procedure has to always be used as a measure of last resort. If the immigration detention is prolonged over 6 months, it has to be proven that a migrant is not cooperating with the execution of the return order or that the deportation is temporarily halted due to delays in obtaining necessary documentation from third countries (Article 403 (3a) of the Act on Foreigners). The mere hypothetical assumption that the migrant might not cooperate cannot itself lead to the prolongation of the immigration detention.

In 2019, the Association for Legal Intervention helped a migrant in his compensation claim for wrongful detention. The migrant was placed in immigration detention due to the hypothetical possibility that he might not cooperate with deportation. Courts indicated that a previous illegal stay and the desire to live in Poland proved the lack of cooperation. It was suggested that the migrant planned to contract a false marriage. Courts did not take into account the fact that the migrant, of his own will, presented a new, valid travel passport and that the return proceedings were pending and he could not be deported throughout the whole period of his detention.

The migrant, with the help of the Association for Legal Intervention, lodged a compensation claim for wrongful immigration detention arguing that the mere hypothetical possibility of the lack of cooperation in the future cannot be the sole reason for the detention. The court was requested to ask for a preliminary ruling in order to determine whether the mere assumption that a migrant might not cooperate in the future means “lack of cooperation” or “avoiding or hampering the preparation of return or the removal process” within the meaning of the Return Directive, which justifies the immigration detention (Article 15 (6)(a) and 15 (1)(b) of the Return Directive in connection with Article 6 of the Charter for Fundamental Rights).

The State Treasury is strictly reliable for the deprivation of liberty.

The Regional Court in Białystok ruled in favor of a migrant awarding him 15,000 PLN for 6 months of wrongful immigration detention (judgement of 23 October 2019, case no. III Ko 224/19). In the orally delivered ratio decidendi the Court held that the State Treasury is strictly reliable for the deprivation of liberty. Therefore, as in the end the migrant obtained a residence permit in Poland and was not issued with the return order, he should be compensated for his detention. The court did not make a preliminary reference. The ruling is final.

157. Response of the Headquarters of the Border Guard of 18 February 2020, no. KG-OI-III.0180.1.2020 B.Z, inf. cit.

In 2019, the Association for Legal Intervention assisted another migrant with her compensation claim for wrongful immigration detention. The detention period was prolonged due to delays in obtaining documentation from third country necessary for the deportation. It was indicated in the compensation claim that according to the readmission agreement, the third country was not delayed in providing documentation. Furthermore, the migrant remained in detention even after obtaining all documents from the third country. As the deportation decision was not final, the migrant could not be deported and was released from detention. The case is pending.

Małgorzata Jaźwińska

5. PROCEDURAL GUARANTEES

The Association for Legal Intervention observes that procedural guarantees in immigration detention cases are not sufficient. Major problems include the lack of presence of migrants in detention hearings, the issue of court appointed attorneys and the appointment of experts by courts in cases concerning children and survivors of violence.

According to the information obtained from courts competent to hear cases concerning prolongation of immigration detention (in first and second instance), in 2019 only in two cases a migrant was brought and allowed to participate in the court hearing. In this period, the said courts issued 872 rulings on immigration detention.[158] Migrants, deprived of liberty, cannot go on their own to the court in order to defend their rights. They need to be brought to the court by the court's order. The Association for Legal Intervention observes that despite lodging requests to be brought to the court hearing, the hearings are most commonly held in absentia of the migrant. Migrants are often not informed about the date of the hearing. They are also not informed and are not served with the motion of the Border Guard to place them or prolong the immigration detention.

The Association for Legal Intervention observes that despite lodging requests to be brought to the court hearing, the hearings are most commonly held in absentia of the migrant. Migrants are often not informed about the date of the hearing.

In practice, it means that migrants who do not have sufficient financial means to appoint a lawyer of their choice cannot access the motion of the Border Guard nor present their defense before the decision to prolong their immigration detention is reached. It deprives them of any possibility for a successful defense in the court's first instance proceedings. This issue was indicated in the case that the Association for Legal Intervention helped bring before the European Court of Human Rights. The case was communicated to the Polish government (case no. 47888/19).

Furthermore, the lack of information in advance concerning the date of the hearing, as well as no assistance from a translator nor a lawyer, deprives or restricts migrants from the possibility to request an appointment of state lawyer for the immigration detention proceedings in the first instance. In consequence, in 2019, in detention courts competent for Kętrzyn, Lesznowola, Biała Podlaska, Przemyśl, Krosno Odrzańskie and Białystok, only in less than one percent of cases were migrants represented by a state appointed attorney in the detention proceedings in the first instance, whereas in the proceedings in the second instance in around 2% of cases.[159]

158. Response of the Chief Judge of the District Court in Przemyśl of 14 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Kętrzyn of 16 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Biała Podlaska of 10 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Grójec of 15 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Krosno Odrzańskie of 16 January 2020, inf. cit.; Response of the Chief Judge of the Regional Court in Przemyśl of 15 January 2020, inf. cit.; Response of the Chief Judge of the Regional Court in Olsztyn of 14 January 2020, inf. cit.; Response of the Chief Judge of the Regional Court in Lublin of 13 January 2020 r., inf. cit.; Response of the Chief Judge of the Regional Court in Białystok of 14 January 2020, inf. cit.
159. Ibidem

In two cases prepared by the lawyer from the Association for Legal Intervention and communicated in 2019 to the Polish government by the European Court of Human Rights the violation of the procedural guarantees in immigration detention proceedings was raised. Migrants were not informed in advance about the date of the detention hearing, they were not served with the motion to prolong detention nor were they brought before the judge for a hearing (case no. 11247/18 and 47888/19).

In 99,4% of cases courts grant Border Guard's motions to detain or prolong immigration detention.

Another issue concerning proper procedural guarantees for detained migrants is the insufficient appointment of court experts in cases of children and survivors of violence. The issue was elaborated on in the sections on the immigration detention of survivors of violence and the immigration detention of children.

Not appointing court experts and the lack of sufficient guarantees for migrants in detention can all be a cause of disturbingly high percentage of Border Guard's detention motions granted. According to the information obtained from district courts competent for detention facilities in 99,4% of cases courts grant Border Guard's motions to detain or prolong immigration detention. It means that out of 714 cases only in two of them the court refused to prolong immigration detention. Competent courts of second instance revoked or changed the appealed rulings only in around 7%, that is, in 11 cases out of 158.[160]

Remote interview by way of judicial assistance

In 2019 the Association for Legal Intervention assisted in the compensation proceeding for wrongful immigration detention. The migrant no longer stayed in Poland. Due to her absence it was necessary to conduct her interview in another EU country, where she lived at the time. The Regional Court in Olsztyn decided to take the testimony by way of judicial assistance based on the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. From requesting to conduct the remote interview until the issuance of the decision to compensate for wrongful immigration detention, around half a year passed.

160. Response of the Chief Judge of the District Court in Przemyśl of 14 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Kętrzyn of 16 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Biała Podlaska of 10 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Grójec of 15 January 2020, inf. cit.; Response of the Chief Judge of the District Court in Krosno Odrzańskie of 16 January 2020, inf. cit.; Response of the Chief Judge of the Regional Court in Przemyśl of 15 January 2020, inf. cit.; Response of the Chief Judge of the Regional Court in Olsztyn of 14 January 2020, inf. cit.; Response of the Chief Judge of the Regional Court in Lublin of 13 January 2020 r., inf. cit.; Response of the Chief Judge of the Regional Court in Białystok of 14 January 2020, inf. cit.

IV. Access to social assistance and health care

Aleksandra Chrzanowska

1. ACCESS TO THE TREATMENT OF VIRAL HEPATITIS

Asylum seekers in Poland are provided with health care to the same extent that insured Polish citizens are (excluding health spa treatment and health spa rehabilitation). The Head of the Office for Foreigners is responsible for organizing health care services. Since the middle of 2015, this task has been contracted to Petra Medica sp. z o.o (PM).

Over the last few years, the Association for Legal Intervention noticed a dozen or so of migrants' complaints related to the access to the treatment of communicable diseases, such as HIV or viral hepatitis. Since the beginning of 2018, we have monitored the case of one of the clients, who suffered from hepatitis C. The case finally ended well at the end of the third quarter of 2019. It undoubtedly would not have been possible, if not for our intervention.

Over the last few years, the Association for Legal Intervention noticed a dozen or so of migrants' complaints related to the access to the treatment of communicable diseases, such as HIV or viral hepatitis.

The asylum seeker was diagnosed in 2016 with hepatitis C and had a recommendation to start a treatment in the Provincial Infectious Hospital in Warsaw at Wolska 37. He requested the assistance of the Association for Legal Intervention in March 2018 after - once again- he had received the referral to the doctor, who 2 years earlier- after carrying out diagnostic tests -had stated that the treatment is necessary but impossible in this specific institution. The patient was given a clear written recommendation: „The treatment of viral hepatitis C in Poland is possible only under the National Health Fund therapeutic program carried out in a specific institutions i.e. in the Provincial Infectious Hospital in Warsaw, Wolska st. 37. The patient should be referred to such institution!".[161] In response to a request for a referral to the Provincial Infectious Hospital, the primary care doctor gave the patient a referral to another institution, where the treatment could not take place. In March 2018 we intervened at the Head of the Office for Foreigners. We pointed out that actions of PM doctors have hallmarks of mocking help and abandonment of the actual treatment. It puts patient's health in danger and it is an ineffective use of public money because of multiple medical visits that cannot have the desired effect. After the intervention of the Association for Legal Intervention, the patient was referred to the Provincial Infectious Hospital and there, after carrying out full diagnostic tests, the commencement of his treatment with EPCLUSA medicine[162] was planned for

161. According to the patient medical documentation

162. The EPCLUSA therapy is a medical therapy financed from public funds on the basis of the Act on Publicly Funded Healthcare Benefits. According to the information obtained from the specialists from Voivodship Hospital for Communicable Diseases it is an up to date therapy lasting three months and guaranteeing full recovery for the majority of patients. The therapy is costly, yet available to insured persons, therefore is also available for persons under the protection of the Head of the Office for Foreigners. The therapy is fully refunded

January 2019. The day before the planned commencement of the therapy, the patient was informed, that PM had refused to cover the costs of the treatment. For the next six months, we were regularly monitoring the situation. The correspondence showed that the Head of the Office for Foreigners was not able to successfully enforce the fulfilment of the contract with PM. After signing a new contract between the Head of the Office for Foreigners and Petra Medica sp. z o.o. in June 2019, we were informed that the new contract contains provisions which will allow the Office to successfully enforce the fulfilment of the duties related to providing health care for asylum seekers by the health care operator.

It seemed that the problem of the access to viral hepatitis treatment was solved. At the beginning of July 2019, the client of the Association for Legal Intervention had a control medical visit and the commencement of the treatment was planned for the next day. However, before he had left the hospital, doctors received a request from the representatives of PM to withhold the therapy. According to the account of the hospital's administrative worker, the Head of the Office for Foreigners and PM agreed that before the start of the long-term and costly treatment, the Office should confirm that the right to health care of the patient will not terminate during the treatment. In the next letter, we pointed out that this is an unlawful practice. It is a refusal to provide a health care service, that the asylum seeker has a right to. According to the regulations, the access to the medical benefits does not depend on any additional conditions for the patient to fulfil. If he or she has a right to medical benefits at the moment of recommending the treatment by a specialist, there is no reason to postpone the commencement of the treatment. Moreover, the asylum procedure - both at the first and the second instance- is rarely finished in the time frame provided by the law.

According to the regulations, the access to the medical benefits does not depend on any additional conditions for the patient to fulfil. If he or she has a right to medical benefits at the moment of recommending the treatment by a specialist, there is no reason to postpone the commencement of the treatment.

At the same time, PM started - without a legal basis- an investigation to check whether the patient works and is insured by the employer. It is worth mentioning that regardless of whether the asylum seeker works, it is PM's duty to cover the costs of the treatment of asylum seekers.

After the next months of interventions, the Association for Legal Intervention managed to assist the asylum seeker in asserting his right to medical treatment. The treatment commenced at the beginning of September 2019. By the end of the year, we received an information that the client had been cured and felt good.

The Association does not possess the information as to the number of people, who are in a similar situation, and do not know their rights and places where they can find help. However, from our experience, we know that not many people have enough power to fight for their rights for so long - even with the support of non-governmental organizations. A lot of people do not believe that this fight can bring the results expected. They are afraid to stand against the institution that decides their chances to get international protection. Part of them does not have enough willpower to go through failure and humiliation while confronting doctors and other public officials.

Aleksandra Chrzanowska
Magdalena Sadowska
Patrycja Mickiewicz

2. PARENTAL BENEFITS

In 2019, the Association for Legal Intervention continued its legal support of single parents applying for parental benefits for their children.

The parental benefit commonly called „500+" was introduced into the Polish legal system in 2016. The purpose of the benefit is to partly cover the costs of raising a child, including caregiving and satisfaction of needs. The right to benefit was given not only to the Polish citizens, but also to some groups of migrants distinguished on the basis of the type of their stay in Poland (refugees and persons granted subsidiary protection, provided that they live with their family members in the territory of Poland).[163]

Initially, the benefit was granted for a second and subsequent child in the family, regardless of the amount of income achieved. The right to the benefit for the first child depended on the income criterion - the income per family member could not have exceeded 800 PLN.[164] After a year, additional requirements were imposed on single parents applying for the benefit. Single parents were entitled to the benefit 500+ only when their child had been granted alimony payments from the second parent based on the enforceable title derived or approved by a court. This requirement did not apply when the second parent was no longer alive, when the father was unknown, when the second parent's claim for alimony was dismissed, when the court obliged one of the parents to fully cover the costs of the child's maintenance and did not oblige the second one to pay the alimony payments, or when the child - according to the court decision- was in the alternating custody of both parents for comparable and repetitive periods.[165]

The requirement to have a court alimony payment order prevented many clients of the Association for Legal Intervention from obtaining the right to childcare support.

The requirement to have a court alimony payment order prevented many clients of the Association for Legal Intervention from obtaining the right to childcare support. Adjudicating bodies interpreted this rule literally and consequently denied the right to the benefit to single mothers, regardless of individual circumstances related to the inability to obtain an alimony payment order.

Since 1 July 2019, the right to the parental benefit also for the first child regardless of income criterion was introduced. The requirement to have an alimony payment order was waived.[166]Yet, the Association for Legal Intervention continued efforts to obtain the parental benefits in cases initiated before the date of the amendment entering into force.

163. Article 1 (2) (2) of the State Aid for Child Support Act.
164. The State Aid for Child Support Act.
165. Article 15 (4) of the Act of 7 July 2017 on amendment to certain acts concerning the system of the family support (Dz. U. of 2017, item 1428)
166. Act of 26 April 2019 on amendment the State Aid for Child Support Act , which entered into force on 1 July 2019 (Dz. U. of 2019, item 924)

Legal support was provided for single parents, who - for reasons beyond their control, because of their residence status - could not apply for protection in their country of origin. A lot of women assisted by the Association for Legal Intervention, left their countries of origin with children, looking for protection from domestic violence. From a formal point of view, they could have brought an action for alimony payments in Poland, however, it could lead to revealing their place of residence and cause real danger for their health and life. This circumstance- in the opinion of the Association for Legal Intervention - should be taken into account while deciding cases for parental benefits.

In appeals prepared by the Association for Legal Intervention, we pointed out the defectiveness of the interpretation of the regulations of State Aid for Child Support Act as well as a violation of the constitutional principle of equality before the law. The Association faulted administrative authorities for false assumption that the Act requires submitting an alimony payment order in every case of applying for the parental benefit, whereas this requirement should apply only when there is a necessity to check family income. Furthermore, administrative authorities should take into consideration the individual situation of a person applying for the benefit. In this context, it was pointed out that the request from beneficiaries of international protection for documents, which they are not able to submit, constitutes an indirect discrimination. According to the Association for Legal Intervention, a regulation establishing a requirement to submit enforceable title derived or approved by a court applying to every person raising a child alone who applies for parental benefit - even though seemingly neutral - resulted in a situation, where specific groups, i.e. beneficiaries of international protection, could not fulfil this requirement. To justify this statement, the Association for Legal Intervention cited the judgement of the Supreme Administrative Court, where it was stated that the requirement of actions that the party is not able to fulfil because of its specific situation „expresses excessive legal formalism leading to implications contradictory to basic principles of Polish legal system".[167]

The Voivodship Administrative Court in Warsaw agreed with arguments presented by the Association for Legal Intervention and stated in the judgement of 19 June 2019[168] that „due to the specific situation, which binding regulations of the cited State Aid for Child Support Act did not predict, adopting only a literal interpretation of the Article 8 clause 2 of this act - as the adducting administrative authorities did - is not enough in Court's opinion. The literal interpretation is not always sufficient enough to decode correctly legal norm contained in the legal regulation. (...) As far as the literal wording of the Article 8 clause 2 of the cited Act may de facto lead to the simple conclusion, that the appellant who is a migrant is not entitled to the benefit, this understanding of the regulation in specific conditions, that occurred in the case, is not justified by the Constitution or by the purpose that the legislator wanted to achieve by implementing to the legal system an institution of parental benefit which is a partial coverage by the State of the costs of raising a child, including caregiving and satisfaction of needs (article 4 close 1 of the cited act)". In the described judgement the Voivodship Administrative Court in Warsaw cited the judgement of the Supreme Administrative Court of 20 October 2010[169], and shared the opinion regarding the principle of equality and the ban on discrimination stating that „(...) in the adjudicated the case,

167. Case no. I OSK 793/10
168. Case no. I SA/Wa 910/19, the case concerned the application for child support for 2017-2018
169. Case no. I OSK 793/10

the authorities, by failing to interpret correctly, violated the Article 32, Article 37 clause 1 and Article 71 clause 1 of the Constitution in connection with the Article 8 clause 2 of the State Aid for Child Support Act of 11 February 2016, and this violation had a significant impact on the outcome of the case". Moreover, the Court pointed out that during the review of the case, the administrative authority should consider the applicant's special situation.

The mentioned case ended in the autumn of 2019, when the district office paid parental benefits for the period 2017-2018. However, it is worth mentioning that the administrative authority of first instance - the Mayor of Warsaw- with the same factual and legal status denied granting the benefit to the migrant for the next benefit period (2018-2019). Once again, the lack of the alimony payment order was pointed as a basis for the denial. In the opinion of the Association for Legal Intervention, it is unacceptable in a democratic state to take two different decisions by the same body, on the same subjects and with the same factual and legal status. This action strikes not only the constitutional rule of law, but also the principle of increasing the trust in the administrative authority, that is mentioned in the Article 8 §1 of the Code of Administrative Procedure. The appeal proceeding is pending.

Arguments regarding the indirect discriminatory nature of the State Aid for Child Support Act in the wording from before the amendment of 2019 were not shared by the Voivodship Administrative Court in the judgment of 15 May 2019.[170] In this judgement, the Court held that since the complainant's children currently reside in Poland, the alimony payments case should be considered according to the Polish law and it should be subject to the jurisdiction of the Polish courts. It means that there is no ground to exempt the complainant from the obligation to obtain the enforceable title, since Polish citizens are not exempted from that obligation, including those who suffer from domestic violence. However, the Voivodship Administrative Court in Warsaw found a faulty interpretation of the regulations of the State Aid for Child Support Act and allowed the complaint. According to the Court „the Article 8 clause 2 of the State Aid for Child Support Act applies when the application to grant the benefit concerns the first child. It means that this regulation does not apply when the application concerns second and subsequent child as it is in the present case. Parental benefit is granted for every second and subsequent child regardless of the amount of income achieved and other requirements. (...) Administrative authority's investigation of the circumstances that do not have an impact on the decision cannot be considered correct". This case also ended in the autumn of 2019 when the district office paid parental benefits to the client for the period 2018-2019 for four out of five children.

It must be pointed here, that both of the mentioned above clients applied in August 2019 for the parental benefit for the period 2019-2021. We predicted that due to the amendments of 26 April 2019 in the State Aid for Child Support Act, that entered in force since 1 July 2019 (granting the right to the parental benefit also for the first child regardless of the amount of income achieved and waiving the requirement to submit alimony payment order) both migrant families - and every single parent in an analogous situation - would obtain the benefit for the current benefit period without undue delay. However, in both cases, the proceedings were suspended due to the failure to process applications for

170. Case no. I SA/Wa 295/19

the previous benefit period: "Since you filed a complaint against the decision no. KOC / 7292 / Sw / 18 of 19 December 2018 of the Local Government Appeals Council, the case was referred to the Voivodship Administrative Court, which did not issue a ruling in the case. In this situation, pending the determination of your right to parental benefit for the period from 01 October 2018 to 30 September 2019, it is reasonable to suspend the proceedings on the application for the benefits requested for the period from 01 July 2019 until 31 May 2021, what was decided as at the beginning"[171] and: „In connection to the ongoing proceedings for granting the right to parental benefit for (...) the benefit period 2018/2019, the administrative authority will not consider the application until the termination of the proceedings for the benefit period 2018/2019".[172] The Association believes that such a practice is unlawful, because - in connection with the change in regulations - the benefit for the period 2019-2021 should be granted regardless of the positive or negative decision on the previous benefit period. The findings made by the administrative authorities in the course of previous proceedings regarding evidence and alimony payments should not be considered a preliminary issue in the current case, as they remain irrelevant to the decision for the current benefit period.

In one case, we prepared a complaint against the decision to suspend the proceedings. In the second one, unfortunately, the client informed us about its receipt after the deadline for lodging a complaint.

It is also worth mentioning that in one of the cases, that the Association for Legal Intervention run, arguments presented in the appeal against the refusal decision were shared by the Local Government Appeals Council, which overruled the decision of the administrative authority of first instance, pointing to the exceptional situation of the applicant. In the justification of the decision of 27 May 2019[173], the appeal authority stated that the applicant „(...) is undoubtedly in an unique situation. Together with her child, she found herself in a foreign country, where she was granted a refugee status and therefore has the right to receive benefits. Therefore, due to this special situation, which the current regulations did not predict, adopting only a literal interpretation of the Article 8 clause 2 of the Act, as the first instance administrative authority did, is in the opinion of the Adjudication Panel insufficient. The literal interpretation is not always sufficient enough to decode correctly the legal norm contained in the legal regulation. The results obtained in this way should, in principle, be confronted with the rules of systemic or teleological interpretation. It may turn out that the sense of a regulation, which seems linguistically clear, will turn out to be doubtful when it is confronted with other regulations or when the purpose of the legal regulation is taken into account. This happens in the present case. As far as the literal wording of the Article 8 clause 2 of the cited Act may de facto lead to the simple conclusion, that the complainant who is a migrant is not entitled to the benefit, this understanding of the regulation in the specific conditions, that occurred in the case, is not justified by the Constitution or by the purpose that the legislator wanted to achieve by implementing to the legal system an institution of the parental benefit, which is partial coverage by the State of the costs of raising a child, including caregiving and satisfaction of needs".

171. Decision of 14 October 2019, no. UD-VI-WSZ-SR-2.8250.15079.2019.KOI/2/
172. Decision of 21 October 2019, no. UD-VI-WSZ-SR-1.8250.171.91.2019.DOS(2)
173. Case no. KOC/2216/Sw/19

In another case run by the Association for Legal Intervention, the administrative authorities granted the benefit 500+ for too short of a period, justifying it by the upcoming expiry date of the migrant's residence card. In the judgement of 12 September 2019, the Voivodship Administrative Court in Warsaw ruled that administrative authorities have no competences to modify the period of granting the benefit. The Act „(...) clearly states that the right to parental benefit is granted for the period from 1 October to 30 September of the following year".[174] The regulations of the Act do not contain a legal basis for the administrative authorities to shorten the "final payment period only because of the period of the validity of the residence card held by the migrant".[175] According to the Administrative Court, "the possession by the complainant of a residence card valid until 31 March 2019 results only in the administrative authority being obliged to check (...) whether after the expiry of the residence card the applicant obtained a new residence card with a new period of validity. If the applicant did not submit a new residence card, the authority could use the option of"[176] changing or repealing the right to parental benefit. It is worth adding here that the case concerned a person with the international protection granted, who automatically receives another residence card. There was no risk of changing her legal status after the expiry of the card.

The right to the parental benefit (as well as to family benefits or benefits due under the Social Assistance Act) is granted to persons who have the abovementioned residence permit, not a valid residence card. Residence cards are issued to persons granted refugee status, subsidiary protection and residence for humanitarian reasons - as well as personal ID cards for citizens - on request, without the need for an investigation, after the expiry of the previous document. It sometimes happens that the waiting period for issuing a new residence card is extended for reasons beyond the control of the applicants. Such a situation should not affect the refusal to grant the benefit, granting it only until the expiry of the document's validity period or sometimes even the refusal to accept the application for granting the benefit due to the upcoming expiry date of residence card.[177] Nevertheless, such situations are often reported by refugees seeking the assistance of the Association for Legal Intervention.

174. Judgement of the Voivodship Administrative Court in Warsaw of 12 September 2019, case no. I SA/Wa 1050/19
175. Ibidem
176. Ibidem
177. The Association for Legal Intervention observes that this problem concerns not only the parental benefits, but also the access to other benefits, i.e. benefits based on the Social Welfare Act or while applying for communal housing. The migrant usually receives the information that his or her application will not be accepted orally. They receive the information that they can submit the application upon receiving new residence card

Magdalena Sadowska

3. „GOOD START" BENEFIT

The "Good start" benefit is a one-time benefit of 300 PLN granted at the parent's request for a child studying at school, regardless of the family income.[178] In 2019, there were no changes to the regulations establishing the "Good start" benefit in the scope of changing the catalogue of entities entitled to the benefit. Thus, legal doubts remain valid as to whether the Regulation of the Council of Ministers of 30 May 2018 on the detailed conditions for the implementation of the government's "Good start" program (hereinafter: the "Good start" regulation) was not issued in excess of the statutory delegation in this respect.

It should be noted that the practice of the first instance administrative authorities regarding the procedure of submitting an application for the "Good start" by asylum seekers has changed. In 2018, the administrative authorities left without an examination applications for granting the right to the "Good start" benefit submitted by asylum seekers. According to the administrative authorities, the reason for leaving the application without an examination was the fact, that the formal defects were not corrected on time, i.e. the lack of a valid residence card with the annotation "access to the labour market".

In 2019, the Voivodship Administrative Court in Warsaw issued a ruling[179] in the proceedings initiated by the action on the failure to act of the administrative authorities filed by the client of the Association for Legal Intervention. The Court obliged the Mayor of Warsaw to examine the migrant's application for the right to the "Good start" benefit. According to the Court, by leaving the application without an examination, the administrative authority failed to act. In the cited judgement of the Voivodship Administrative Court in Warsaw, the Court stated that the exclusion, under the regulation „Good start", of asylum seekers, who are holders of a temporary identity certificate, from the scope of the entities entitled to the benefit is contrary to the Act. The Court indicated that the "Good start" regulation was issued in excess of the statutory delegation, therefore authorities may not request the applicants to submit additional documents (residence cards, residence permits, residence cards with the annotation "access to the labour market") under pain of leaving the application without further examination. The judgment is not final.

The exclusion, under the regulation „Good start", of asylum seekers, who are holders of a temporary identity certificate, from the scope of the entities entitled to the benefit is contrary to the Act.

Although the abovementioned judgment is not final, in 2019, it had an impact on the practice of the administrative authorities examining applications for granting the right to the "Good start" benefit. In 2019, first instance administrative authorities examined on the merits the applications for granting benefits submitted by asylum seekers, and then issued a decision refusing to grant the requested benefit. The reason to refuse the benefit was the fact that the "Good start" regulation does not indicate asylum seekers as the entities entitled to receive the benefit.[180] The Association for Legal Intervention supports the migrants in appeal proceedings. Cases are still pending.

178. The „Good start" benefit is based on the Article 187a (1-5) of the Act on the family support and the foster care system, Regulation no 80 of the Council of Ministers of 30 May 2018 on the implementation of the governmental program "Good start" and the Regulation of the Council of Ministers of 30 May 2018 on special conditions of implementation of the governmental program "Good start"
179. Judgement of the Voivodship Administrative Court in Warsaw of 17 May 209, case no. I SAB/Wa 49/19
180. Decision of the President of Warsaw, no. UD-X-WSZ-SR.8250.499.1320.2019.MKR; Decision of the Mayor of Piastów, no. 778/2019; Decision of the President of Warsaw, no. UD-III-WSZ-RA.8250.922.2155.2019.JOK

Patrycja Mickiewicz

4. INDIVIDUAL INTEGRATION PROGRAM

A migrant who obtained a refugee status or subsidiary protection in Poland, or is staying on the territory of Poland on the basis of a temporary residence permit granted in order to reunite with family who had obtained international protection in Poland, is assisted, at his request, in his integration process by the so called Individual Integration Program (hereinafter: IIP, Program).

The Association for Legal Intervention provided legal support to a family that was refused the integration assistance under the IIP for an underage child born after the termination of the Program by his family members, who received subsidiary protection in Poland.

Justifying the negative decisions, the administrative authorities of both instances took the view that through the implementation of the program by the minor's family, the objectives set out in the IIP had been met, and that the minor would naturally integrate with Polish society. It was argued that the need and the burden of the integration should focus primarily on people who have just arrived to Poland, and not to those who were born in a family for whom the integration assistance process was completed. It was emphasized that it is difficult to talk about the integration of a child who is not even a year old, and his assimilation (sic!) in Polish society will proceed in a completely natural way. It was pointed out that the integration assistance is a one-off help, so there is no reason to accept that the right to such assistance may arise again in connection with the birth of another child in the family.

The Association for Legal Intervention did not agree with the interpretation used by the administrative authorities and provided assistance in preparing a complaint to the Voivodship Administrative Court. The complaint alleged that granting integration assistance was conditional only on having a residence permit specified by law and on submitting the application within the statutory period.[181] There is no legal basis to refuse assistance to a minor based solely on the fact that his family members have already benefited from this type of assistance in the past, since the assistance is sought for the minor and not for his family members. It was explained that it is unfounded to examine the integration possibilities of the minor, since the determinations in this regard do not affect the outcome of the case, as they do not constitute a premise for granting the benefit. It was emphasized that the provision constituting the basis for granting IIP is a constrained norm, which means that determining that a minor has subsidiary protection obliges the administration authority to grant assistance under IIP.

Additionally, it was pointed out that the interpretation adopted by the administrative bodies may lead to the violation of the provision of Article 32 of the Constitution, which provides for equality of all before the law, as it differentiates the right to benefit under IIP depending on the moment when the child was born. In this way, the administrative authority puts children who were born during the asylum procedure and children born after obtaining one form of the international protection, in a completely different situation, although their integration abilities and needs are analogous, if not the same. A child born during the course of proceedings will be covered by the parents' application and receive integration assistance, while the child born after the asylum procedure for his or her parents

181. Article 91(1) and (3) of the Social Welfare Act.

was concluded with granting them one form of international protection - despite having similar needs – will be refused assistance. It was argued that such action undermines the constitutional principle of equality before the law, and moreover, it is incompatible with the principles of social justice referred to in Article 2 of the Constitution.

In the judgment of 11 July 2019, case no. III SA / Gd 287/19, the Voivodship Administrative Court in Gdańsk ruled that it is impossible to agree with the position of administrative authorities and explained: "Adopting such a view in the present case means that the migrant and his family may benefit from the assistance aimed at supporting the integration process permanently exhausts the entitlement to this type of assistance, not only for those who have benefited from this assistance, but also for subsequent family members - minor children - who were later born. This means that the subsequent birth of a child in a migrant's family would not give rise to separate rights to benefit from this type of assistance. However, according to the literal wording of the Article 91 clause 1 of the Act on social assistance, the legislator made the creation of a migrant's right to receive the said assistance dependent only on the fact that he had previously obtained a specific title to legally reside in Poland, namely a refugee status or subsidiary protection or obtained a temporary residence permit based on the Article 159 clause 1 point 1 letter c or d of the Act on Foreigners, reserving only the appropriate sixty-day period for submitting the application in this regard (in the Article 91 clause 3).[182] Thus, the Voivodship Administrative Court came to the conclusion that both the decision of the first instance authority and the decision of the appeal body were issued in breach of substantive law, which had an impact on the outcome of the case and, consequently, the Court eliminated both rulings from the legal circulation.

During the re-examination of the case, the administration authority awarded the minor the IIP requested.[183]

182. Case no. III SA / Gd 287/19
183. Decision of the President of Gdańsk, no. PS.CPS.9.4026-1 / 601013666/19

Aleksandra Chrzanowska
Patrycja Mickiewicz

5. ACCESS TO COMMUNITY HOUSING IN WARSAW

All residents of a given local government community can apply for housing benefits. The Act on the protection of the rights of tenants does not exclude migrants, regardless of their residence title. Each commune sets its own framework criteria - related to housing conditions, income or the period of stay in a given area - which must be met in order to be included on the list of persons awaiting the housing.

The Association for Legal Intervention assists mostly refugees or persons with the residence permit for humanitarian reasons in their applications to obtain housing from the district resources of the Capital City of Warsaw. After leaving the refugee centers, they rent flats on the free market for very high prices which are inadequate to their earning capacity.

We help dozens of families a year in their struggle to obtain communal or social housing.

We help dozens of families a year in their struggle to obtain communal or social housing. Every week, during the individual consultations, we provide detailed information about the requirements to apply for housing, we help fill in applications, respond to calls from districts Departments of Housing Resources (hereinafter: DHR), collect additional documents, explain the procedures, etc. Sometimes we accompany our clients as interpreters, when they make statements to the authorities. Qualification procedures to be listed on the waiting list for housing usually take several months. After being included on the list, the waiting period for an apartment lasts from about a year (in very favorable circumstances) to several years.

For example, we helped one of our clients - a mother raising several children on her own - fill in the application form in March 2019. In April she was requested by DHR to provide additional explanations. We accompanied her during her visit to the office, and then helped her collect the documents she had been asked to provide. In June, DHR representatives appeared at her apartment for a local visit. At the beginning of September, she received a letter confirming her application and informing her that the lists were updated on a regular basis, in chronological order. At the beginning of 2020, her name was not yet on the list. The information obtained by phone shows that it should appear before the end of the first quarter and that one should take into account at least a three year waiting period for an apartment from the moment she was entered on the list. According to the observations of the Association for Legal Intervention, the flats awarded, in most cases, require general renovation. The Property Management Board is responsible for the organization and costs of such renovations. Tendering procedures apply to the selection of contractors, which significantly extends the case. People who are awarded flats usually wait a few months or a year before they can actually move in. Therefore, it should be assumed that in the case of our client, it will take about five years from lodging the application to the actual acquisition of housing.

Most often - even when all criteria are met – the clients of the Association for Legal Intervention are refused an entry on the housing list. Then we assist them and prepare complaints to the Voivodship Administrative Court. The most common reason for a refusal is that the person or a family applying for housing - and meeting the square footage and income criterion - have a legal title to another apartment, for example a lease or lending agreement. This is against the law. The administrative court proceedings last a long time - from six months to one year before the Voivodship Administrative Court and another one

or two years before the Supreme Administrative Court (if the administration of a given district decides to lodge a cassation appeal after the migrants win in the court of first instance). For several years now, we have been observing that the jurisprudence of the Voivodship Administrative Court is stable in this regard. If the only reason for refusing to enter a waiting list for a communal housing is having a lease agreement, the administrative courts repeal such resolutions or annul them. Despite this, many districts in Warsaw still refuse to include a migrant on the list of persons waiting for housing solely on this basis. Some districts, after losing before the Voivodship Administrative Court, consistently submit cassation complaints to the Supreme Administrative Court, who also consistently rules in favor of migrants. In the opinion of the Association for Legal Intervention, such action is aimed at discouraging migrants from exercising their rights or forcing them to move out of the district and lose the right to apply for housing in this particular location. This approach proves to be very effective - refugees often lose hope and give up or are forced to leave their current flat. Many of them decide to leave Poland and try to settle in another EU country. From our perspective, it seems that the main reason for leaving Poland is the lack of housing security.

In brief, we will describe the story of two families applying, with our support, for community housing, who have been persistently fighting for their rights for many years.

Family A submitted its first application for a communal housing in the Praga Południe district in October 2014. They rented one small room in a three-room apartment, in which the other two rooms, on the basis of separate contracts, were rented by other, unrelated people. The family was refused to be included on the list of people waiting for housing due to exceeding the criterion related to the maximum area of the current flat. The authorities counted the total area of the apartment, although it was not difficult to prove that the family used only one room, in which the living space did not exceed 6 m2 per person. In mid-2015, we assisted the family and prepared a complaint to the Voivodship Administrative Court. In autumn 2015, the family was forced to move out of the flat they had occupied so far (the owner wanted to sell the flat). The family rented a separate apartment in the same district, where they also met the criteria of the maximum area of the flat. The Association prepared for them a new application for housing. The application was considered by the district board as unsubstantiated due to the pending proceedings before the Voivodship Administrative Court regarding the first application for housing. In the summer of 2016, our client won the case before the Voivodship Administrative Court concerning the first application. DHR, reconsidering the case, requested the family to update the information concerning their housing, family and income situation. Then, in the spring of 2017, the district board refused to include the family on the housing list - this time due to having a legal title to an apartment (lease agreement). The DHR had not previously raised this argument. The family could no longer remain in the existing apartment for reasons beyond their control. They managed to find a flat in the Bielany district of Warsaw. There, they also did not exceed the criterion as to the maximum area of the flat. They also met the income criterion. In consequence, in autumn 2017, we assisted them and prepared another application for a communal housing from the resources of the Bielany district. After one year of reviewing their application, the district board refused to include them on the waiting list solely because they had a legal title to an apartment. Again, we assisted the family and prepared a complaint to the Voivodship Administrative Court. The Court once again, in August 2019, allowed the complaint.[184] In the justification of the judgment, the Court held that "(...)

184. Judgment of the Voivodship Administrative Court in Warsaw of August 8, 2019, annulling the contested resolution, case no. II SA / Wa 2201/18

the District Board in the contested resolution referred only to the fact that the applicants rented, pursuant to a private contract, the abovementioned apartment and it was deduced from this fact that the applicants had a settled housing situation. However, no provision of the Resolution from 2009 automatically excludes from the group of persons applying for housing from the housing stock of the Capital City of Warsaw, persons possessing a private contract for renting a flat." Despite this, the district board decided to lodge a cassation complaint to the Supreme Administrative Court, which postpones the final settlement of the case for another year or two. Since 2015, the family has been parallelly applying, year after year, for housing under the so-called housing competition at the Warsaw Family Support Center.[185] Every time we helped fill in the application forms. Sometimes we had to mentally support the family so that they would not abandon the next steps. They felt so discouraged and lost faith that they would ever be able to win the right to housing. In January 2020, the family received information awarding them an apartment in the WCPR "competition" of 2019. A pool of 5 apartments from the WCPR is being distributed by the Housing Policy Office of the Capital City of Warsaw. There is a good chance that this year our clients will be able to move into their dream apartment.

Family B, lodged their first application for social housing (they were living at the time only on social benefits, so due to lack of income they could not apply for a communal flat) in 2015 in the Bemowo district. After a year, they received a refusal due to having a legal title to an apartment (lease agreement). Due to the stable jurisprudence indicating that if you have any legal title to the apartment, you have no right to apply for social housing, we advised the family to apply for a communal apartment. At the end of 2016, we assisted them in completing the application for communal housing. After about a year, the district board refused to include the family on the waiting list - also because of having a legal title to an apartment. In August 2017, the family prepared a complaint to the Voivodship Administrative Court, which in April 2018 ruled in favour of the family. The administration of the Bemowo district lodged a cassation complaint with the Supreme Administrative Court. The Supreme Administrative Court dismissed the cassation complaint in a judgment of 4 December 2019.[186] The Court pointed out that "(...) an interpretation that the possession of a different legal title to an apartment (other than listed in § 6 section 1 point 1 of the resolutions), in this case a private lease agreement, will always deprive an applicant of the possibility to apply for the communal housing from the municipal housing stock, cannot be accepted. In the circumstances of the present case, it is common ground that the dwelling being the subject of the lease, due to its small area (5.25m2 of living space per one person) meets the criteria of difficult housing conditions specified in § 4 point 1 of the resolution, and therefore cannot be automatically excluded from the possibility of applying for the rent of housing from the municipal housing resource. The interpretation proposed by the complainant in cassation would lead to an extension of the scope of § 6 par. 1 point 1 of the resolution, i.e. the extension of cases permitting to refuse communal housing to all situations were the applicant had concluded a private lease of an apartment, regardless of the size of an apartment. " In January 2020, the family received a call from DHR requesting them to update the information concerning their current housing and income situation. Even assuming that in the coming weeks the family would be included on the waiting list for housing - their

185. WCPR since 2002 announces calls for applications for housing from housing resources of the Capital City of Warsaw every autumn – "Warsaw for refugees". In the "competition" 5 flats are awarded annually. Refugees and persons with subsidiary protection, who have completed the Individual Integration Program in Warsaw, are still living in Warsaw and have been refused to be included on the housing list in the district in which they live, can apply. More on: https://wcpr.pl/nasze-uslugi/cudzoziemcy/wsparcie-mieszkaniowe

186. Case no. I OSK 3283/18

situation has changed only slightly and according to the Association of Legal Intervention they still meet all the criteria - before them, there remain a few years of waiting for an apartment. The family lives in a district where the housing stock is very small, so the waiting period will probably be longer than in other districts. They are not recognized refugees and they obtained residence permits for humanitarian reasons, therefore they are not entitled to apply for housing in the WCPR "competition".

In 2019, the Association for Legal Intervention participated as a social organization in two proceedings before the Voivodship Administrative Court in Warsaw, concerning complaints about the refusal to qualify for lease from the city's housing resources.

In one case, the district board decided that there was a gross disproportion between the situation indicated in the application and the actual financial status of the applicants. It was the basis to refuse to include the family on the list of people qualified to rent premises from housing resources. To justify the decision, the board cited § 6 par. 1 point 3 of the Resolution No. LVIII / 1751/2009 of the Council of the Capital City of Warsaw of 9 July 2009 on the principles of renting premises that are part of the residential resources of the Capital City of Warsaw.[187] According to the resolution the community housing can be refused if the examination of the application and the living, family and material situation determined, inter alia, in the applicant's place of residence, shows that there is a significant disproportion between the low income shown when submitting the application and the actual financial situation of the applicant or members of his or her family, as well as when the actual housing conditions of the applicant or members of his or her family applying for a lease with him or her do not confirm the situation indicated in the application, and in the opinion of the district board the applicants have the possibility to secure their housing needs on their own.

In the course of administrative judicial proceedings, the Association for Legal Intervention pointed to a malfunction of the authority's activity in the area of gathering and assessing the evidence. The Association argued, inter alia, that the administrative authority did not indicate what the gross disproportion was, which it alleged against the applicants, and was the basis for the refusal. If it was the basis of the refusal, the administrative authority was under the obligation to analyze the financial situation of the family diligently.

The Voivodship Administrative Court in Warsaw, in the judgment of 12 June 2019, case no. II SA/Wa 2181/18, annulled the contested resolution. According to the Court: "It should be noted that the issuance of a decision, pursuant to § 6 par. 1 point 3 of the abovementioned resolution, have to be preceded by a thorough evidence hearing in order to establish financial situation in an undisputed manner. Such an evidence hearing was not carried out in the present case, and therefore it should be considered that issuing the resolution in such a situation was at least premature. (...) The court notes that the administrative authority is obliged to examine all the factual circumstances related to a given case in order to formulate a real picture of it and have the basis to correctly apply the law."

The second case, in which the Association for Legal Intervention participated as a social organization, concerned a situation where one dwelling was occupied by several households. When examining the criterion of the maximum area of an apartment, the authority took the position that they should take into account the total area of all rooms,

187. Journal Office. Mazovia Province pos. 3937, as amended

regardless of how many households reside in the flat and which room is actually occupied by the family.

In the course of the proceedings the Association for Legal Intervention pointed to a faulty interpretation of the provision of § 1 item 16 of the Resolution.[188] The Association held that the regulation constituting the basis for the refusal determines only the type of premises that should be taken into account when determining the area of premises. In no way does it give grounds to take into account the living space of an apartment occupied by households other than the applicant's. Additionally, the violation of procedural rights was alleged, i.e. the lack of the assessment of the entirety of the evidential material regarding the applicant's housing conditions, as well as the omission of the fact that the applicant lives with his mother in one room with an area of 7.61 m2, which means that he meets the criteria for the maximum area of an apartment.

In the judgment of the Voivodship Administrative Court in Warsaw of 5 June 2019, case no. II SA/Wa 1932/18, the Court annulled the contested resolution. The Court did not make reference to the interpretation of the resolution, but found significant procedural violations. In addition, the Court pointed to an extremely important issue - the essence of the housing support: "It should be emphasized that in such cases the fundamental right of the citizen to have the proverbial roof over his or her head is at stake. Difficult living conditions should determine the administrative authority's actions to settle the matter as soon as possible, not evading the substantive decision (...)."

188. Resolution No. LVIII / 1751/2009 of the Council of the Capital City of Warsaw of 9 July 2009 regarding the rules of renting premises as part of the housing stock of the capital city of Warsaw, Dz. Office. Mazovia Province No. 132, item 3937 as amended

V. Procedural guarantees in proceedings regarding the legalization of stay in Poland

Olga Dobrowolska
Małgorzta Jaźwińska
Patrycja Mickiewicz

Faulty notice

Migrants applying for the right of residence in Poland repeatedly reported to the Association for Legal Intervention problems related to evidence hearing by the Governor of Mazowieckie.

It was signaled that on the day of submitting applications for a residence permit in person (this applies to both temporary residence and permanent residence permits, as well as long-term residents of EU), migrants receive an extensive request to submit documents that are not always required in their individual cases or have already been submitted together with the application. As a consequence, migrants do not know what documents they have submit to obtain a decision in accordance with their request. It often leads to the refusal to grant the requested permit.

In response to the reported problems, the Association for Legal Intervention sent an official letter to the management of the Department of Foreigners of the Mazowieckie Voivodship Office in Warsaw (hereinafter: WSC MUW). It the letter, the Association expressed its reservations regarding the conformity of the procedures with the law.

The Governor of Mazowie–ckie requires not only the perfect knowledge of the law in Poland, but also its smooth application.

The letter indicated that the lack of an individualized request to additional document de facto shifts the burden of evidence hearing to a party to the proceedings. It was argued that, on the basis of the administrative proceedings, it is the administrative authorities that have to take all necessary steps to clarify the facts of a case, and are required to comprehensively collect and assess all the evidence. It was emphasized that the administrative authorities are obliged to ensure that the parties and other persons participating in the proceedings do not suffer damage due to the ignorance of the law. This obligation, in matters relating to migrants, was given a special rank. The administrative authorities are required to instruct migrants on their rights and obligations in a language they understand. It was noticed that the Governor of Mazowieckie requires not only the perfect knowledge of the law in Poland, but also its smooth application - the migrant is not only required to independently assess what documents are required in his or her case by law, but also needs to know what documents are required by the authority in practice. In the opinion of the Association for Legal Intervention such a procedure of the administrative authorities is not justified.

The Association for Legal Intervention suggested remodeling the way proceedings were conducted, so that all procedural guarantees granted to the party were fully respected.

Referring to the proposals formulated by the Association, WSC MUW pointed out that the decision to issue such notice results from the need to simplify the procedures. According to the Head of the Department, the instruction contained in the notice clearly states that only those documents that have not been previously submitted, should be submitted.

Due to the fact that the Association for Legal Intervention did not share the arguments raised by the Mazowieckie Voivodship Office, in January 2020, we sent another official letter, this time to the Minister of the Interior and Administration. The case is pending.

Formal defects

One of the conditions to obtain a work permit or a uniform residence and work permit in Poland is to attach to the application the starost's opinion on the inability to meet staffing needs with the local labor market (the labor market test, starost's opinion), if it is required in the migrant's individual situation. According to the stable jurisprudence, the starost's opinion does not constitute formal defect in the procedure of obtaining a uniform residence and work permit.

In 2019, the Association for Legal Intervention represented an employer, whose application for a work permit for an employee was not further considered because the labor market test had not been attached. In the opinion of the Governor of Mazowieckie, the lack of the opinion constituted a formal defect of the application, and thus the failure to attach it within the set time limit resulted in the application not being considered.

The Association for Legal Intervention lodged to the Ministry of Labor and Social Policy a request for urgent consideration of the case. According to the Association for Legal Intervention, the public administration authorities was obliged to conduct a preliminary investigation to determine whether in the given case the starost's opinion was required. The law provides that certain groups of migrants do not have to conduct a labor market test. The migrant in the present case was also exempted from this obligation as he had been legally and continuously living in Poland for 3 years. Therefore, the Governor had to make an individual assessment as to whether the starost's opinion was required in the present case. Consequently, its absence cannot constitute a formal defect of the application justifying that the application will not be further considered. The Ministry of Labor and Social Policy did not share the above interpretation of the regulations.

In the present case, a complaint was lodged with the Voivodship Administrative Court in Warsaw. The complaint alleged that the starost's opinion was one of the substantive conditions for issuing a work permit. It is analyzed at the stage of assessing whether the party meets the requirements for the permit, and not at the initial stage of the proceedings. Leaving the application without consideration due to the absence of the starost's opinion constitutes an evasion by the administrative authority of the obligation to decide the case. The labor market test is not a formal defect in proceedings on granting temporary

residence and work permit.[189] Thus, by analogy, in a case where a party applies for a work permit in Poland, the starost's opinion will not constitute a formal defect of the application.

When issuing a work permit, the administrative authorities are required to determine whether in an individual case, the labor market test will be required. In certain situations, the migrant will not be required to attach this document. Determining whether the labor market test is necessary to adjudicate the case requires a preliminary investigation and thus cannot constitute a formal defect. The case is pending.

Failure to act of a public authority and the length of the proceedings

In 2019, there were still glaring examples of failure to act of the Head of the Office for Foreigners and the Governor of Mazowieckie in matters regarding the legalization of migrants' stay in Poland.

According to the information obtained from the Head of the Office for Foreigners, in 2019, the average duration of the appeal proceedings regarding temporary residence was 236 days (almost 8 months), on temporary residence and work 230 days (over 7 months), on permanent residence 152 days (over 5 months), and in the case of long-term resident of EU 265 days (almost 9 months). It should be noted that the longest period of these proceedings was 1862 days (over 5 years), 1861 days (over 5 years), 1577 days (over 4 years) and 1390 days (almost 4 years), respectively.[190] Under the law, those procedures should not, in principle, last longer than one month (except for proceedings regarding permanent residence, where the case should end within two months). According to the information obtained from the Office, cases are on average several times longer than they should be. In 2019, due to the failure to act or protracted handling of cases by the Office, approximately 1,300 requests for urgent consideration of the case were lodged and 671 complaints with the administrative court. In 139 cases, the administrative court issued a final judgment stating the failure to act or protracted running of the case by the Office for Foreigners. Due to the failure to act or an excessive length of proceedings, in 2019, the Head of the Office for Foreigners was obliged by the administrative courts to pay a total amount of 83 320 PLN for reimbursement of legal representation costs, fines and awarded sums of money.[191]

Due to the failure to act or an excessive length of proceedings, in 2019, the Head of the Office for Foreigners was obliged by the administrative courts to pay a total amount of 83 320 PLN for reimbursement of legal representation costs, fines and awarded sums of money.

Lack of an effective access to case files

Due to the organization of the work of the Office for Foreigners, lack of an effective access to case files in return and humanitarian procedures remains a problem. Migrants and their representatives are often deprived of adequate access to case files before the issuance of the decision.

189. Judgment of the Supreme Administrative Court of 1 February 2019, case no. II OSK 3027/18; Supreme Administrative Court judgment of 17 July 2018, case no. II OSK 347/18
190. Response from the Office for Foreigners of 20 January 2020, inf. cit.
191. Ibidem

In legalization cases, the waiting period for getting acquainted with the case files in the Office for Foreigners (administrative authority of the second instance) significantly exceeded the standard 7-day deadline for expressing the collected evidence in the case. In the period from 1 January to 31 December 2019, the waiting period to review the files in the Office for Foreigners was around 1,5 months.[192]

In 2019, the Association for Legal Intervention requested the Head of the Office for Foreigners to improve the work of the office by organizing a reading room modeled after court reading rooms or by increasing the number of hours and designating new rooms for viewing case files. In response, the Head of the Office for Foreigners claimed that by the end of 2019 a reading room will be introduced in the office.[193] Unfortunately, these works were not completed by the expected date and the waiting period to review case files is still several weeks long.

In response to questions, the Head of the Office for Foreigners did not directly answer at what stage were the works regarding the introduction of the reading room at the Office. The Head of the Office for Foreigners has only indicated that they introduced an online registering system for file review, that there are restrictions on the number of cases you can review at once (maximum 5 cases), hours during which it is possible to review case files, and the fact that a maximum of 2 people can review files simultaneously within one hour.[194] From the answer obtained, it can be concluded that the Head of the Office of Foreigners did not abandon plans to introduce a reading room on the model of court reading rooms that would allow migrants and their representatives effective access to case files. However, there is no information at what stage of implementation these plans are.

192. Judgment of the Supreme Administrative Court of 1 February 2019, case no. II OSK 3027/18; Supreme Administrative Court judgment of 17 July 2018, case no. II OSK 347/18
193. Response of the Office for Foreigners of 19 August 2019, inf. cit.
194. Response from the Office for Foreigners of 20 January 2020, inf. cit.

Authors

Aleksandra Chrzanowska

Integration and intercultural adviser, member of the board of the Association for Legal Intervention. A graduate of cultural studies at the University of Warsaw. Author of the publication in the field of refugee integration and multiculturalism. Member of the *Commission Experts on Migrant Affairs and National Preventive Mechanism Torture* at the Ombudsman. Winner of the 8th edition (2015) prizes J. Zimowski awarded for activities for social groups in extreme situations, especially on migrants and refugees.

Aleksandra Pulchny

Lawyer. A graduate of the Faculty Law and Administration at the Jagiellonian University, she also studied at the University of Toulouse and Capitole in France. Co-founder of the *International Network on Legal Assistance to Refugees.*

Magdalena Sadowska

Attorney-at-law (radca prawny).
A graduate of the Faculty Law and Administration at the University of Warsaw, she also studied at Stockholm University. Author of publications on human rights, administrative and family law, rights of migrants and refugees.

Małgorzata Jaźwińska

Attorney, member of the board of the Association for Legal Intervention. A graduate of the Faculty of Law and Administration at the University of Warsaw. Author of publications on human rights, rights of migrants and refugees. Featured in the competition of the Supreme Bar Council "Advocate of the Year 2019".

Olga Dobrowolska

Lawyer, specialist in legalization of employment of migrants. A graduate of the Faculty of Law and Administration at the University of Warsaw. A member of the *Council for the Model of Migrant Integration* at the Governor of Mazowieckie.

Patrycja Mickiewicz

Attorney-at-law (radca prawny) at the *District Chamber Legal Advisors* in Warsaw, member of the Association for Legal Intervention, an experienced lawyer in the field of migration law, author of publications and informational on migration.

Stowarzyszenie
Interwencji
Prawnej

SIP in action. The rights of migrants in Poland in 2019
Aleksandra Chrzanowska | Olga Dobrowolska
Małgorzata Jaźwińska | Patrycja Mickiewicz
Aleksandra Pulchny | Magdalena Sadowska

editor: Małgorzata Jaźwińska
proofreading: Jay Hanley
translation: Krzysztof Batarowicz | Krzysztof Berg
Weronika Grzybczyk | Maciej Janik |
Małgorzata Jaźwińska Marek Kobryn | Agnieszka Nowak
Julia Przybysz | Paulina Pyć | Eliza Szarbiewska
Aleksandra Szkodzińska | Michał Zwoliński
typesetting, visual design and illustrations: Izabela Łęska

photos:
s. 3, 63, 65 – Adam Rostowski
s. 9, 31 – www.rawpixel.com
s. 27 – www.freepik.com
s. 56, 62 – Aleksandra Pulchny
s. 64 – www.freepic.diller.com
s. 78, 79 – Bartosz Kazek, Ministerstwo Fotografii