THE RULE OF LAW INSTITUTE
INSTYTUT NA RZECZ PAŃSTWA PRAWA

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LEGAL OPINION

on the systemic deficiencies in the asylum procedure and in the reception conditions for asylum seekers in Poland

to be taken into account in the Dublin transfer of M.P. from France to Poland

GENERAL REMARKS

Cooperation of the Member States of the European Union in the process of application of the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [hereinafter Dublin Regulation] must be based on mutual trust and assumption that in all Member States there is a comparable level of protection of Fundamental Rights. Dublin transfers to the Member State that has been designated on the basis of the criteria listed in Dublin Regulation may not be effectively enforced in cases when according to art. 3(2) of the Dublin Regulation "there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union". In 2011 on the basis of this provision transfers to Greece have been considered to violate fundamental rights [Judgment of the Court (Grand Chamber) of 21 December 2011 of NS and others v. Secretary of State for the Home Department, In Joined Cases C-411/10 and C-493/10].

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EXPERIENCE OF THE RULE OF LAW INSTITUTE IN ASYLUM AND RETURN CASES

The Rule of Law Institute is an independent NGO established by academics and students coming from the Law Faculty of the John Paul II Catholic University of Lublin. Since 2003 it has been providing legal assistance to refugees in Poland. For its contribution in building the system of providing legal assistance to asylum seekers the Rule of Law has been recognized by the Office for Foreigners and Ministry of Interior Affairs. It has implemented dozens of projects funded by UNHCR, European Commission/UNDP, European Refugee Fund, European Return Fund, EEA/Norwegian Mechanism, Batory Foundation and Asylum, Migration and Integration Fund.

Despite freezing of funds for legal aid to asylum seekers and foreigners in return procedures the Rule of Law Institute is actively providing legal assistance to refugees in asylum and return procedures. Every year RLI is serving couple of hundreds of foreigners in reception and detention/deportation centers. At the moment the legal aid team involved in asylum and return matters is composed of 5 lawyers, with an average of more than 10 years of experience in practicing asylum and return (including detention) cases. Next to legal assistance the RLI is active in research and monitoring of detention orders [http://panstwoprawa.org/wp-content/uploads/2015/10/stosowanie-detencji-wobec-cudzoz.pdf;] applying alternatives to detention [http://panstwoprawa.org/wp-content/uploads/2016/09/Stosowanie-alternatyw-do-detencji-cudzoziemcow_ca%C5%82o%C5%9B%C4%87.pdf] and return monitoring (The RLI is participating in Forced Return Monitoring project FReM III, as a representative of Poland). The president of the Board – Tomasz Sieniow is also an Assistant Professor at the John Paul II Catholic University of Lublin, the member of the Commission of Experts on Migrants in Polish Ombudsman Office and serves as a Consultor in the Council on Migrants – advisory body of the Conference of Polish Bishops. More information about the RLI may be found at www.panstwoprawa.org.

The Rule of Law Institute is very much concerned with the systemic flaws in Polish asylum procedures and reception conditions as specified in art. 3(2) of Dublin Regulation. In our opinion "there are substantial grounds for believing that there are

systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union". Here are the bullet point reasons for these concerns.

1. **Lack of transposition of Return Directive provision on free legal aid**

Poland has not implemented Return Directive and is not providing free legal aid to failed asylum seekers (including the asylum seekers being transferred from other Members States under Dublin Regulation). The Minister of Interior Affairs in January 2017 has proposed amendments to the Law on Foreigners to include the system of state funded legal assistance (art. 347a - 347j) to returnees (https://legislacja.rcl.gov.pl/docs//2/12294700/12410552/12410553/dokument270819.pdf).

Unfortunately, despite coming close to the 12th anniversary of adoption of the 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 (Return Directive), Poland has not introduced the minimum procedural guarantees to the foreigners that have received a return decision. In short Poland has not implemented art 12(4) of the Return Directive ("Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC).

In many cases asylum seekers that are being sent back to Poland under the Dublin Regulation are presumed to receive their first asylum decision, since after their absconding Office for Foreigners is issuing a decision finishing the first asylum case.

2. **Speedy judicial review of detention orders does not work in practice**

Article 26(2) 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 guarantees speedy judicial review of the detention orders ("Where an applicant is held in detention, Member States shall ensure that there is a possibility of

speedy judicial review in accordance with Directive 2013/33/EU"). Polish Law specifies that the detention orders are subject to review within 7 days (but this is just instructive deadline). In reality most of the remedies against detention orders are reviewed already after the 60 days detention is served by the foreigners.

Moreover when the Border Guards motion for the extension of detention is heard, the Detained foreigner is never brought to the hearing and may be held in detention for 18 months without being brought to court after the first date. The state does not provide legal assistance in these cases at all.

3. Refugees are not given proper legal assistance in detention cases

Art. 9(6) of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), guarantees that the detained applicants "shall have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant". When reviewing hundreds of detention orders (as part of the conducted monitoring activities), we have never seen an applicant to be represented in detention case by the state funded lawyer.

4. Regular Detention of minors

According to Article 11.2. of the of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) "Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors".

There is no provision in Polish law that may be adequately implementing this directive principle.

Despite Bistieva case (Bistieva and Others v. Poland, application no. 75157/14, judgment of 10/04/2018), Polish government is convinced that there is no need to introduce systemic changes (ACTION REPORT1 Information on measures taken to implement the judgment in the case of Bistieva and Others against Poland https://rm.coe.int/1355th-meeting-september-2019-dh-action-report-11-06-2019-communicatio/168094ef06.

Polish Ombudsman for the rights of the Child has approached the Presidents of the Court of Appeals in Poland to transfer his concerns about detention of children (Letter of 6/3/2018 , ZSM.422.1.2018.AC). The Ombudsman is also constantly advocating for not putting children in detention (last letter to the Commander-in-Chief of the Border Guard dated 5/7/2019 - ZSM.422.8.2019.AC [http://brpd.gov.pl/sites/default/files/wg_do_kgsg_-_detencja_maloletnich_cudzoziemcow.pdf]. It does not seem to change much in the practice of the courts. The Rule of Law Institute knows cases when families (or single mothers) with children were detained for almost 12 months (some of them have been previously transferred under Dublin Regulation).

- G.R. v. Poland Application no 28871/18: a single mother with two year old daughter has been detained for the period of almost 13 months after being transferred to Poland from Germany under Dublin Regulation. The family has been finally deported to Russia before their return administrative decision has been sent to their attorney and before the lawyer has asked for judicial review and suspension of the enforcement of this return order.
- Case of A.G. and S.O. (the family transferred from Germany under Dublin Regulation on 23.04.2018) Przemyśl Regional Court (Sąd Rejonowy w Przemyślu) Ordered on 15.01.2019 (II Ko 52/19 and II Ko 53/19) to extend period of detention to 12 months of a family with 5 and 3 years old children, which has been finally released after 11 months as a result of psychological problems of one of the children.
- Cases of A.K. and K.K. (a family with 5 children 7-17 years of age). Biała Podlaska Regional Court orders of 11.06.2019 (II Ko 47/19 and II Ko 48/19)

extending detention of the family to 12 months after being returned from Germany under Dublin Regulation on 19.09.2018. The family is still being detained despite the medical doctor's opinion that isolation in not recommended...

These are just examples of latest judgments of Polish Courts that ignore the principle that the detention of children should be measure of last resort and after it having been established that other less coercive alternative measures.

5. Detention of vulnerable persons

According to Article 11(1) of the of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) " The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities. Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health."

In practice of the Rule of Law Institute we observe that there is no proper identification of vulnerable persons after the Dublin transfer. To give a handful of examples:

- On 2.04.2019 Regional Court in Kraków-Krowodrza (Sąd Rejonowy dla Krakowa-Krowodrzy w Krakowie) has ordered to detain (II Ko 1297/19/K) a woman that a day before has miscarried during the Dublin Transfer flight from Germany. The translation into Russian of this Court order (II Ko 1297/19/K) has been delivered to the woman on 15.05.2019 (44 days after the detention order was issued). On the same day, the same court has ordered (II Ko 1298/19/K) to detain a husband and two children of the couple in a situation that there were clear evidence of torture and PTSD, that the foreigner can (medically and photographically) prove.
- On 3.04.2019 Regional Court in Zgorzelec (Sąd Rejonowy w Zgorzelcu has ordered to detain (II Ko 1271/19) a pregnant woman with three children (1-7 years old) that was raped in a country of origin and her husband (II Ko 1272/19) that has been a victim of torture and was in psychiatric treatment. After judicial review the Distric Court in Jelenia Góra (Sąd Okręgowy w Jeleniej Górze) on

09.05.2019 has ruled (VI Kz 128/19) to realese the pregnant woman with 3 children but to keep in detention ((VI Kz 129/19) her husband (sic!)

- On 15.02.2019 Regional Court in Wrocław (Sąd Rejonowy dla Wrocławia-Fabrycznej we Wrocławiu) has ordered to detain (II Kp 154/19) a woman with three (1-7 years old) children (one of them being disable) and her husband (II Kp 153/19) that has been a victim of torture (later relased due to PTSD) and whose brother has been killed in the country of origin.
- On 28.09.2018 Regional Court in Zgorzelec (Sąd Rejonowy w Zgorzelcu has ordered to detain (II Ko 3697/18) a woman with six children (1-7 years old) that was raped in a country of origin and her husband (II Ko 3696/18) that has been a victim of torture and imprisonment in the country of origin.
- On 07.09.2018 Regional Court in Zgorzelec (Sąd Rejonowy w Zgorzelcu has ordered to detain (II Ko 3397/18) a single mother (a victim of domestic violence) with2 daughter (6 and 7 years old). Her detention has been later extended and she has spent in detention 6 months before being released.

6. Detention in Poland is not for the shortest period of time and is continued even if there is no reasonable prospect for removal

According to Article 9(1) of the of the European Parliament and of the Council L of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) "An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable. Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention". Moreover according to Article 15(6) of Directive 2008/115 (read in conjunction with Article 15(4)) it is clear that when it appears that a reasonable prospect of removal no longer exists for legal or other considerations or when the conditions laid down in Article 15(1) of the directive no longer exist, detention of the third-country national concerned ceases to be justified and that person must be released immediately (Judgment of the CJEU of 5 June 2014, Case C-146/14 PPU, Ali Mahdi, p.60).

Unfortunately, this provision does not seem to be applicable in Poland. In the case of K.H. it shows clearly that there are systemic deficiencies concerning detaining foreigners when now reasonable prospects of removal exists. An Afghan citizen has been stopped in Warsaw International Airport on 7.03.2017 after he has arrived from Athens without his travel document. He has been immediately (09.03.2017) put to administrative detention by Regional Court in Warsaw (III Ko 387/17). The Embassy of Afghanistan has confirmed his identity on 24.05.2017 but has denied to issue a travel document to him. His detention has been prolonged 6 times by Regional Court in Białystok on 28.04.2017 (III Ko$_1$ 87/17), on 01.09.2017 (III Ko$_1$ 198/17), on 27.11.2017 (III Ko$_1$ 248/17); and then Regional Court in Krosno Odrzańskie on 19.02.2018 (II KoCu 181/18), on 21.05.2018 (II KoCu 507/18), and finally on 18.10.2018 ((II KoCu 1104/18) when court has ordered to prolong his detention until 09.01.2019. Mr. K.H. has never been brought to Court for a hearing, he has not received any legal aid in his detention cases. After intervention of the lawyer from the Rule of Law Institute that has been authorized by Mr. K.H. on . 18, his detention has been terminated after spending 21 months in Guarded Centre for Foreigners by the Office for Foreigners on 10.12.2018 (decision [3), on the grounds of high probability of being granted international protection. Then Poland has asked Germany to take responsibility for Mr. K.H.'s asylum application based on the fact that his wife and two minor children are living in Germany. The family has been reunited in March 2019. The gehenna of the foreigner that, not knowing Polish nor English had to defend himself in Polish detention system lasted two years. It is probable that there is more cases like this in other Guarded Centers for Foreigners in Poland.

7. Access to legal aid limited even further due to governmental freezing of AMIF in Poland

Lack of transposition of Return Directive guaranteeing right to effective legal remedy and legal aid for years has been partially mitigated by the project activities of NGO's receiving support from European Refugee Fund, European Return Fund (2007-2013) and Asylum, Migration and Integration Fund – AMIF (2014-2020). After 2015 parliamentary elections Polish government has not distributed new resources for legal aid to NGO's that were involved in providing leg assistance to asylum seekers and

foreigners in return procedures. The new government has first annulled two calls for proposals in the early 2016. Then (in April and August 2016) it has announced three new calls, but has not announced their results. Almost three years later, and three years of a gap in AMIF funded legal assistance to asylum seekers the government has decided on 25.03.2019 to annul again three 2016 calls: nr 4/2016/FAMI, 5/2016/FAMI, and nr 6/2016/FAMI [http://fundusze.mswia.gov.pl/ue/nabory-projektow/fundusz-azylu-migracji/15242,Informacja-o-uniewaznieniu-naborow-nr-42016FAMI-52016FAMI-oraz-62016FAMI.html] and informed about two new AMIF calls covering also legal aid. Unfortunately neither of them allows for legal assistance to failed asylum seekers and other irregular migrants in return procedures/detention centres.

The problem of implementation of the Asylum, Migration and Integration Fund (AMIF) in Poland has been addressed on 26.02.2018 by MEP Michał Boni (parliamentary question E-001163-18). The answer of the Commission had given no hope for serious change of the situation ("The Commission is aware of the difficulties non-governmental organisations (NGOs) in Poland face in accessing funding available under the Asylum, Migration and Integration Fund (AMIF) and is in contact with the Polish authorities on the issue") [http://www.europarl.europa.eu/doceo/document/E-8-2018-001163-ASW_EN.html].

Since the system of legal aid to asylum seekers and irregular migrants relied greatly on NGO, that have not been funded from public funds during last three years, the asylum seekers being transferred to Poland have slim chances on proper representation and legal counselling.

8. No access to effective legal remedy in return cases

As explained above the government has still not started parliamentary work to transpose art 12(4) of the Return Directive ("Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC). The draft of law that has been subject of public consultations will put in place a system comparable to free legal

assistance in asylum procedures. The foreigner will be granted a right to legal aid in filing appeals on 1st Instance administrative decisions to the 2nd instance administrative organ (Office for Foreigners).

The first instance administrative procedure is conducted by the Border Guard. Up to now, the foreigner is only informed about the right to administrative appeal and this information is very often only verbally translated to a foreigner (e.g. Decision of 04.01.2019 on obligation to return of E.K. issued by the Commander of Kalisz Border Guard Unit [redacted] – decision issued fully in Polish with no translation of the right to appeal).

If a foreigner is able to file an administrative appeal, the second instance administrative case is conducted by the Office for Foreigners. The length of these cases is a separate issue. But it is critically important to name two grave violations of fundamental rights of the foreigner in return procedures. The 2nd instance decisions issued by the Head of the Office for Foreigners include the information about the right to judicial review. There is no explanation why the legal information provided to foreigners in Polish and in a translated language do not match. In Polish the foreigner is informed about 1. Right to file a complaint to the administrative court within 30 days; 2. The court fee of 300 PLN that should be paid for lodging the complaint; 3 Right to apply to the court for appointing a lawyer funded by the state and waiving the court fee; 4. The change of the address of the Office for Foreigners. The translation of the legal information consist just of point 1 and 4, without points concerning right to state funded legal aid, court fees and their waiver. (e.g. Decision of the Head of the Office for Foreigners of [redacted] sustaining the decision of the Border Guard on obligation of return of [redacted] - nr [redacted]; Decision of the Head of the Office for Foreigners of [redacted] sustaining the decision of the Border Guard on obligation of return of A.S. – nr [redacted]; Decision of the Head of the Office for Foreigners of [redacted] sustaining the decision of the Border Guard on obligation of return of Z.M. – nr [redacted]. All of these return decisions were enforced against the will of the failed asylum seekers before the statutory 30 day period for sending a complaint to the administrative court has passed.

9. Problems with the suspensory effect on enforcement of return decisions.

According to art. 13(1) of the Return Directive "The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence". Under par. 2 of this article "The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation."

Under Polish Law on Foreigners the first administrative appeal is hear by the administrative agency – Office for Foreigners, that "is not composed of the members who are impartial or enjoy safeguards of independence". In the Legalization Department of the Office for Foreigners that hears administrative appeals against Border Guard decision there are employed civil servants and in 2019 (due to the massive inflow of legalization cases) some of the decisions are drafted even by the Border Guard officers themselves who are being sent to this Department of the Office for Foreigners to undergo "a temporary training" (Answer of the Office for Foreigners dated on 15.07.2019 nr [redacted]). It means that only complaint to administrative court that performs judicial review over 2nd Instance administrative decisions may be considered an effective remedy against decision related to return. That means that Poland should guarantee "possibility of temporarily suspending" the enforcement of the decisions against which third country national has filed a complaint.

The caselaw of the Court of Justice leaves no doubt about the duty of the member states to secure the full effectiveness of EU law that guarantees right to effective legal remedy in return cases, including suspending enforcement of return decisions pending their judicial review (Judgment of the Court of Justice of the European Union (Grand Chamber) of 19 June 2018 in Case C-181/16, Sadikou Gnandi v État belge; Judgment of the Court of Justice of the European Union of 26 Septemebr 2018 in Case C-180/17, X i Y v. Staatssecretaris van Veiligheid en Justitie). In the latter case the CJEU has stated that " in respect of a return decision and a possible removal decision, the protection inherent in the right to an effective remedy and in the principle of non-refoulement must be guaranteed by affording the applicant for international protection the right to an effective remedy enabling automatic suspensory effect, before at least

one judicial body. Moreover, it is for the Member States to ensure the full effectiveness of an appeal against a decision rejecting the application for international protection by suspending all the effects of the return decision during the period prescribed for bringing the appeal and, if such an appeal is brought, until resolution of the appeal (see, to that effect, judgment of 19 June 2018, *Gnandi*, C-181/16, EU:C:2018:465, paragraphs 56, 58 and 61 and the case-law cited, and order of 5 July 2018, *C and Others*, C-269/18 PPU, EU:C:2018:544, paragraph 50)" (Case C-180/17, X i Y v. Staatssecretaris van Veiligheid en Justitie, p. 29).

Practice of Polish Border Guard responsible for enforcing return decisions cannot be reconciled with the European Union Law. In fact it violates also Polish law, but the Courts have refrained from evaluation of the premature enforcement of the return decision.

In case G.R. an asylum seeker during almost 13 months of detention has asked for judicial review of administrative decision rejecting her application for international protection decision. In the meantime the competent authorities have issued administrative decision in her return case, obliging her to return to the country of origin. The return decision of the third country national and her 2 years old daughter has been enforced (without earlier notice) in the middle of the night on . The return decision has been mailed to the woman's lawyer, on the . after she has been put on the return flight. The decision has included the legal information about the right to ask for a judicial review within 30 days. This complaint (with the request to suspend the enforcement of the decision) has been filed within a time. According to the CJEU caselaw cited above, this should guarantee suspension of the return. The international protection rejection decision has been upheld by the Warsaw Administrative Court on 07.08.2019 (IV SA/Wa 521/18) – 3 weeks after the return decision has been enforced. The action against enforcement of the return decision has been rejected as inadmissible by both Rzeszów Administrative Court on 07.01..2019 (IV Sa/Rz 1153/18) and the Supreme Administrative Court on 30.05.2019 (II OSK 1337/19). According to both courts, enforcement of return decision before 30 days for asking for judicial review cannot be challenged in administrative courts. Similarly Warsaw Adminstrative Court on 04.02.2019 (IV SA/Wa 2781/18) has upheld the return decision of the Office for Foreigners, with the caveat that it is not ruling on its enforcement before the 30 days deadline for sending a complaint to the Court. From

the G.R. case it appears that there is no legal remedy against premature enforcement of the return decision, when the return operation is performed in a way that violates the right to the right to an effective remedy enabling automatic suspensory effect (Case C-180/17, X i Y v. Staatssecretaris van Veiligheid en Justitie, p. 29).

Similar practice has also been observed in an enforcement of return decisions the Head of the Office for Foreigners of 18.06.2019 sustaining the decisions of the Border Guard on obligation of return of A.S. and Z.M. (r and nr). Both decisions have been enforced on 05.07.2019, exactly 14 days before the deadline for submitting a complaint to the Warsaw Administrative Court. Since the applicants have been informed about the date of return a couple of hours before the 2.a.m. operation of return has been launched they were even unable to print out (the computer room was locked 2 hours earlier that evening) and sign the complaints that were prepared for them by the Rule of Law Institute volunteer lawyer. The fate of the foreigners is unknown, since after the they have not responded to any communication initiated by their lawyer nor their co-detained asylum seekers from the Guarded Centre in Kętrzyn.

The Rule of Law Institute has asked the Commander-in-Chief of the Border Guard about the number of the foreigners that have been returned before the 30 days deadline to ask for judicial review has passed. In the answer sent on the Border Guard informs that it is not collecting this type of data. Moreover according to the Border Guard the second instance administrative decision on return is final and is to be enforced. The only exception is when the complaint with the suspension motion is earlier received by the Warsaw Administrative Court. [Letter of 26.06.2019 – III].

10. Length of the return cases v. detention for as short period as possible

The length of the return cases is also a matter of concern for the Rule of Law Institute. The return case that starts after the administrative decision rejecting application for international protection is issued by the Office for Foreigners or the Refugee Board (but before the judicial review is performed). If a failed asylum seeker is detained the Border Guard Unit may finish the return case and issue a return decision within a couple of days. This decision may be appealed to the 2nd instance administrative Organ

(Office for Foreigners), and only this final decision may be reviewed on request made within 30 days by the foreigner. The Rule of Law Institute has observed serious delays in taking a 2nd instance decisions in return cases. This is why under the provisions of Access to Information Act, we have requested statistics on issuing 2 instance decisions in on obligation to return cases. Based on the received answer of the Office for Foreigners dated on ') ( ) the average length of these procedures has raised from 163 days in 2017, to 286 in 2018 and 360 in the first half of 2019. This situation has not even been improved by taking into practical training the Border Guard Officers, who according to the Office for Foreigners are "only drafting" these rulings and are avoiding conflict of interest of being involved in the cases from the BG Units that they are coming from.

There are two problems observed. First, The Border Guard Officers are issuing the first instance decisions, they are preparing a draft of the second instance Office for Foreigners decision and they are not required to wait for the judicial review before they start enforcing it....

Second is the fast growing length of the procedures of persons that are in a way in a legal limbo. There were 1100 2nd instance return administrative decisions issued in 2018. But at 15.07.2019 there are 3300 pending cases. If the Office for Foreigners does not hire more staff for Legalization Department (at the moment there are just 7 employees of this unit) the average length of appeal procedure may soon exceed 2 years. The Department of Legalization must have some different "speedy" path for foreigners in administrative detention, but the last year experience shows that these 2nd instance decisions (rarely may be issued sooner than within six months). Of course the decisions are issued faster if the foreigner does not know Polish at all and is not assisted by a lawyer/counsellor.

If the detained foreigner has appointed a lawyer in the return case, the Office for Foreigners must in the appeal case provide him/her with the opportunity to access the files of the case. Unfortunately 7 employees of the legalization department dealing with 3300 return cases cannot manage the interest of the parties to administrative procedures. To facilitate the access in June 2019 the Office for Foreigners has introduced electronic appointment system (https://rezerwacja.udsc.gov.pl/public/). Unfortunately the demand is so huge that a lawyer must wait 4 months to get access to the files of his/her client (that is detained in the Guarded Center for as short period

as possible and should be released whenever there are no reasonable prospects of removal). As of today (22 of July 2019) the first open slot for access to clients files is on 19 November 2019.

Polish law guarantees everyone a right of judicial review of administrative decisions (including return decisions). As follows from the case-law of the CJEU (e.g. Case C-180/17, X i Y v. Staatssecretaris van Veiligheid en Justitie), the person in a return procedure has a right to ask for a suspensory effect during the 1st instance judicial review. Filing a complaint to administrative court is not a task that a person in detention facility can successfully achieve. It is too complicated without knowing Polish language, without access to legal assistance (that the foreigner is (on purpose?) not informed in the language that he/she speaks, without being informed where to find proper forms to start the request for a state-funded lawyer. However, if the foreigner is assisted by someone (such as a volunteer law student from refugee clinic) helping to fill out the forms the case in the Warsaw Administrative Court will be decided (only formal procedural issues) after 6 months from the moment of filing a complaint.

The length of the whole return case normally lasting about 1,5-2 years might not be so shocking, if it was not for the fact that it might be the case of a detained family with children. The perspective of waiting a year until the court is reviewing administrative return decision of a family is one of the main reasons why these vulnerable families of failed asylum seekers decide not to appeal after spending 6 months in detention in the asylum procedure. In the assessment of the Rule of Law Institute the detention in such legal environment (clearly showing systemic flaws) is very often leading to the violation of fundamental rights, and the foreigners would face a real risk of being subjected to inhuman or degrading treatment.

11. Access to Asylum, principle of non-refoulement– returning asylum seekers to Bielarus

One of the hardships that asylum seekers face when arriving to Poland is the access to asylum. Statistically overwhelming majority (80-90 %) of asylum applications were filed in Terespol (border town with Bielarus). As compared with the pick year 2013 (before so called refugee crisis), when 15253 asylum application have been filed in Poland, the number of accepted applicants have dropped down drastically (all the data

coming from the Website of the Office for Foreigners - https://udsc.gov.pl/statystyki/. In 2016 it was still 12319. But in 2017 only 5078, and in 2018 the number has dropped down to 4135. For the first half of 2019 year (until 11.07.2019) this number has been reduced again to 1972, but 35% (699) were subsequent applications. The number of asylum seekers arriving to Poland has dropped down to the lowest level in 20 years (in 1999 there were just 3061 asylum applications filed).

The decline of asylum applications has not been caused by the smaller interest in seeking protection in Poland in the period when most of the European Union members have recorded increase of applicants. This phenomenon may be attributed to the border practice observed since July 2016. This is when Terespol Border Guard Unit has stopped accepting asylum applications from persons arriving through the territory of Belarus on the grounds of lack of visa. From the observations of the Rule of Law Institute, many foreigners have successfully filed the asylum application after 10, 20 or even more than 30 attempts. At the same time the number of foreigners refused access to Polish territory due to the lack of visa has drastically grown, and the number of applications received has dropped.

Frontex data show that the number of refusals of entry to the EU has doubled between 2015 and 2016 and that this is clearly the result of the refusals issued at Polish-Belarussian border [https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf]. The Helsinki Foundation for Human Rights reports that "around 75% of all refusals in 2016 were issued at the PolishBelarusian border (an increase of 213% comparing to 2015) [Helsinki Foundation for Human Rights, "Access to asylum procedure at Poland's external borders. Current situation and challenges for the future", Warsaw, April 2019, p. 10. http://www.hfhr.pl/wp-content/uploads/2019/06/0207_report-HFHR-en.pdf]

This change of attitude in 2016 has been confirmed by the previous Minister of Interior Affairs, Mariusz Błaszczak. It is obvious in this case that the Polish authorities are reinforcing security at the expense of individuals' rights. The anti-immigration sentiments were reflected in the administrative statements of the interior minister who called the situation in Terespol "an attempt to open another route for the influx of Muslims to Europe," and claimed that "as long as I am interior minister and as long as

Law and Justice Party is in power, we will not put Poland in danger of terrorism." (https://www.themoscowtimes.com/2016/08/31/chechens-running-from-kadyrov-stuck-on-polish-border-a55165). Since then the situation at the border has not improved at all.

Polish government in Europe claims it has accepted one million of Ukrainian refugees, but in fact 99,5 % have never applied for international protection in Poland (most of them are legally working in Poland, filling gap on Polish labour market).

Since mid-2016 (NATO Summit in Warsaw held on 8-9 July 2016 and World Youth Day in Cracow held on 26-31 July 2016) the government is consequently denying access to protection to thousands of asylum seekers. FRONTEX statistical data shows that there were less than 2000 refusals of entry on Polish-Belarussian border in June 2016 and the number has picked to 17000 two months later in August 2016 [Frontex, Risk Analysis for 2017, p. 21/60 https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf]. At the same time the number of filed asylum applications has dropped from over 1300 in June 2016 to less than 600 in August and little over 200 in November 2016. There might be more of asylum seekers returned since 2016 on one checkpoint located on the Eastern Schengen Border than refugees rejected by Italy on humanitarian NGO's ships. This may amount to discrimination as provided by Article 21 of the Charter of Fundamental Rights and can be interpreted as an administrative practice of expelling asylum seekers without proper examination as in the Berdzenishvli (Berdzenishvli and Others v. Russia Application no. 14594/07).

Returning foreigners applying for international protection before allowing them to file an application at the border crossing in Terespol, due to the alleged lack of Poland's jurisdiction before the decision was taken by the Border Guards to enter the territory of the Republic of Poland, was subject to the following proceedings before the European Court of Human Rights: Application no 40503 / 17 MK against Poland lodged on 8 June 2017; Application no 43643/17 M.K. and Others against Poland lodged on 20 June 2017; Application no 42902/17 M.A. and Others against Poland lodged on 16 June 2017; Application no 51246/17 D.A. and Others against Poland lodged on 20 July 2017. It has also been condemned by the Supreme Administrative Court of Poland [Supreme Administrative Court, cases nos. II OSK 2511/18, II OSK 2599/18, II OSK

3100/18]. However, according to the Helsinki Foundation for Human Rights "none of the foreigners who successfully challenged his or her case before the court was allowed entry to Poland as a direct consequence of the favourable ruling". [Helsinki Foundation for Human Rights, "Access to asylum procedure at Poland's external borders. Current situation and challenges for the future", Warsaw, April 2019, p. 13-14 http://www.hfhr.pl/wp-content/uploads/2019/06/0207_report-HFHR-en.pdf].

It is hardly surprising that Professor Michał Kowalski, a member of the Refugee Board (second Instance administration body, determining if the person should be recognized as a refugee), stated in March 2018: "In the light of the above, there is no doubt that a foreigner applying for border checks at a land border crossing on the Polish border, including a border crossing in Terespol, is under the jurisdiction of the Polish authorities within the meaning of art. 1 ECHR. Consequently, there is no reason to question the jurisdiction of the Tribunal in the analyzed area. (...) In order to counteract the phenomenon of abuse of the international protection procedure by foreigners, the Border Guard undertakes preliminary verification of the legitimacy of applications for protection. The problem, however, is that in the current legal situation - as indicated above - there are no sufficient legal grounds for this, and such actions may lead to violations of human rights and Poland's international responsibility. [M. Kowalski M. Wnioski o ochronę międzynarodową składane na granicy - uwagi na tle środków tymczasowych zarządzonych wobec Polski przez Europejski Trybunał Praw Człowieka, Europejski Przegląd Sądowy, 2018/3/11-17 (available in the LEX system)].

It is worth noting that in a parallel case based on the same facts, on December 11, 2018, the European Court of Human Rights recognized the case of M.A. AND OTHERS v. LITHUANIA (Application no. 59793/17) that not accepting applications from citizens of the Russian Federation, Lithuania violated art. 3 and art. 13 ECHR.

Access to the asylum is regulated in the Directive 2013/32/EU of the European Union and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedures Directive), which applies to all asylum applications lodged within the territory of the EU, including at the borders. Proper reading of art 6(1) and art. 6(2) of Asylum Procedures Directive allows to distinguish three consecutive stages of the application procedure: (1) **making an application** for international protection, (2) **lodging an application**, and (3)

registration of the application. This is also confirmed by the European Asylum Support Office [EASO, Judicial analysis. Asylum procedures and the principle of non-refoulement, 2018, p. 35. available at: https://www.easo.europa.eu/sites/default/files/asylum-procedures-ja_en.pdf]. The situation in Terespol Border checkpoint clearly shows that the authorities do not allow to lodge the application despite the clearly express wish to make an application for international protection. This is no more and no less but a violation of the core principle of principle of non-refoulement.

This practice fits into the general anti-immigration policy and rhetoric of Polish government that after 2015 parliamentary elections has changed Poland's position on the relocation of refugees and has openly declared not to follow the ruling of the Court of Justice of the European Union [The judgment of the CJEU of 6 September 2017 in joined cases C-643/15 and C-647/15, Slovak Republic and Hungary v. Council of the European Union].

12. Lack of cooperation of Polish courts in the asylum cases with the Court of Justice (unused preliminary ruling procedure)

Poland is one of the Member States that has not referred any asylum cases to the Court of Justice of the European Union. Research that the Rule of Law Institute undertook shows, that the courts from 13 new members of the European Union have since 1 of May 2019 applied 14 times with the request for the preliminary ruling in the field of asylum policy (out of total 84 references from all 28 Member States). Poland is the biggest of the new Member States. Probably it has the biggest number of judges in Europe (10 thousand). But has never referred any case for a preliminary ruling. When compared with serious doubts about proper implementation of *acquis communautaire* in the field of the Common European Asylum System and relatively high number (over 130 000) of asylum applications filed in Poland in the period 2004-2019, it is quite surprising that Polish courts had no doubts about validity or interpretation of EU Law.

One of the reasons why the courts do not refer cases in asylum cases to the CJEU is quite narrow scope of judicial review of the administrative courts.

As noticed in the legal doctrine "*In the cassation–type model of administrative jurisdiction, administrative courts in principle only investigate the administrative body's compliance with the law. The main weakness of this adjudication model is that the same case is consecutively heard by administrative authorities and administrative courts (of various instances), without a final decision being issued. However, the stereotype of a court coined in another epoch as a purely cassation–type body must not obscure the challenges of our times. A lot has changed in the world since then, and the ever–growing dependence of the individual on administration (public service) is its visible symptom. Effective protection of the interests of the former now requires the use of more diversified control tools affording a remedy sooner and at a lower cost, and, in specific situations, also allowing administrative courts to decide cases on their merits.*" [Zbigniew Kmieciak, The Efficiency of Administrative Courts (In the Light of European and Polish Experiences), Comparative Law *Review vol.* 15 (2013), p. 135 – 150. http://dx.doi.org/10.12775/CLR.2013.008].

During last years an observer of public life may also point at a new reason: referring questions to the Court of Justice of the European Union has been negatively perceived by Polish Government. Polish and international press have been is informing about disciplinary procedures against Polish judges referring cases to CJEU or applying standards of the ECtHR. These troublesome disciplinary cases launched during last two years against judges were well documented by the Polish Judges Association IUSTITIA (an organization grouping 3500 Polish Judges) and their summaries were even translated into English:

1) Judge Ewa Maciejewska case: https://www.iustitia.pl/en/disciplinary-proceedings/2825-polish-disciplinary-prosecutor-michal-lasota-launched-a-case-against-judge-ewa-maciejewska-who-sent-pre-judical-queries-to-cjeu;

2) Judge Igor Tuleya case: https://www.iustitia.pl/en/disciplinary-proceedings/2824-polish-disciplinary-prosecutor-michal-lasota-launched-a-case-against-judge-igor-tuleya-who-sent-pre-judical-queries-to-cjeu;

3) Judge Alína Czubieniak case: https://www.iustitia.pl/en/disciplinary-proceedings/2872-disciplinary-spokesman-s-deputy-judge-lasota-is-looking-for-disciplinary-offence-in-gorzow-wlkp;

4) Judge Alina Czubieniak case: https://www.iustitia.pl/en/disciplinary-proceedings/2979-a-detailed-summary-of-the-judge-alina-czubieniak-s-case).

So no wonder that the new system of disciplinary procedures against judges in Poland is under European Commission scrutiny (https://www.tvn24.pl/tvn24-news-in-english,157,m/if-poland-harasses-judges-for-consulting-ecj-eu-vows-to-intervene,911121.html). It has also gained attention of the Human Rights Organizations and the UN Special Rapporteur on the Independence of Judges and Lawyers (http://www.hfhr.pl/wp-content/uploads/2019/07/HFHR_submission_justice-czubieniak_16042019.pdf).

The Rule of Law Institute lawyers have asked in various procedures to refer questions for preliminary rulings to the CJEU. These motions were never accepted. Thus, one must conclude that Polish courts despite serious problems with a proper implementation of CEAS provisions do not cooperate with the Court of Justice of the European Union.

13. Effectiveness of enforcing return decisions in Poland and the European Union

One phenomenon of return policy of the European Union is a low effectiveness of the return orders in most of the European Union Member States. It has been noticed by the European Commission that has urged the Member States to establish a stronger and more effective European return policy. The statistics provided show that one may observe a decline of effective returns. While in 2016 the Member States were enforcing 45,8% of the Return decisions, in 2017 the effectiveness has dropped to 36,6% (https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-returns-policy_en.pdf).

However Poland has constantly held a position of the leader in effectively returning irregular migrants. In 2017 Polish Border Guard has effectively enforced 94% of the return decisions. According to the statistics made available by the Office for Foreigners 24 882 non-EU citizens were ordered to leave Poland in 2017 (Ukraine – 75 %, Russia – 9%, Bielarus 5%, Moldova 5%). As much as 23 364 (94 %) TCN's were effectively

returned. Some of this "success" might be attributed to the relatively easy return operations through land border crossings with Ukraine. However this unique effectiveness may be explained also by not securing the returnees basic procedural guarantees.

14. Lessons learned from the Case C-216/18 PPU – "a flagrant denial of justice"

The threats to the right of access to an independent and impartial tribunal in Poland has been looked into by the Court of Justice of the European Union once (Judgment of the Court (Grand Chamber) of 25 July 2018, Case C-216/18 PPU). Following the preliminary reference of the Court in Ireland CJEU has ruled that the provisions of the European Arrest Warrant decision (art. 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002), must be interpreted as meaning that, "where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State."

This judgment may mutatis mutandis be a source of authority in cases of asylum seekers being transferred under Dublin III Regulation. In practice, surrending the person in respect of whom EAW has been issued is quite similar (with this exception that asylum seekers are not charged with a crime) to the transfer of asylum seeker in

respect of whom one Member State has accepted responsibility for processing person's application for international protection.

Following this CJEU judgment Irish High Court has decided (Justice Donnelly delivered the judgment on the 19th day of November, 2018 in case The Minister for Justice and Equality v. Artur Celmer [http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/1792edc8d00027238025834a0048bb42?OpenDocument] to surrender the person in respect of whom Poland has issued a European Arrest Warrant. In the opinion of the Rule of Law Institute the conclusions of the courts controlling legality of transfers of asylum seekers in Poland should be different.

The test that was applied by the Irish court may be summarized as follows. Surrending a person to the other Member State will be lawful if there is no risk of the flagrant breach of the rights of this person (which in High Court's view is not distinctive from the concept used by the CJEU: "breach of the 'essence' of a right".

Following the Irish Human Rights and Equality Commission submission the High Court has considered the test of the flagrant denial of justice as construed by the ECtHR in case of Othman (Abu Qatada) v. The United Kingdom (Application no. 8139/09).

That principle of the flagrant denial of justice was first set out in by the ECtHR in Soering v. the United Kingdom, 7 July 1989, § 113, Series A no. 161 and has been subsequently confirmed by the Court in a number of cases (see, inter alia, Mamatkulov and Askarov v. Turkey, Applications nos. 46827/99 and 46951/99, §§ 90 and 91; Al-Saadoon and Mufdhi v. the United Kingdom, no. 61498/08, § 149, ECHR 2010). According to the ECtHR the term "flagrant denial of justice" has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (Sejdovic v. Italy[GC], no. 56581/00, § 84, ECHR 2006 II; Stoichkov v. Bulgaria, no. 9808/02, § 56, Drozd and Janousek v. France and Spain, 26 June 1992, Series A no. 240, § 110). The Court has indicated that certain forms of unfairness could amount to a flagrant denial of justice. These forms have included:

1) **conviction in absentia** with no possibility subsequently to obtain a fresh determination of the merits of the charge (Einhorn v. France (dec.), no 71555/01, § 33; Sejdovic, cited above, § 84; Stoichkov, cited above, § 56);

2) a trial which is summary in nature and conducted with a total **disregard for the rights of the defence** (Bader and Kanbor v. Sweden, no. 13284/04, § 47);

3) **detention without any access to an independent and impartial tribunal** to have the legality the detention reviewed (Al-Moayad v. Germany No. 35865/03, § 101);

4) deliberate and systematic **refusal of access to a lawyer**, especially for an individual detained in a foreign country (Al-Moayad v. Germany No. 35865/03, § 101).

Abstaining from challenging the High Court conclusion that surrending the person in respect of whom EAW has been issued by Poland does not lead to the risk of the flagrant breach of the rights of this person to fair trial and the right to impartial court, the Rule of Law Institute believes that current systemic flaws in Polish asylum, detention and return procedures determine that the courts of the EU Member States may not transfer an asylum seeker to Poland even if they establish that this is the 'Member State responsible' within the meaning of Regulation No 343/2003. The other Member States cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

CONCLUSION

As it has been confirmed in the NS and Others Case (C-411/10) European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union. In the light of the above cited examples of violations of EU Law by Poland the presumption that fundamental rights of asylum

seekers will be equally protected in the situation of their Dublin transfer to Poland should be rebutted. **In the opinion of the Rule of Law Institute the EU Member States should stop transferring asylum seekers to Poland under Dublin III Regulation until Poland introduces in its asylum and return procedures all procedural safeguards foreseen in the Common European Asylum System.**

Analysis presented above should have merit for the Courts of France, that are to decide about the transfer of M.P. to Poland, that may result in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.

Should you have any further questions or need an access to the case-law or administrative decisions cited above, you should contact the president of the Rule of Law Institute Board over email (prezes@panstwoprawa.org).

INSTYTUT NA RZECZ PAŃSTWA PRAWA * FUNDACJA *

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