



VOLUNTARY RETURN

EU Legal and Policy Framework

Anna Kosińska • Paweł Wojtasik (ed.)

RULE OF LAW INSTITUTE FOUNDATION
Lublin 2014

VOLUNTARY RETURN

EU Legal and Policy Framework

Anna Kosińska
Paweł Wojtasik (ed.)



RULE OF LAW INSTITUTE FOUNDATION
Lublin 2014



Published as a part of the "Support for Voluntary Returns in the Lublin Region II" project pursued by Rule of Law Institute Foundation. Project co-funded by the European Return Fund and the state budget.

Copyright by Fundacja Instytut na rzecz Państwa Prawa 2014

Authors: Anna Kosińska
Paweł Wojtasik (ed.)

English translation and language consultation:
Yulian Hofman, prof. Delaine R. Swenson

Authors: The Rule of Law Institute Foundation
Chopina 14/70, 20-023 Lublin
tel./fax: +48 81 743 68 05
e-mail: fundacja@panstwoprava.org
www.panstwoprava.org

ISBN 978-83-62551-60-6

The Rule of Law Institute Foundation is exclusively responsible for the contents of this publication. The opinions contained in this publication do not in any way reflect the official position of the European Commission, which shall not be liable for any use of the information provided.

Contents

Preface	5
Chapter 1.	
Regulations on the European Union return policy	7
1.1. Return migration in the light of Directive 2008/115	7
1.2. Asylum, Migration and Integration Fund.....	10
Chapter 2.	
Polish legal regulations on migrant return	19
2.1. Preliminary issues.....	19
2.2. Act on foreigners of 12 December 2013.....	21
2.2.1. Decision on imposing a return obligation on a foreigner	21
2.2.2. The realization of voluntary return in the light of the new Act on Foreigners	26
2.2.3. Forced execution of the decision on imposing the return obligation on the foreigner.....	29
2.2.4. Detention or custody prior to expulsion	30
2.2.5. List of foreigners whose stay within the territory of the Republic of Poland is undesirable	33
2.3. Act on granting protection to aliens within the territory of the Republic of Poland and voluntary return realized by the Office for Foreigners.....	35
2.4. International Organization for Migration and the Assisted Voluntary Return Program	38
2.5. Unassisted voluntary return	43
Chapter 3.	
Project experience	45
3.1. Activities undertaken in the project.....	45
3.2. Recommendations.....	46
List of legal acts and documents	47

Preface

Dear Readers,

This publication was prepared as a part of the project "Support for Voluntary Returns in the Lublin Region II", implemented beginning the 1 of January 2010 by the Rule of Law Institute Foundation.

Over the past few years Polish returns policy, implemented within the framework of European Migration Policy, has experienced a few significant changes. In July 2012 a new program called "Polish Migration Policy – current state and postulated actions" was adopted, and in April 2012 the Return Directive was fully implemented into the Polish legal system. At the same time the creation of the new Law on Foreigners was in progress. It was adopted on 12 December 2013 and entered into force as of 1 May 2014.

This publication was created for the purpose of promoting the idea of voluntary return of third-country nationals to their countries of origin, as well as to transfer basic legal information on this topic.

The following chapters introduce legal regulations on voluntary return, both at the European (Directive 2008/115) as well as national level. Chapter II discusses provisions of the new Law on Foreigners concerning voluntary and forced returns, as well as provisions of the Act on granting protection to aliens within the territory of the Republic of Poland to the extent related to the organization of voluntary return realized by the Head of the Office for Foreigners. Particular attention was paid to the possibility to carry so-called assisted voluntary return by the International Organization for Migration. The final part of the publication consists of recommendations and conclusions, based on the experience of cooperation between the Rule of Law Institute Foundation and institutions jointly conducting voluntary returns under Polish law.

We wish you a fruitful reading

The Authors

CHAPTER 1.

Regulations on the European Union return policy

1.1. Return migration in the light of Directive 2008/115

The foundations for the creation of migration and asylum policy of the EU were laid by the establishment of the **Area of Freedom, Security and Justice (AFSJ)** under the Treaty of Amsterdam. In accordance with Article 3, Paragraph 2 of the Treaty on European Union,

The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime¹.

Activities within the Area of Freedom Security and Justice are a shared competence of the EU and the Member States (art. 4 of the Treaty on the Functioning of the European Union)².

The legal act on the returns of third-country nationals, the so-called Return Directive, i.e. Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals, was adopted to establish transparent and fair rules that would define an effective return policy³.

¹ Consolidated version of the Treaty on European Union (OJ C 83/13 of 30 March 2010).

² Consolidated version of the Treaty on the Functioning of the European Union (OJ C 83/47 of 30 March 2010).

³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348/98 of 24 December 2008).

In accordance with Article 1, *this Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.*

Recital 10 of the Preamble to the Return Directive defines voluntary return to be the preferred form of an alien's return. It states, that *in order to promote voluntary return, Member States should provide for enhanced return assistance and counseling and make best use of the relevant funding possibilities offered under the European Return Fund.*

The preamble also sets out the standards of human rights protection in the return process:

- 1) the obligation to implement the Directive **without discrimination** on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation (par. 21 of the preamble);
- 2) in line with the 1989 United Nations Convention on the Rights of the Child, when implementing the Directive, the **best interest of a child** should be a primary consideration of a Member State (par. 22 of the preamble);
- 3) in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, **respect for family life** should be a primary consideration of Member States when implementing this Directive (par 22 of the preamble).

These principles have been repeated once again in the wording of Article 5 of the Directive: *when implementing this Directive, Member States shall take due account of a) best interest of a child, b) family life, c) the state of health of a third-country national concerned, and respect the principle of non-refoulement.*

What is more, Paragraph 24 of the Preamble highlights, that *this Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union.*

In accordance with the definitions set out in the Directive:

- 1) **“return”** means the *process of a third-country national going back, whether in voluntary compliance with an obligation to return, or enforced, to: his or her country of origin, or a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted* (Art. 3 Par. 3 of the Directive);
- 2) **“voluntary departure”** means *compliance with the obligation to return within the time-limit fixed for that purpose in the return decision* (Art. 3 Par. 8 of the Directive).

The conditions for voluntary departure were specifically set in the Article 7 of the Return Directive. In accordance with this article, *a return decision shall provide for an appropriate period for voluntary departure of **between seven and thirty days**. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.*

It is also worth mentioning, that:

- Third-country nationals have the possibility to leave before the time period given in the decision on obligation to return (Art. 7 Par. 1);
- Member States shall, where necessary, *extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links* (Art. 7 Par. 2);
- Member States may impose certain obligations for the duration of the period for voluntary departure, such as *regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place* (Art. 7 Par. 3);
- In some cases, the authorities of a Member State may refrain from granting a period for voluntary departure or may grant a period shorter than seven days (among others in situations, *when there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded*

or fraudulent, or if the person concerned poses a risk to public policy, public security or national security – Art. 7 Par. 4);

Concepts used in the European Law referring to voluntary returns were defined in the **European Migration Network (EMN) Report** on voluntary returns realized in the EU Member States⁴. This report includes the following:

- **„voluntary return”** is the assisted or independent movement of a person returning to the country of origin, based on a free will of the returnee;
- **„assisted voluntary return”** refers specifically to the provision of (logistical financial or other material) assistance for the voluntary return of a returnee;
- **„voluntary departure”** means compliance with the obligation to Return within the time-limit fixed for that purpose in a Return Decision;
- **„forced return”** is the compulsory return of an individual to the country of origin, transit or third country, on basis of an administrative or juridical act.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by **24 December 2010**. Poland implemented this directive only in April 2012⁵.

1.2. Asylum, Migration and Integration Fund

In accordance with Article 3 of the Treaty on European Union, the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured. However AFSJ is not only related to the mobility of citizens, but also to areas such as citizenship of the Union, control and protection of external borders, asylum and immigration, visa policy, as well as police and judicial cooperation, *inter alia* in the prevention and fighting of crime.

⁴ *Programs and strategies in the EU Member States fostering Assisted Voluntary Returns to and Reintegration in Third Countries*, European Migration Network, March 2011, available at: www.emn.intrasoft-intl.com.

⁵ Ustawa z dnia 27 kwietnia 2012 r. o zmianie ustawy o cudzoziemcach oraz ustawy o promocji zatrudnienia i instytucjach rynku pracy (Amendment of the Act on foreigners and the Act on employment promotion and labour market institutions), Dziennik Ustaw 2012, No. 589.

The realization of the AFSJ objectives (shaping migration and asylum policy can be mentioned as one of those objectives) is impossible without the necessary budgetary support. To ensure the effective implementation of migration policies in the European Union and to support the activities of Member States in this regard, suitable financial instruments were created. First of all, four European Funds were established: the European Refugee Fund (ERF), the European Fund for the Integration of Third-Country Nationals (EIF), European Return Fund (RF) and the External Borders Fund (EBF). In addition, two specific programs were created in the field of internal security: "Prevention of and Fight against Crime" (ISEC) and "The Prevention, Preparedness and Consequence Management of Terrorism and other Security-related Risks" (CIPS).

European Funds were the **main financial instruments of the General program "Solidarity and Management of Migration Flows"** established for the period 2007-2013, whose aim was to improve the management of migration flows in the European Union and to strengthen solidarity between Member States. Program Activities related to the control of external borders, return of illegal migrants to their countries of origin, integration of migrants legally residing in the EU and asylum matters.

The return policy of the EU received support from the European Return Fund established by Decision of the European Parliament and of the Council of 23 May 2007⁶ for the period 1 January 2008 to 31 December 2013. The Fund's total budget for the period 2008-2013 is EUR 676 million⁷. The objectives of the Fund⁸ were carried out in the framework of multiannual programming for the period 2008-2013. However, due to the existing rule on eligibility of expenditure until 30 June of the year „N+1.5", projects co-financed by the RF can be in fact implemented till 30 June 2015.

⁶ Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General Program 'Solidarity and Management of Migration Flows' (OJ L 144/45 of 6 June 2007).

⁷ The total amount available for Poland is **18 084 375,67**.

⁸ The general objective of the Fund, in accordance with Article 2 of the Decision establishing RF, is: *introduction and improvement of the organization and implementation of integrated return management by Member States; strengthen cooperation between Member States in the framework of integrated return management and its implementation; to promote the effective and uniform application of common standards on return in line with policy developments in this area.*

While working on the financial framework 2014-2020, EU institutions have recognized the need to simplify the structure of the financial instruments in the area of internal affairs. During the implementation of projects funded by the SOLID instruments, it was noted that there was a problem with the diversity and fragmentation of rules governing spending programs, which included unnecessarily complex procedures and difficulties in the implementation of the objectives and its verification. This situation led to significant administrative complications, and consequently resulted in errors in the project documentation, delayed payments, and thus the delay in implementing the project objectives.

Therefore, in order to simplify the structure of programs for internal affairs, it was decided to reduce the number of funds to two. Regulations from 15 April 2014 established:

- Asylum, Migration and Integration Fund⁹;
- Internal Security Fund¹⁰.

As pointed out in the Preamble (Par. 5) of the Regulation No 516/2014 of the European Parliament and of the Council, *the new two-pillar structure of funding in the field of home affairs should contribute to the simplification, rationalisation, consolidation and transparency of funding in that field. Synergies, consistency and complementarity should be sought between different funds and programs, including with a view to allocating funding to common objectives. However, any overlap between the different funding instruments should be avoided.*

⁹ Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC (OJ L 150/168 of 20 May 2014) and Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management (OJ L 150/112 of 20 May 2014).

¹⁰ Regulation (EU) No 513/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA (OJ L 150/93 of 20 May 2014) and Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC (OJ L 150/143 of 20 May 2014).

Two instruments of financial support are being created as a part of the **Internal Security Fund**. The first one deals with external borders and visas, and has a budget of 2 760 million euro. The second instrument is designed to promote police cooperation, prevent and fight crime, and for crisis management. Its overall budget is 1 004 million euro. Both financial support instruments have the same goal, i.e. to contribute to ensuring a high level of security in the European Union.

The instrument for **support for borders and visa** wants to ensure safety in the EU, above all, by supporting a common visa policy to facilitate legitimate travel, ensure equal treatment of third-country nationals and prevent illegal migration. The high level of security in the EU is also supposed to be achieved by supporting border management, in order to ensure a high level of protection of external borders, as well as smooth crossing of external borders in accordance with the Schengen acquis.

In contrast, an instrument for **support of police cooperation in fighting crime** seeks to ensure safety in the EU by preventing and fighting cross-border crime and by strengthening coordination and cooperation between law enforcement authorities of the Member States and relevant Third Countries. Moreover, the instrument is to strengthen the capacity of Member States and the Union to effectively manage the risks connected with safety and crisis management and to prepare and protect people and critical infrastructure from terrorist attacks and other events related to the security threat.

A bit smaller funds have been reserved for the second of the “new” funds. The total budget of the **Asylum, Migration and Integration Fund** (AMIF), established for the period from **1 January 2014 to 31 December 2020** was set at the level of **3 137 million euro**. Comparing this sum to the total budget of three previous Funds – ERF, EIF and RF, that was 2 129 million euro¹¹, shows a significant increase in expenses in the field of migration and asylum policy of the EU.

The preamble to the Regulation establishing AMIF, draws attention to the need for **increased flexibility and simplification of procedures**. At the same time, while implementing of the Fund, the guiding principles should be used, which

¹¹ The sums referred to in the decisions establishing Funds, developed as follows: ERF - 628 million euro, Return Fund - 676 million euro (in both cases for the period 1 January 2008 - 31 December 2013) and EIF - 825 million euro (for the period 1 January 2007 - 31 December 2013).

are the efficiency of the funds and quality of expenditure. In addition, the implementation of the Fund should be extremely effective and easy for the user, and at the same time, meet the requirements of predictability and to ensure fair and transparent allocation of resources. All this is aimed at creating the possibility to meet the goals and objectives of the AMIF.

Article 3 Paragraph 1 of the Regulation establishing AMIF defines the **general objective of the Fund**, which is *to contribute to the efficient management of migration flows and to the implementation, strengthening and development of the common policy on asylum, subsidiary protection and temporary protection and the common immigration policy, while fully respecting the rights and principles enshrined in the Charter of Fundamental Rights of the European Union.*

Within its general objective, the Fund contributes to the common specific objectives listed in Article 3 Paragraph 2:

- a) *to strengthen and develop all aspects of the Common European Asylum System, including its external dimension;*
- b) *to support legal migration to the Member States in accordance with their economic and social needs, such as labour market needs, while safeguarding the integrity of the immigration systems of Member States, and to promote the effective integration of third-country nationals;*
- c) *to enhance fair and effective return strategies in the Member States which contribute to combating illegal immigration, with an emphasis on sustainability of return and effective readmission in the countries of origin and transit;*
- d) *to enhance solidarity and responsibility-sharing between the Member States, in particular towards those most affected by migration and asylum flows, including through practical cooperation.*

According to the analysis of the specific objectives, the Fund will focus on four main areas, namely the creation of a common European asylum system, the establishment and development of strategies on integration and the exploring the potential of legal migration, the development of the return programs and solidarity among Member States. Project activities under the AMIF will be able to carried out only

within the framework of the above-mentioned specific objectives, the priorities for which will be identified by the Member States under National Programs.

According to Article 5 of the Regulation, **the target group of the Fund** is:

- a) *those who enjoy refugee status or subsidiary protection status within the meaning of Directive 2011/95/EU;*
- b) *those who have applied for one of the forms of international protection referred to in point (a) and have not yet received a final decision;*
- c) *those who enjoy temporary protection within the meaning of Directive 2001/55/EC;*
- d) *those who are being or have been resettled in or transferred from a Member State.*

It is worth noting that the regulation contains a number of definitions of terms or phrases referring to the idea of the return of third-country nationals to their countries of origin. Among the definitions contained in Article 2 of the AMIF Regulation, we can find *inter alia* the concept of "**return**", meaning *the process of a third-country national going back, whether in voluntary compliance with an obligation to return or enforced, as defined in Article 3 of Directive 2008/115/EC*. The term "**removal**" means *the enforcement of the obligation to return, namely the physical transportation out of the Member State, as defined in Article 3 of Directive 2008/115/EC*. "**Voluntary departure**", according to the Regulation means *compliance with the obligation to return within the time-limit fixed for that purpose in the return decision, as defined in Article 3 of Directive 2008/115/EC*;

In the Preamble to the Regulation establishing AMIF (par. 26), it is noted how important is *to improve the management of the return of third-country nationals in all its dimensions, with a view to the continuous, fair and effective implementation of common standards on return, in particular as set out in Directive 2008/115/EC of the European Parliament and of the Council*. EU legislators recognize, that voluntary and enforced return are interlinked and have a mutually reinforcing effect. Therefore, it is in the interest of both, the EU as well as the Member States, to encourage the states to reinforce the complementarities of the two forms in their activities related to the management of returns. The regulation indicates the need to encourage Member States to give priority to voluntary return. On the other hand, still **there is**

a need to carry out removals *in order to safeguard the integrity of the immigration and asylum policy of the Union and the immigration and asylum systems of the Member States. Thus, the possibility of removals is a prerequisite for ensuring that this policy is not undermined and for enforcing the rule of law, which itself is essential to the creation of an area of freedom, security and justice (par. 28 of the Preamble).*

In accordance with Paragraph 29 of the Preamble, to ensure the effectiveness of the return policy, it is essential for the Fund to support specific measures for returnees in the country of return, in order to ensure their effective return to their town or region of origin under good conditions and to enhance their durable reintegration into their community.

The Preamble to the Regulation also highlights the importance of readmission agreements. It is also pointed at the need of AMIF to supplement and support activities undertaken by **the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union**, *inter alia* in the field of joint return operations.

Within the specific objective defined as enhancing fair and effective return strategies in the Member States, AMIF is focused on the following categories of third-country nationals (art. 11 of the Regulation):

- a) *third-country nationals who have not yet received a final negative decision in relation to their request to stay, their legal residence and/or international protection in a Member State, and who may choose to make use of voluntary return;*
- b) *third-country nationals enjoying the right to stay, legal residence and/or international protection within the meaning of Directive 2011/95/EU, or temporary protection within the meaning of Directive 2001/55/EC in a Member State, and who have chosen to make use of voluntary return;*
- c) *third-country nationals who are present in a Member State and do not or no longer fulfill the conditions for entry and/or stay in a Member State, including those third-country nationals whose removal has been postponed in accordance with Article 9 and Article 14(1) of Directive 2008/115/EC.*

It is worth noting, that the regulation adopted on 16 April 2014 entered into force on the day following its publication in the Official Journal of the European Union, i.e. 21

May 2014, and, according to the Treaties, since that time is binding and directly applicable in the Member States. However, according to Article 32, it shall apply from the 1st of January 2014.

CHAPTER 2.

Polish legal regulations on migrant return

2.1. Preliminary issues

The primary legislation acts governing migrant returns in the Polish law are:

- **Act on Foreigners** of 12 December 2012, which entered into force on 1 May 2014¹² (together with executive acts);
- **Act on granting protection to aliens within the territory of the Republic of Poland** of 13 June 2003¹³ with changes coming into force on 1 May 2014 (together with executive acts).

The issue of voluntary return has also been regulated in:

- **Agreement between the Minister of Internal Affairs and Administration of the Republic of Poland and the International Organization for Migration on cooperation in the field of voluntary returns of foreigners leaving the territory of the Republic of Poland** of 12 July 2005¹⁴;
- **Regulation of the Ministry of Internal Affairs and Administration on the amount of aid for foreigners applying for refugee status** of 10 November 2011¹⁵

On the basis of currently existing regulations voluntary return of the migrant may:

- 1) have an assisted nature and be implemented with the support of the International Organization for Migration (IOM),
- 2) be organized by the Head of the Office for Foreigners,

12 Dziennik Ustaw 2012, No. 1650.

13 Dziennik Ustaw 2012, No. 680.

14 Monitor Polski of 13 January 2006.

15 Dziennik Ustaw 2011, No. 261, Item 1564.

- 3) be organized independently by the foreigner in compliance with the a decision obliging him to return.

Although Poland has participated in the implementation of the EU's migration policy, the assumptions of Polish migration policy have been presented in the **"Polish Migration Policy - current state and postulated actions"** of 31 July, 2012¹⁶.

In this document we can also find reference to the return policy – *return policy is widely seen as an important tool to fight illegal migration, limiting the undesirable state – the illegal stay of foreigners, as well as fulfilling an important preventive role*¹⁷.

Among the recommendations proposed in the document in the field of voluntary returns were:

- *extension of the categories of foreigners who may benefit from a program of voluntary return on persons who have received subsidiary protection in Polish, and on victims of human trafficking, including those who did not wish to participate in the support program of the witness/victim of trafficking;*
- *ensuring the possibility to use the reintegration assistance to aliens whose returns are entirely organized by the Office for Foreigners*
- *conducting systematic research on the effectiveness of voluntary returns and reintegration assistance*¹⁸.

Current data on migration in Poland and in the European Union are presented at the website of the National Contact Point for the European Migration Network (EMN Contact Point in Poland):

www.emn.gov.pl

¹⁶ *Polityka Migracyjna Polski – stan obecny i postulowane działania* (Migration policy of Poland – the current state of play and further actions). The document prepared by the Working group on elaboration of Polish Migration Strategy, established the Intergovernmental Committee for Migration, within inter-ministerial Committee on Migration, approved by Committee on Migration at its meeting on 20 July 2011, updated as of 8 March 2012. The document is available on the Ministry of Interior's Public Information Bulletin's website - www.bip.msw.gov.pl.

¹⁷ *Ibidem*, s. 48.

¹⁸ *Ibidem*, s. 55.

2.2. Act on foreigners of 12 December 2013

2.2.1. Decision on imposing a return obligation on a foreigner

The legal basis for leaving the territory of the Republic of Poland of a third-country national is, as a general rule, a **decision on imposing on a foreigner a return obligation**. Such decision is issued to a foreigner (in accordance with Article 310 of the Act) by the **commanding officer of the Polish Border Guard or the commanding officer of a Polish Border Guard outpost**:

- **ex officio** – if established the premises justifying the decision on imposing the return obligation on a foreigner;
- **at the request** of a Voivode, the Minister of National Defence, the Chief of the Internal Security Agency, Chief of the Intelligence Agency, an authority of the Customs Service, a voivodeship or poviát (municipal) Police commander, the commanding officer of a Polish Border Guard unit or the commanding officer of a Polish Border Guard outpost territorially competent for the seat of the authority that submits the application or for the place of residence of the foreigner.

The Head of the Office for Foreigners shall be a higher-level authority, in relation to the commanding officer of a Polish Border Guard unit or the commanding officer of a Polish Border Guard outpost in matters pertaining to the imposition of return obligation on a foreigner (Article 321 of the Act).

In accordance with Article 302 of the Act on Foreigners, a decision on imposing the return obligation shall be issued to a foreigner, who:

- 1) resides or resided within the territory of the Republic of Poland without a valid visa or another valid document authorising him/her to enter this territory and stay within it;
- 2) *has not left the territory of the Republic of Poland **after the lapse of the maximum duration of his/her stay** within the territory of some or all Schengen countries to which he/she was entitled without the need for a visa;*
- 3) *has not left the territory of the Republic of Poland after the lapse using the maximum duration of his/her stay indicated in the Schengen visa within each 180-day period or after the lapse of the permissible period of stay on the basis of a national visa;*

- 4) **performs or performed work without a required work permit or an employer's declaration** of intention (registered in a district labour office) to employ him/her to perform work, or has been fined for illegal performance of work;
- 5) operated an **economic activity in breach of the regulations** applicable in this regard within the territory of the Republic of Poland;
- 6) **does not have the financial resources** necessary to cover the costs of his/her stay within the territory of the Republic of Poland, to travel back to the country of origin or residence or transit through the territory of the Republic of Poland to a third country that will grant a permission to enter and has not indicated reliable sources to obtain such funds;
- 7) the foreigner **is entered in the register of foreigners whose stay within the territory of the Republic of Poland is undesirable**;
- 8) the foreigner's data can be found in **the Schengen Information System for the purposes of refusing entry** if the foreigner stays within the territory of the Republic of Poland under the visa-free travel regime or under a Schengen visa, with the exception of a visa authorising only the entry and stay within the territory of the Republic of Poland
- 9) it is justified by **national security or defence, the protection of public order and safety or the interests** of the Republic of Poland;
- 10) **has crossed or attempted to cross the border in breach of legal regulations**;
- 11) has been **convicted** in the Republic of Poland **by a final decision** for a custodial sentence subject to execution, and there are grounds to conduct proceedings on his/her transfer abroad for the purpose of enforcing the penalty against him;
- 12) resides outside the border zone in which according to the permit for crossing the border under the local border traffic, he/she may reside;
- 13) stays within the territory of the Republic of Poland after lapse of the period of stay to which he/she was entitled under a permit to cross the border under the local border traffic;
- 14) further stay of the foreigner within the territory of the Republic of Poland would be a **threat to public health, which was confirmed by clinical examination**, or to the international relations of another European Union Member State;

- 15) *the purpose and conditions of stay of a foreigner within the territory of the Republic of Poland are inconsistent with the declared ones, unless the legal regulations allow him/her to be changed;*
- 16) *a **decision on refusal to grant refugee status or subsidiary protection** award or a decision to discontinue the proceedings on granting him/her refugee status was issued and he/she has not left the territory of the Republic of Poland within the deadline and in the case referred to in Article 299.6.2.*

In accordance with Article 323 of the Act, the Polish Border Guard Authority shall **record the issue of a return obligation for a foreigner in the foreigner's travel document**, and it shall immediately inform the authority that made the request for the issue thereof about it.

What is more, the authority that conducts the proceedings on imposing the return obligation shall instruct the foreigner about the opportunity to submit an application for refugee status (Article 304), and the proceedings on imposing the return obligation **shall be suspended** in the case when proceedings on granting refugee status to a foreigner have been instituted (Article 305).

The decision on imposing the return obligation for a foreigner shall **expire by virtue of law** if a foreigner has refugee status, subsidiary protection, resides within the territory of the Republic of Poland on the basis of a permit as a victim of human trafficking or a temporary residence permit due to other circumstances (Article 306).

According to article 307, a national visa shall be invalidated and a temporary residence permit and a work permit shall expire by virtue of law on the day on which the decision on imposing the return obligation for a foreigner has become final.

A decision on imposing the return obligation shall not be issued to a foreigner in the cases described in Article 303 of the Act, namely in the cases when a foreigner:

- 1) *has **refugee status** or subsidiary protection;*
- 2) *has been **granted residence permits for humanitarian reasons** or permits for tolerated stay, or there are reasons to grant;*
- 3) *has been awarded the permit referred to in Article 187(6) or (7);*
- 4) ***is a spouse of a Polish citizen or a foreigner holding a residence permit or a long-term resident's EU residence permit** within the territory of the Republic of Poland and it is not in breach of national defence or national security*

- or public safety and order, unless the purpose of marriage or of its existence is to circumvent this Act;*
- 5) *resides within the territory of the Republic of Poland on the basis of a Schengen visa issued for the purpose referred to in Article 60.1.23 that authorises him/her to enter only the territory of the Republic of Poland and stay within this territory, the permit referred to in Article 181.1 or the permit referred to in Article 176;*
 - 6) *was granted a **permanent residence permit or a long-term resident's EU residence permit** within the territory of the Republic of Poland;*
 - 7) *has a residence permit or another permit for stay granted by another Schengen country, and it is not in breach of national defence or national security or public safety and order, unless the foreigner did not go immediately to the territory of that Schengen state upon being informed of the obligation to leave for the territory of the country referred to in Article 314;*
 - 8) *is **temporarily seconded to provide services within the territory of the Republic of Poland by an employer established in a Member State** of the European Union, a Member States of the European Free Trade Association (EFTA) – a party to the agreement on the European Economic Area or Swiss Confederation and he/she is entitled to stay and be employed within the territory of that State, if the decision on imposing the return obligation would have to be released due to being within the territory of the Republic of Poland without a valid visa or another document that authorises him/her to enter that territory and stay within it or due to crossing or attempted crossing of the border in violation of legal regulations;*
 - 9) ***can be immediately transferred to a third country on the basis of an international agreement on the transfer** and acceptance of persons after prior arrest because of border crossing in violation of legal regulations;*
 - 10) ***can be immediately escorted to the border if he/she has been arrested in the border zone** immediately having unintentionally crossed the border in violation of legal regulations;*
 - 11) *can be immediately transferred to another Member State of the European Union, a Member States of the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area or the Swiss Confederation on the basis of an international agreement on the transfer and acceptance of persons, which was applicable on 13 January 2009;*

- 12) *resides within the territory of the Republic of Poland on the basis of a certificate referred to in Article 170.*

In accordance with Article 318 of the Act, **a decision on imposing the return obligation on a foreigner shall provide for the prohibition of re-entry into the territory of the Republic of Poland and shall determine the period of such a prohibition.**

A prohibition of re-entry into the territory of the Republic of Poland shall be ruled in case of decision on imposing the return obligation on a foreigner in which no deadline for voluntary return has been specified or a deadline for voluntary return has been specified – in case when, within this deadline, a foreigner has not left the territory of the Republic of Poland, or has crossed or attempted to cross the border in breach of legal regulations (Article 318 Paragraph 2).

The prohibition of re-entry into the territory of the Republic of Poland, according to Article 319 of the Act, **shall be formulated for the following periods:**

- 1) **from 6 months to 3 years** – in the cases referred to in Article 302 Paragraph 1, Points 1-3, 6, 10, 12, 13, 15 or 16, (among others, when a foreigner resides or resided within the territory of the Republic of Poland without a valid visa, has not left the territory of the Republic of Poland after the lapse of the maximum duration of his/her stay within the territory of some or all Schengen countries, does not have the financial resources necessary to cover the costs of his/her stay within the territory of the Republic of Poland, has crossed or attempted to cross the border in breach of legal regulations, resides outside the border zone in which according to the permit for crossing the border under the local border traffic, he/she may reside, stays within the territory of the Republic of Poland after lapse of the period of stay to which he/she was entitled under a permit to cross the border under the local border traffic, a decision on refusal to grant refugee status or subsidiary protection award was issued,
- 2) **from 1 year to 3 years** – in the cases referred to in Article 302 Paragraph 1, Points 4-5 (when a foreigner performs or performed work without a required work permit or an employer's declaration of intention to employ him/her to perform work, or operated an economic activity in breach of the regulations applicable in this regard within the territory of the Republic of Poland,
- 3) **from 3 to 5 years** – in the cases referred to in Article 302 Paragraph 1 Points 7, 8, 11 or 14 (among others, when the foreigner is entered in the register of foreigners whose stay within the territory of the Republic of Poland is undesira-

ble, the foreigner's data can be found in the Schengen Information System for the purposes of refusing entry, has been convicted in the Republic of Poland by a final decision for a custodial sentence subject to execution, and there are grounds to conduct proceedings on his/her transfer abroad for the purpose of enforcing the penalty against him or further stay of the foreigner within the territory of the Republic of Poland would be a threat to public health, which was confirmed by clinical examination,

- 4) **5 years** – in the cases referred to in Article 302 Paragraph 1 Point 9 (meaning when it is justified by national security or defence, the protection of public order and safety or the interests of the Republic of Poland).

The prohibition of re-entry into the territory of the Republic of Poland may be withdrawn by way of decision in the cases described in Article 320, if a foreigner demonstrates that:

- 1) he/she has fulfilled obligations arising from the decision on imposing the return obligation,
- 2) his/her re-entry into the territory of the Republic of Poland or other Schengen states is to be made due to justified reasons, in particular for humanitarian reasons,
- 3) he/she has been granted assistance in voluntary return.

2.2.2. The realization of voluntary return in the light of the new Act on Foreigners

Regulations concerning voluntary return have been placed in Chapter 2, Section VII of the Act on Foreigners. In accordance with Article 315 of the Act, *the decision on imposing the return obligation on a foreigner shall define a deadline for voluntary return, which ranges from 15 to 30 days, counting from the date of notification of the decision.*

It is worth mentioning, that the Polish legislature extended the minimum period for voluntary return to 15 days, although the Return Directive in Article 7 provides for a period of 7 to 30 days. **The decision shall not specify the period for voluntary return** of a foreigner in the cases referred to in Article 315 Paragraph 2, meaning if:

- 1) *there is a likelihood that a foreigner will escape,*

- 2) *it is required for reasons of national security or defence, the protection of public order and safety*

In case when a foreigner crossed or attempted to cross the border in violation of legal regulations within the period after the issue of the decision on imposing the return obligation on the foreigner and before the deadline for voluntary return, the period for voluntary return shall expire by virtue of law (Article 315, Paragraph 6).

Particularly important from the point of view of the protection of the interests of the foreigner is the provision of Article 316 of the Act, according to which **the authority issuing the decision on imposing the return obligation on a foreigner may extend the deadline for voluntary return** if:

- 1) *the foreigner is obliged to appear in person before the Polish public authority,*
- 2) *the foreigners' presence within the territory of the Republic of Poland is required because of the interest of the Republic of Poland,*
- 3) *the exceptional personal situation of the foreigner, resulting in particular from the length of the foreigner's stay within the territory of the Republic of Poland, from the foreigner's family and social ties or a need to continue education by a minor child of the foreigner.*

The period for voluntary return may be **extended** even after issuing a decision on imposing the return obligation (Article 316 Paragraph 3). But in any case, this period **must not be longer than one year.**

To secure the deadline for voluntary return (Article 317), a foreigner may be obliged, until the time of voluntary return, to do the following:

- *to report at specified intervals to the authority indicated in the ruling – until the date of voluntary return;*
- *to pay a security deposit in an amount specified in the decision, no lower than twice the amount of the minimum wage stipulated by minimum wage regulations;*
- *to provide the deposit to the body indicated in the decision of the travel document;*
- *to reside in the place designated in the decision – until the day of voluntary return.*

The use of one or more of the above measures predicates the decision on imposing the return obligation on a foreigner (Article 317 Paragraph 2). In addition until the day of voluntary return the foreigner is not allowed to change the place of residence.

If a decision on imposing the return obligation on a foreigner provides the prohibition of re-entry into the territory of the Republic of Poland on the basis of Article 319 of the Act, then in the case of receiving assistance for voluntary return, the issuing authority may decide, at the request of the foreigner, to revoke such prohibition.

According to Article 334 of the Act, *an entity whose statutory duties include the organization of voluntary returns may organize assistance in voluntary return of a foreigner upon his/her request.* **Assistance in voluntary return** (on the basis of Article 334 Paragraph 2) **may be provided to a foreigner:**

- *who applies for refugee status and whose application for this status has been disregarded for formal reasons,*
- *for whom a decision has been issued that imposes a return obligation on a foreigner, with the exception of a decision on imposing the return obligation that does not specify a deadline for voluntary return, or with the exception of another case where the decision is subject to forced execution,*
- *who resides within the territory of the Republic of Poland on the basis of a certificate referred to in Article 170 or on the basis of a temporary residence permit referred to in Article 176.*

In accordance with Article 335 of the Act, **assistance in voluntary return shall cover:** travel costs, administrative fees of obtaining a travel document and necessary visas and permits, the costs of food during travel, costs of medical care, costs of organizing voluntary return by the entity whose statutory duties include the organization of voluntary returns and other costs associated with providing safe and humane return for a foreigner.

To prevent excessive use of the instrument of assisted return, according to Article 334 Paragraph 5, **financing of further assistance for voluntary return may take place not earlier than two years** from the date on which the foreigner who has been granted the first assistance for voluntary return funded by the Commander-in-Chief of the Polish Border Guard left the territory of the Republic of Poland. This provision shall not apply to assistance to a foreigner who is a victim of human trafficking and an unattended minor foreigner residing within the territory of the Republic of Poland.

Importantly, the issuing authority **shall inform the foreigner of the possibility of assisted voluntary return**, if the person meets the criteria specified in Article 334 Paragraph 2.

2.2.3. Forced execution of the decision on imposing the return obligation on the foreigner

According to Article 329 of the Act on Foreigners, *if a foreigner has not voluntarily left the territory of the Republic of Poland within the period specified in the decision on imposing the return obligation, the decision is subject to **forced execution**.*

What is more, forced execution of a decision on imposing the return obligation on a foreigner shall take place when:

- *the decision does not specify the deadline for voluntary return*
- *after the issue of the decision there is a likelihood that the foreigner will escape, or a stay of the foreigner might pose a threat to national defence or national security or public safety and order.*

In accordance with Article 329 Paragraph 3 of the Act, **forced execution of the decision** on imposing the return obligation on a foreigner shall consist in bringing a foreigner to the border or to an airport or sea port of the state to which he/she is to be transferred.

A decision on imposing the return obligation to the country of origin shall not be issued to a foreigner (according to Article 330 of the Act) if:

- 1) *there are pending proceedings involving the foreigner on **granting refugee status**,*
- 2) *there are pending proceedings on granting the foreigner **a residence permit for humanitarian reasons, a tolerated stay permit** or the permit referred to in Article 176 or Article 181 Paragraph 1,*
- 3) *the foreigner has been granted a **residence permit for humanitarian reasons or a permit for tolerated stay**, or there are reasons to grant him/her such a permit,*

- 4) *the foreigner resides within the territory of the Republic of Poland on the basis of a **Schengen visa** that authorizes him/her to enter only the territory of the Republic of Poland and that was issued for the purpose referred to in Article 60 Paragraph 1 Point 23, or the permit referred to in Article 181 Paragraph 1,*
- 5) *the foreigner resides within the territory of the Republic of Poland on the basis of a certificate referred to in Article 170,*
- 6) *the foreigner is a **spouse of a Polish citizen** or a foreigner holding a permanent residence permit or a long-term resident's EU residence permit within the territory of the Republic of Poland and it is not in breach of national defence or national security or public safety and order, unless the purpose of marriage or of its existence is to circumvent this Act,*
- 7) *a preventive measure in the form of a prohibition to leave the country has been ruled against the foreigner in the Republic of Poland.*

There are limited possibilities for **execution of the decision on imposing the return obligation issued to a minor foreigner**. Such decision shall be executed, according to Article 332, provided that:

- 1) *in the country to which it was obliged to return, the minor foreigner will be provided with care by its parents, other adults or care institutions as defined with the standards set out in the Convention on the Rights of the Child (...),*
- 2) *the return shall be conducted under the custody of a legal representative, or such a foreigner will be transferred to its legal representative or a representative of competent authorities of the country to which it will be returned.*

2.2.4. Detention or custody prior to expulsion

In accordance with Paragraph 16 of the Preamble to the Return Directive *the use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.*

According to Article 394 Paragraph 1 of the Act on Foreigners, *a foreigner in the case of whom there are circumstances that justify issuing a decision on imposing the return obligation on him/her or a foreigner who fails to comply with the obligations set*

out in such a decision or fails to comply with the obligations laid down in a ruling on the use of the measures referred to in Article 398 Paragraph 3 may be detained for a period not longer than 48 hours. **A foreigner's detention shall be carried out by the Border Guard or the Police.**

A detained foreigner shall be released if, within 48 hours of detention, he/she has not been put at disposal for a court of law, and at the same time no request has been made to put him/her in a guarded centre or in a detention centre for foreigners, or if, within 24 hours of putting at disposal for a court of law, no ruling to put him/her in a guarded centre or in a detention centre for foreigners has been delivered to him/her (Article 394 Paragraph 5). A detained foreigner shall also be released upon order by a court of law, or if the reasons for detention has ceased to exist.

In accordance with Article 398 of the Act, **a foreigner shall be placed in a guarded facility if:**

- 1) *there is a probability that a decision on imposing the return obligation on a foreigner will be issued without a specified period for voluntary return,*
- 2) *a decision on imposing the return obligation on a foreigner has been issued without a specified period for voluntary return,*
- 3) *a foreigner has not voluntarily left the territory of the Republic of Poland within the period specified in the decision on imposing the return obligation, and immediate forced execution of the decision is not possible,*
- 4) *a foreigner fails to meet the obligations set out in the ruling on use of the measures referred to in paragraph 3.*

If there are **no grounds for placing the foreigner in the detention center**, and no decision on return obligation has been issued to a foreigner (according to Article 298 Paragraph 2), a foreigner shall be obliged to:

- 1) **report at specified intervals to the Polish Border Guard authority** indicated in the ruling,
- 2) **lodge a security deposit** specified in the ruling, no lower than twice the amount of the minimum wage stipulated by minimum wage law,
- 3) **surrender travel documents** for custody to the body indicated in the ruling,
- 4) **reside at the place indicated in the ruling** – until a decision on imposing the return obligation has been executed.

Furthermore, according to Article 400 of the Act, *a ruling on detention of foreigners in a guarded center or in a detention center for foreigners shall not be issued if:*

- 1) *it could pose threat to the life or health of a foreigner,*
- 2) *the foreigner 's physical and psychological condition could justify a presumption that a foreigner has experienced violence.*

A court of law, in its ruling ordering to place a foreigner in a guarded center or in a detention center for foreigners, shall indicate the period of stay in a guarded center or in a detention center for foreigners, but not more than **3 months** (Article 403 of the Act). The period of stay in a guarded center or in a detention center for foreigners may be **extended** for a fixed period of time, if:

- *there are reasonable grounds to believe that the period of execution of the decision on imposing the return obligation on a foreigner will be extended,*
- *a foreigner for whom a decision on imposing the return obligation has been issued does not co-operate with a Polish Border Guard authority in the execution of the decision,*
- *execution of the decision on imposing the return obligation on a foreigner is temporarily impossible due to delays in obtaining documents from third parties necessary for this purpose.*

According to Article 403 Paragraph 3, ***the period of stay in a guarded centre or in a detention centre for foreigners must not exceed 12 months, where each subsequent ruling of the court in their case shall be issued for a period not longer than three months.***

The period of stay in a guarded centre or in a detention centre for foreigners, according to Article 403 Paragraph 5, (if a foreigner has filed a complaint to the administrative court) may be extended to **18 months**. However, according to Article 403 Paragraph 6 of the Act, **a foreigner shall be placed in a guarded centre or in a detention centre for foreigners for the shortest possible period.**

2.2.5. List of foreigners whose stay within the territory of the Republic of Poland is undesirable

A list of foreigners whose stay within the territory of the Republic of Poland is undesirable is kept by the **Head of the Office for Foreigners**. The data of a foreigner shall be entered into the list and stored in it if at least one of the premises, described in Article 435 has been fulfilled:

- 1) *a decision on imposing the return obligation on a foreigner has been issued, and a prohibition on re-entry into the territory of the Republic of Poland or a prohibition on entry into the territory of the Republic of Poland and other countries of the Schengen area has been issued;*
- 2) *a foreigner has been convicted by a final judgement in:*
 - a) *the Republic of Poland – for an intentional crime or a tax crime to pay a fine or serve a prison sentence,*
 - b) *a country other than a Schengen country – for an offense constituting a crime under Polish law,*
 - c) *the Republic of Poland or another Schengen state – for an offense to serve a prison sentence for more than one year;*
- 3) *the foreigner's entry into or stay within the territory of the Republic of Poland is undesirable due to obligations arising from the provisions of ratified international agreements applicable to the Republic of Poland;*
- 4) *it is justified by national security or defence, the protection of public order and safety or the interests of the Republic of Poland;*
- 5) *a foreigner has been transferred to a third country on the basis of an international agreement on the transfer and acceptance of persons after detention because of border crossing in violation of legal regulations.*

Inclusion of data of a foreigner in the list shall be made by the Head of the Office, ex officio or upon request by one of the bodies listed in Article 440 of the Act: the minister of National Defence; the minister competent for public finance; the minister competent for foreign affairs; the Commander-in-Chief of the Police; the Commander-in-Chief of the Polish Border Guard; the Head of Internal Security Agency; the Head of the Foreign Intelligence Agency; the Head of the Customs Service; the President of

the Institute of National Remembrance – the Chief Commission for the Prosecution of Crimes against the Polish Nation or a Voivode.

The foreigner's data shall be included in the list, according to Article 438, for a period:

- 1) **specified in a decision on imposing the return obligation on a foreigner** if it was ordered therein to prohibit the re-entry into the territory of the Republic of Poland or to prohibit the entry into the territory of the Republic of Poland and other countries of the Schengen area;
- 2) **of three years from the date of transfer of a foreigner to a third country** on the basis of an international agreement on the transfer and acceptance of persons after detention because of border crossing in violation of legal regulations;
- 3) **of five years from the end date of a prison sentence** served on the basis of a conviction that represented the basis for entry of the data into the list if a foreigner was convicted to a prison sentence of more than three years;
- 4) **of three years from the end date of a prison sentence** served on the basis of a judgement that represented the basis for entry of the data into the list if a foreigner was convicted to a prison sentence of more than three years;
- 5) **of three years from the date of entry into force of a judgement** that represented the basis for entry of the data into the list if a foreigner was sentenced to pay a fine;
- 6) of a conditional suspension of a prison sentence from the date of entry into force of the judgement referred to in Article 435 Paragraph 1 Point 2, if a foreigner was convicted to a conditionally suspended prison sentence;
- 7) arising from international agreements that are applicable to the Republic of Poland and represent a basis for foreigner's entry into the list;
- 8) **no longer than five years** with an opportunity of renewal for additional periods none of which may exceed five years, in the case of entries in the list due to the fact that the entry or residence of a foreigner may be a threat to national defence or national security or the protection of public order and safety or the interests of the Republic of Poland.

The data of a foreigner shall be included in the list **starting from the date** of execution of a decision on imposing the return obligation; on which the deadline for volun-

tary return referred to in a decision on imposing the return obligation on a foreigner has passed, in the absence of information on the execution of that decision; or of issuance of a decision on imposing the return obligation on a foreigner if the decision does not specify the period for voluntary return (Article 438 Paragraph 2).

2.3. Act on granting protection to aliens within the territory of the Republic of Poland and voluntary return realized by the Office for Foreigners

The Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland shall, in accordance with Article 1, lay down the principles, conditions and procedure for granting protection to aliens within the territory of the Republic of Poland and the authorities competent in these matters (Article 1)¹⁹.

According to Article 70 Paragraph 1 of the Act, placed in Chapter V (Assistance for aliens applying for granting refugee status): *the applicant and the person on whose behalf the applicant is acting shall be provided with social assistance and medical care and may be provided with: 1) assistance in voluntary return to the country to which they have the right to enter, hereinafter referred to as 'assistance in voluntary return.*

Assistance in voluntary return may not be, in accordance with Article 70, Paragraph 2, granted to **a person** who:

- 1) uses subsidiary protection;
- 2) resides in the territory of the Republic of Poland on the basis of a tolerated stay permit after the expiration of the periods referred to in Article 74, Paragraph 1 - which is:
 - after the completion of the proceedings for granting refugee status,
 - 2 months after the notification of the final decision on granting refugee status, or for a period of 14 days from the date of the notification of the final decision to discontinue in the cases where proceedings on granting refugee status have been discontinued;

¹⁹ Dziennik Ustaw 2012, No. 680.

- 3) resides in the territory of the Republic of Poland on the basis of a residence permit for a fixed period, a settlement permit or residence permit for long-term resident of the European Communities;
- 4) is in a custodian-educational centre;
- 5) is in the guarded centre or in the arrest for the purpose of expulsion;
- 6) is temporarily detained or serving a prison sentence.

A request for assistance in voluntary return made by persons mentioned above, shall be left unexamined.

In accordance with Article 75 of the Act, assistance in voluntary return can be provided to foreigners:

- 1) *who have been denied refugee status and have not been granted subsidiary protection;*
- 2) *who have applied and then withdrawn their application for refugee status.*

Another aid in the return may be granted by analogy with the provisions of the Act on Foreigners, **after the period of two years** from the date on which the foreigner has left the territory of the Republic of Poland with the use of such assistance (Article 75, Paragraph 1a).

Assistance in voluntary return, provided in accordance with Article 75, Paragraph 2 of the Act, **includes:**

- *costs of transportation;*
- *administrative costs related to obtaining travel documents and necessary visas and permits;*
- *the cost of meals during travel;*
- *costs of medical treatment during travel;*
- *the costs of organizing voluntary return by the entity, the statutory duties of which include the organization of voluntary returns.*

The decision to grant aid for voluntary return is issued by the Head of the Office for Foreigners upon a foreigner's request. Such a request should be issued by a foreigner in a *period not exceeding 30 days from the day on which the decision on refusal to grant him refugee status or subsidiary protection or decision to discontinue the pro-*

ceedings on granting him refugee status became final (Article 75, Paragraph 3a). The request issued after this deadline shall be left unexamined.

Pursuant to Article 75, Paragraph 4, **the return is arranged by the Head of the Office**. In accordance with Article 82c, *the Head of the Office may authorize international organizations, on the basis of international agreements, to organize voluntary return*.

On the basis of the Article 86, the legislature gave the minister competence with respect to internal affairs the right to determine, by means of an ordinance, the amount of assistance to cover the costs of food for a foreigner travelling in connection with the voluntary return to a country to which the alien has the right of entry, as well as the time limit and the measures of paying out the benefits.

In accordance with the **Ordinance of the Minister of Interior and Administration on the amount of assistance for foreigners applying for refugee status** of 10 November 2011²⁰ (Paragraph 8):

- 1) *the amount of aid to cover the costs of nutrition for a foreigner during travel in connection with voluntary return to the country in which the foreigner was granted the right of entry (...) shall be PLN 23 per day of travel;*
- 2) *such aid shall be granted for no longer than 3 days;*
- 3) *the amount allocated to assistance referred to in (1) shall be paid no earlier than 7 days and no later than 2 days prior to the voluntary return of the foreigner (...).*

Another important fact is that The Office does not provide reintegration assistance. For this reason most returning foreigners prefer the assistance of the International Organization for Migration.

Foreigners who want to return with the help of the Office should report to the **Centre for Foreigners in Podkowa Leśna – Dębak**. Foreigners who are residents of Centers for Foreigners may submit an application at their location.

²⁰ Dziennik Ustaw 2011 No. 261, Item 1564. Ordinance came into force on 1 January 2012.

2.4. International Organization for Migration and the Assisted Voluntary Return Program

The **International Organization for Migration**, with its Headquarter in Geneva is an international organization that was founded in 1951.

IOM focuses, according to the Constitution adopted on 19 October 1953²¹, on enhancing the orderly management of migration and the effective respect for the human rights of migrants in accordance with international law²², and to undertake programs which facilitate the voluntary return and reintegration of migrants. Poland has been cooperating with IOM since 1993, but IOM Poland office operates in Warsaw only since 2002²³. **The Assisted Voluntary Return Program has been implemented since 2006.**

This program is implemented by IOM on the basis of the **Agreement between the Minister of Internal Affairs and Administration of the Republic of Poland and the International Organization for Migration on the cooperation in the field of voluntary returns of aliens leaving the territory of the Republic of Poland** of 12 July 2005²⁴. According to the Preamble to the Agreement, an *expansion and strengthening of existing co-operation in the field related to management of voluntary returns of aliens leaving the territory of the Republic of Poland may contribute to increasing the efficient operation of Polish migration policy.*

The agreement defines the terms "voluntary return" and "country of return" (Article 2 of the Agreement):

- **"voluntary return"** refers to situation where an alien agrees to leave the territory of the Republic of Poland to return to the country of which he/she is a national or, where such return is not possible or an alien is a stateless person – to the country of former residence or to another country which agrees or is obliged to receive him/her, when alien's decision on return is based upon freedom of choice, meaning the absence of any physical, psychological or ma-

21 The Constitution is available in English at: www.iom.int

22 Source: www.iom.pl

23 IOM Poland is located in Warsaw on Mariensztat 8.

24 Monitor Polski of 13 January 2006.

terial pressure, and upon an informed decision which requires having sufficiently accurate and objective information about the conditions of return and the situation in the country that the alien returns to;

- **"country of return"** – *refers to the country of which an alien is a national, the country of his/her former residence, or a country which agrees or is obliged to receive him/her.*

Article 1 of the Agreement enlists **the group of foreigners, the provisions of the Agreement shall apply to:**

- aliens who applied for refugee status:
 - a) whose applications have been left without examination for formal reasons;
 - b) who have been refused refugee status and have not been granted permission for tolerated stay;
- aliens who applied for refugee status and then withdrew or did not pursue their claim;
- aliens who applied for asylum and who have been refused asylum in the Republic of Poland;
- aliens who have been issued the decision which indicate an obligation to leave the territory of the Republic of Poland.

The provisions of the Agreement do not apply to foreigners who have been granted refugee status, despite the fact that, this category of beneficiaries was included in the Decision establishing the European Return Fund. In many cases, such return would be justified, especially when the situation in the country of a foreigner's origin has changed.

The responsibilities of the IOM, according to Article 4, shall be to:

- prepare informational materials concerning voluntary returns and to disseminate them promptly among foreigners – potential beneficiaries;
- provide assistance to the foreigners, in order to obtain travel documents and visas;
- arrange for transportation to enable voluntary returns of aliens leaving the territory of the Republic of Poland, including departure from the territory of the Republic of Poland, arrival to the country of return and transit through its territory. In the framework of IOM's voluntary return, a foreigner shall be able

to return to a place chosen by them even if it is far from main communication points;

- prepare and update training materials and information concerning the countries of origin of the aliens;
- train representatives of the Polish governmental and non-governmental organizations dealing with foreigner's affairs.

Moreover, upon the Minister's request, the IOM shall provide assistance to foreigners in order to support the process of their re-integration in the country of return (Article 4 Paragraph 2). The Organization, in accordance with Article 4, Paragraph 3, shall endeavor to promote the **conclusion of the agreements** with the transit countries and countries of return in order to secure assistance to aliens enjoying voluntary returns and to ensure control over transit through these countries.

The responsibilities of the Minister, in accordance with Article 5 of the Agreement, is to inform the foreigners – beneficiaries of the return program, specified in Article 1, on possibilities of voluntary returns and provide the Organization with information concerning foreigners (with their consent), within scope necessary for executing tasks imposed by this Agreement.

On the basis of Article 6 of the Agreement a **Joint Consultative Commission**, was established. The Commission shall be composed of 4 representatives, 2 appointed by the Minister and 2 by the Organization. Additionally, according to Article 4, Paragraph 4, *where necessary, representatives of governmental and non-governmental organizations which deal with foreigner's affairs may participate in the work of the Commission*. The President of the Commission convenes meetings of the Commission, as need be, at least once every six months.

The responsibilities of the Commission are contained in Article 6, Paragraph 2 and shall be to:

- supervise the implementation of the provisions of this Agreement;
- evaluate the co-operation with the Polish governmental and non-governmental organizations which deal with foreigner's affairs;
- advise upon submitted proposals concerning the organization of voluntary returns of foreigners.

The International Organization for Migration in Poland is obliged to submit a plan of action provided for in the Agreement (together with the statement of anticipated costs) by 31 December each calendar year.

Expenses incurred by IOM are reimbursed by the Head of the Office for Foreigners (with regard to: foreigners who applied for refugee status and then withdrew or did not pursue their claim and foreigners who applied for asylum and who have been refused asylum in the Republic of Poland) or by **the Chief Commander of the Border Guard** (with regard to: foreigners who applied for refugee status whose applications have been left unexamined for formal reasons or who have been refused refugee status and have not been granted permission for tolerated stay, and aliens who have been issued the decision on obligation to leave the territory of the Republic of Poland). Reimbursement shall be made on the basis of the monthly debit notes.

The International Organization for Migration in Poland is obliged to submit a technical report (for the first six months by 31 July, and for each year within 90 days of the end of the calendar year).

Voluntariness is the basic principle of the AVENIR program. According to the information contained in the IOM publication: *voluntariness of the decision consists of two components: "freedom of choice", understood as the absence of any kind of physical coercion and "informed decision" assuming, that the decision is based on reliable and objective information*²⁵.

The procedure of assisted voluntary return organized by IOM comprises the following stages:

- dissemination of information about the program;
- directing to the program;
- confirmation of the eligibility of the request for assistance in voluntary return;
- consultancy activities on return (for example, obtaining information about the situation in the country of origin);
- submission of a request for assistance in voluntary return;
- organizing the return trip (including obtaining travel documents, visas and permits);

²⁵ *Assisted Voluntary Return from Poland. Principles and practice*, IOM Warsaw 2012, p. 17.

- medical consultation (especially when there is a suspicion that the health condition would be a contraindication for travel);
- material help before departure (if the foreigner is homeless or has no means of livelihood);
- departure – IOM provides transportation to the airport or train station, and, in exceptional circumstances, assistance during the journey;
- reintegration assistance after return;
- monitoring of the return and evaluation missions, during which IOM staff can meet with project beneficiaries²⁶.

A particularly important aspect of the AVENIR program is to ensure the **sustainability of return**. For this reason, the IOM provides a wide range of aid measures in the process of reintegration. These are mainly:

- financial support and assistance to meet the basic needs – this kind of assistance is supposed to ensure the possibility of organizing life in the country of return in the first days after returning;
- assistance for establishing and operating a business – foreigners have the opportunity to prepare a business plan and open business after returning;
- vocational training;
- educational assistance – targeted primarily to juveniles;
- subsidized employment and internships.

Special care in voluntary return shall be provided to persons requiring special treatment, i.e. pregnant women, single parents with young children, unaccompanied juvenile, the indisposed and the disabled, as well as victims of human trafficking.

Detailed information on the program is provided
by the IOM office employees in Warsaw under phone number +48 22 538 9103
or Wroclaw office +48 698 081 732, and the IOM website:

www.iom.pl

26 *Ibidem*, p. 25.

2.5. Unassisted voluntary return

In a situation where the foreigner's stay in Poland is irregular, he/she can independently go back to the country of origin. Once at the border, the foreigner should inform the Border Guard officer that he/she has been in Poland illegally and wants to voluntarily leave the Republic of Poland.

A person **applying for refugee status**, who wants to leave voluntarily should apply to the Head of the Office for Foreigners for discontinuing the proceedings in connection with intended voluntary return. After receiving the passport and other documents from the deposit, the foreigner can go to the border crossing. He/she is also obliged to surrender a Temporary Identity Certificate issued in relation with the refugee proceedings.

CHAPTER 3.

Project experience

3.1. Activities undertaken in the project

The „Support for Voluntary Return in the Lublin Region II“²⁷ project works to create a collaboration platform for organizations and institutions involved in voluntary return and pursuing return policy. The long-term goal of the project is to promote the idea of voluntary return.

The project includes:

- organizing regular expert seminars (4 per year) and training sessions (3 per year) dedicated to: legal changes and legal issues of returns, information on countries of origin, human rights and the exchange of good practices among judges, prosecutors and the Border Guard;
- a quarterly-published Newsletter , which discusses the most interesting phenomena of European migration – the Newsletter is available on: www.migrant.lublin.pl and www.panstwoprawa.org;
- maintaining a free of charge Migration Library – thanks to co-financing from Return Fund collections are still expanded – a library catalog is available on: www.migrant.lublin.pl and www.panstwoprawa.org;
- materials promoting voluntary return are being prepared – **brochures and leaflets** addressed to foreigners – the potential beneficiaries of the program of voluntary returns.

27 The project's implementation period: 1 January 2013 - 30 June 2015.

3.2. Recommendations

The project implemented by the Rule of Law Institute aims to **promote voluntary return and sensitivity to the problem of protection of the rights of irregular migrants.**

We believe that by providing legal and practical knowledge about voluntary return for both foreigners and institutions working with migrants, voluntary returns will become the preferred instrument of return policy.

It seems important **to promote returns through examples of people who returned to their country of origin and were effectively integrated there** – it is important that examples were related to the country of the same culture from which the foreigner originates.

Foreigners potentially interested in voluntary return should also have access to free legal advice, but also to reliable and detailed information on the situation in their country of origin. Therefore activities in the framework of our project focus on trainings for the Border Guard, the Office for Foreigners and other institutions in the field of intercultural communication and the situation in the countries of origin of migrants, such as region of Central Asia, the Caucasus and the Russian Federation.

List of legal acts and documents:

- Regulation (EU) No 513/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA (OJ L 150/93 of 20 May 2014)
- Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management (OJ L 150/112 of 20 May 2014)
- Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC (OJ L 150/143 of 20 May 2014)
- Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC (OJ L 150/168 of 20 May 2014)
- Consolidated version of the Treaty on European Union (OJ C 83/13 of 30 March 2010)
- Consolidated version of the Treaty on the Functioning of the European Union (OJ C 83/47 of 30 March 2010)
- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348/98 of 24 December 2008)
- Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General Program 'Solidarity and Management of Migration Flows' (OJ L 144/45 of 6 June 2007)

Ustawa o cudzoziemcach z dnia 12 grudnia 2013 r. (Act on Foreigners of 12 December 2013) (consolidated text: Dziennik Ustaw 2013, item 1650)

Ustawa o udzielaniu cudzoziemcom ochrony na terytorium RP z dnia 13 czerwca 2003 r. (Act on granting protection to aliens within the territory of the Republic of Poland of 13 June 2003) (consolidated text: Dziennik Ustaw 2012, No. 680)

Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 10 listopada 2011 r. w sprawie wysokości pomocy dla cudzoziemców ubiegających się o nadanie statusu uchodźcy z 10 listopada 2011 r. (Ordinance of the Minister of Interior and Administration of 10 May 2011 establishing the amount of financial support for foreigners applying for refugee status) (Dziennik Ustaw 2011, No. 261, item 1564)

Porozumienie między Ministrem Spraw Wewnętrznych i Administracji Rzeczypospolitej Polskiej a Międzynarodową Organizacją do Spraw Migracji w sprawie współpracy w zakresie dobrowolnych powrotów cudzoziemców opuszczających terytorium Rzeczypospolitej Polskiej z dnia 12 lipca 2005 r. (Agreement between the Ministry of Internal Affairs and Administration of the Republic of Poland and the International Organization for Migration on cooperation in the field of voluntary returns of aliens leaving the territory of the Republic of Poland dated 12 July 2005) (Monitor Polski of 13 January 2006)

The Stockholm Program – An open and secure Europe serving and protecting citizens (OJ C 115 of 4 May 2010)

Fundamental Rights of migrants in irregular situation in the European Union, FRA 2011, available at the website of the Fundamental Rights Agency – www.fra.europa.eu

Polityka Migracyjna Polski – stan obecny i postulowane działania (Migration policy of Poland (Migration policy of Poland – the current state of play and the further actions). The document prepared by the Working group on elaboration of Polish Migration Strategy, established the Intergovernmental Committee for Migration, within inter-ministerial Committee on Migration, approved by Committee on Migration at its meeting on 20 July 2011, updated as of 8 March 2012. The document is available on the Ministry of Interior's Public Information Bulletin's website - www.bip.msw.gov.pl

Pomoc w dobrowolnym powrocie z Polski. Zasady i praktyka (Assisted Voluntary return from Poland. Principles and practice), IOM Warszawa 2012

Programs and strategies In the EU Member States fostering Assisted Voluntary Returns to and Reintegration in Third Countries, European Migration Network, March 2011, available at: www.emn.intrasoft-intl.com