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UNHCR
The UN Refugee Agency

PAŃSTWO-NGOsy-CUDZOZIEMCY:

Monitoring wdrażania ustawowej
pomocy prawnej

Iceland 
Liechtenstein
Norway **Active
citizens fund**

Seminar “Access to State-Funded Legal Assistance in Asylum and Return Procedures in Poland”

14.12.2023 r. - UNHCR Warsaw Office

11:00 Opening:

Christine Goyer - Deputy Representative, UNHCR Warsaw

Aleksandra Wacko - Counsellor (EEA and Norway Grants), Norwegian Embassy

11:15 Monitoring report presenting implementation by Poland of the EU Law obliging Member States to provide foreigners with the access to state-funded legal assistance in asylum and return procedures:

Dr. Tomasz Sieniow (The Rule of Law Institute)

12:15 Comments to the report:

Dr. Iryna Kozak-Balaniuk - The John Paul II Catholic University of Lublin

Anna Trylińska - Centre of Migration Research, University of Warsaw

Maria Pamuła – Protection Officer, UNHCR Cracov Regional Office

12:45 Discussion



The project is implemented with a grant from the Active Citizens – National Fund funded by Iceland, Liechtenstein and Norway through the EEA Funds



The aim of the project „STATE - NGOs – FOREIGNERS” was to monitor the application of public policy in the area of ensuring access to legal remedies available for foreigners:

- 1) applying for international protection or
- 2) being in return proceedings

The obligation to provide legal aid in both areas results from the European Union law. RLI was to analyse if the legal guarantees work in practice (protect migrants against arbitrariness).

NGOs are the key entities protecting rights of migrants.

A particularly important area of analysis was to examine whether Poland has correctly implemented the Procedural Directive 2013/32 / EU and the Return Directive 2008/115 / EU in the scope of providing foreigners with free legal assistance and legal representation.



ECRE/ELENA
LEGAL NOTE
ON ACCESS TO
LEGAL AID IN
EUROPE

November 2017

The **right to legal aid** has been considered under international law as a **safeguard for the effective enjoyment of fundamental rights**.

Moreover, it has been interpreted as a component of the right to an effective remedy and to a fair trial, and crucial to ensure equality of arms.

Under international law, **the principle of *non-refoulement* and the right of effective access to justice** require that certain procedural safeguards are adhered to within the refugee status determination procedure, central to such guarantees **is the right to legal aid for asylum applicants**.



Article 16 of the 1951 Geneva Convention guarantees refugees equal treatment with nationals in matters pertaining **to access to the courts, including legal assistance.**

Treaty on European Union

Article 19 .1.

Member States shall **provide remedies sufficient to ensure effective legal protection** in the fields covered by Union law.

Treaty on the Functioning of the European Union

Article 67

1. The Union shall constitute an area of **freedom, security and justice with respect for fundamental rights** and the different legal systems and traditions of the Member States.
2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, **which is fair towards third-country nationals.** (...)

Charter of Fundamental Rights of the EU

Article 47 Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has **the right to an effective remedy before a tribunal** in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary **to ensure effective access to justice.**

European Convention for Human Rights

ARTICLE 6 Right to a fair trial
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a **fair and public hearing** within a reasonable time **by an independent and impartial tribunal established by law.**

ARTICLE 13 Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have **an effective remedy before a national authority** notwithstanding that the violation has been committed by persons acting in an official capacity

European Convention for Human Rights and the Charter of Fundamental Rights of the EU

Article 47 of the CFR codified the EU *acquis* on effective judicial protection, bringing the **right to an effective remedy** (Article 13 ECHR) and that to a **fair trial** (Article 6(1) ECHR), under the same provision.

Article 47 CFR applies to matters of EU law, **including migration and asylum**, that are not governed by Article 6 as a matter of ECHR law.

Common European Asylum System

One of the fundamental principles of this system is access to state-funded legal aid in both asylum and return cases.

- Article 20 of Asylum Procedures Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, applicants are **entitled to free legal assistance and representation upon request in the case of a negative decision by the domestic authorities**, in order to lodge an appeal and be represented at the appeal hearing.
- Article 13 of Return Directive (2008/115/EC) of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals . Requires EU MS **to provide free legal assistance upon request and in accordance with relevant national legislation**. The directive is binding on all EU Member States except Ireland.

Asylum Procedures Directive 2013/32/EU (recast)

Article 20 **Free legal assistance and representation in appeals procedures**

1. Member States shall ensure that free legal assistance and representation is **granted on request in the appeals procedures (...)**. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.

Deadline for implementation – 20 July 2015

* Asylum Procedures DIRECTIVE 2005/85/EC of 1 December 2005

(Art. 15.2. In the event of a negative decision by a determining authority, Member States shall **ensure that free legal assistance and/or representation be granted on request.** (Transposition by 1 December 2008).

Asylum Procedures Directive 2013/32/EU

Article 46 The right to an effective remedy

1. MS shall ensure that applicants have the right to an **effective remedy** before a court or tribunal, against a decision taken on their application for int'l protection,
3. MS shall ensure that an effective remedy provides for a **full and *ex nunc* examination of both facts and points of law** (...) at least in appeals procedures before a court or tribunal of first instance.
4. MS shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult.
5. MS shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

Return Directive 2008/115/EC

Article 12 PROCEDURAL SAFEGUARDS

1. Return decisions (...) shall be issued in writing and give reasons in fact and in law as well as **information about available legal remedies**.
2. Member States shall provide, upon request, a written or oral **translation** of the main elements of decisions related to return, as referred to in paragraph 1, **including information on the available legal remedies** in a language the third-country national understands or may reasonably be presumed to understand.

Return Directive 2008/115/EC of 16 December 2008

Article 13 Remedies (implementation of art. 13.4. by 24 December 2011)

1. The third-country national concerned shall **be afforded an effective remedy to appeal** against or seek review of decisions related to return, (...) before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.
3. The third-country national concerned shall have **the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.**
4. MS 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**. (financial means test).

State-funded legal aid in asylum procedures in Poland

- Introduced by the 2015 Amendments to the Act on granting protection to the foreigners on the territory of the Republic of Poland
- Took effect on 1 January 2016
- Is regulated in chapter 4a of the Act on granting protection (articles 69c-69m)
- Allows asylum seeker to choose a lawyer from the list provided by the Head of the Office for Foreigners:
 - **Advocate**
 - **Legal adviser**
 - **Specialized NGO lawyer** having at least 3 years of experience in providing legal assistance to refugees

State-funded legal aid in asylum procedures in Poland

Scope - Art. 69e of the Act on granting protection

- **Preparing an appeal against 1st instance decision to the Refugee Board**
 - Rejection
 - Inadmissibility
 - Discontinuation of asylum procedure
 - Rejection of the declaration of Asylum seekers to continue his/her asylum procedura that has been discontinued
 - Transfer to other MS (Dublin)
 - Deprivation of int'l protection
- **Representation of asylum seeker before the Refugee Board**

State-funded legal aid in asylum procedures in Poland

Costs reimbursed - Art. 69l.

1. **lawyer's fee** (150% of the minimum fee applied for administrative court 1st instance cases – 720 PLN)
2. reimbursement of the necessary and documented **travel costs** to: -
 - Reception or detention centres for foreigners or the Refugee Board (provision of law)
 - Office for Foreigners before filing an appeal (Caselaw , direct application of EU Law)
3. reimbursement of necessary and documented **translation costs**

State-funded legal aid in asylum procedures in Poland

Number of cases									
Legal aid provider	2016	2017	2018	2019	2020	2021	2022	Total	
The Rule of Law Institute	53	138	136	93	97	129	95	741	
Association for Legal Intervention (SIP)	64	160	148	136	182	160	58	908	
H. Nieć Legal Aid Centre	0	0	0	0	1	0	0	1	
Advocates and Legal Advisers	14	41	39	70	59	34	30	287	
TOTAL	131	339	323	299	339	323	183	1937	

State-funded legal aid in asylum procedures in Poland

Number of translation reimbursements								
Legal aid provider	2016	2017	2018	2019	2020	2021	2022	Total
The Rule of Law Institute	0	0	0	2	0	0	0	2
Association for Legal Intervention (SIP)	13	36	53	37	29	26	2	196
H. Nieć Legal Aid Centre	0	0	0	0	0	0	0	0
Advocates and Legal Advisers	0	0	1	4	1	0	0	6
TOTAL	13	36	54	43	30	26	2	204

State-funded legal aid in asylum procedures in Poland

Travel costs reimbursements								
Legal aid provider	2016	2017	2018	2019	2020	2021	2022	Total
The Rule of Law Institute	0	25	31	40	12	12	11	131
Association for Legal Intervention (SIP)	0	2	0	0	0	0	0	2
H. Nieć Legal Aid Centre	0	0	0	0	0	0	0	
Advocates and Legal Advisers	0	0	0	0	1	0	0	1
TOTAL	0	27	31	40	13	12	11	134

State-funded legal aid in asylum procedures in Poland

Legal fees reimbursements								
Legal aid provider	2016	2017	2018	2019	2020	2021	2022	Total
The Rule of Law Institute	38 160,00	99 360,00	97 920,00	67 173,96	69 840,00	92 880,00	68 400,00	533 733,96
Association for Legal Intervention (SIP)	46 080,00	115 200,00	106 560,00	97 920,00	131 040,00	115 200,00	41 760,00	653 760,00
H. Nieć Legal Aid Centre	0,00	0,00	0,00	0,00	720,00	0,00	0,00	720,00
Advocates and Legal Advisers	10 079,99	29 520,01	28 078,99	50 453,99	42 480,01	24 480,00	21 599,99	206 692,98
TOTAL	94 319,99	244 080,01	232 558,99	215 547,95	244 080,01	232 560,00	131 759,99	1 394 906,94

State-funded legal aid in asylum procedures in Poland

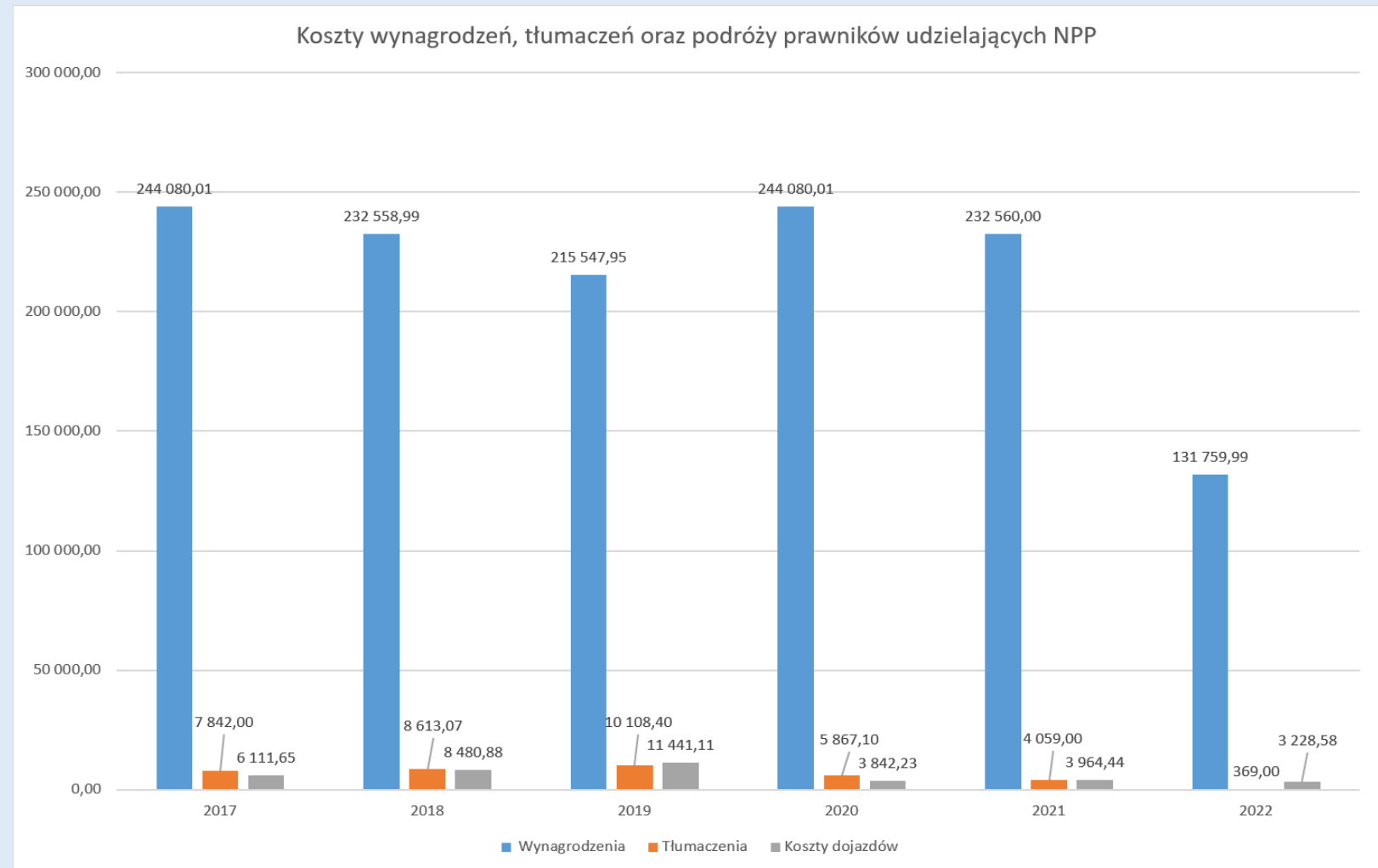
Total costs of providing state-funded legal assistance in asylum cases.

Legal fees

Translation costs

Travel costs

Years 2017-2022



State-funded legal aid in asylum procedures in Poland

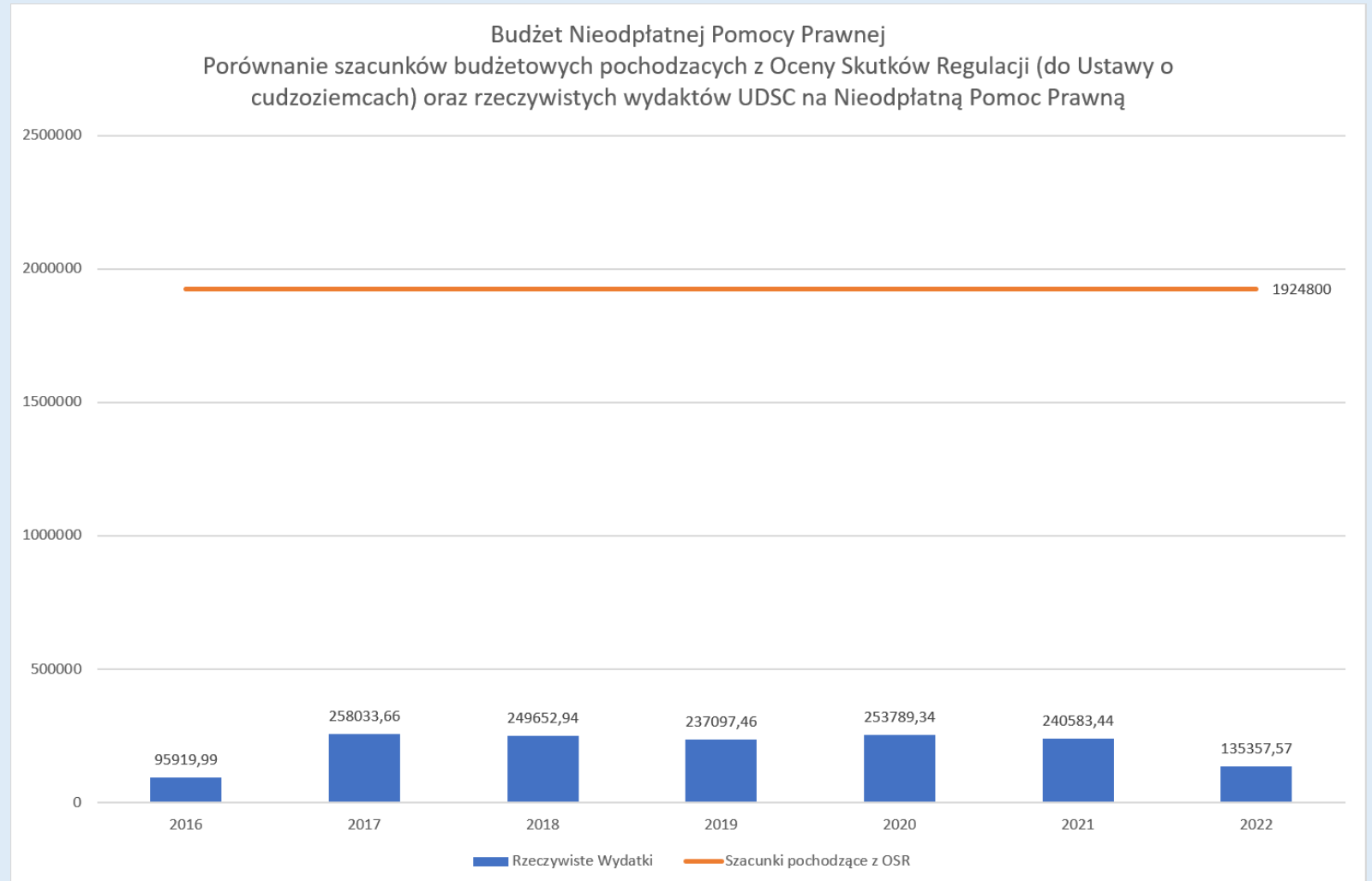
Real costs of state-funded legal assistance as compared to forecasts from the moment of drafting the law

Years 2016-2022

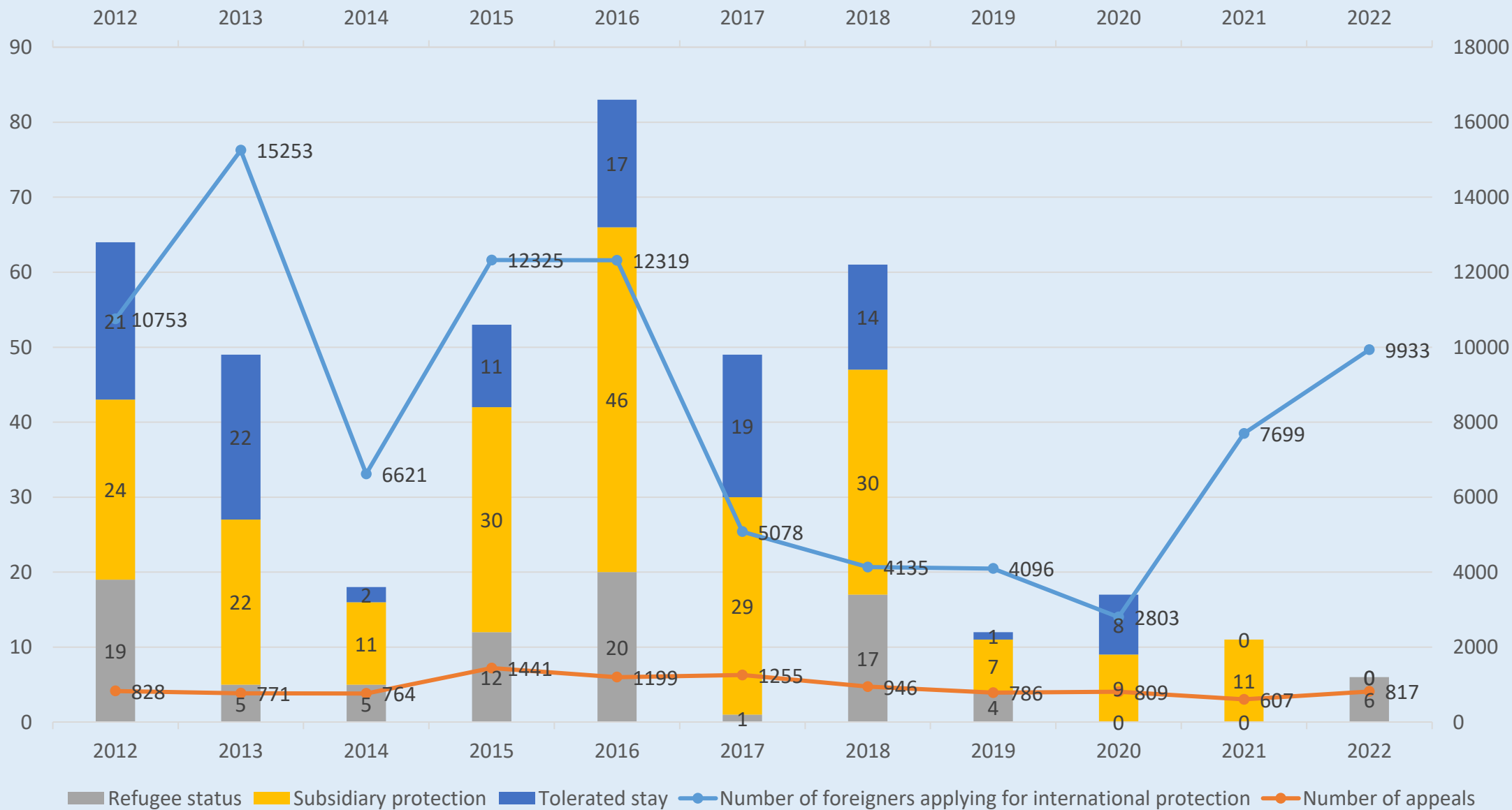
Forecast (7 years) 13, 473 mln PLN

Costs 1,473 mln PLN (11%)

Average 276 cases instead of 2303.

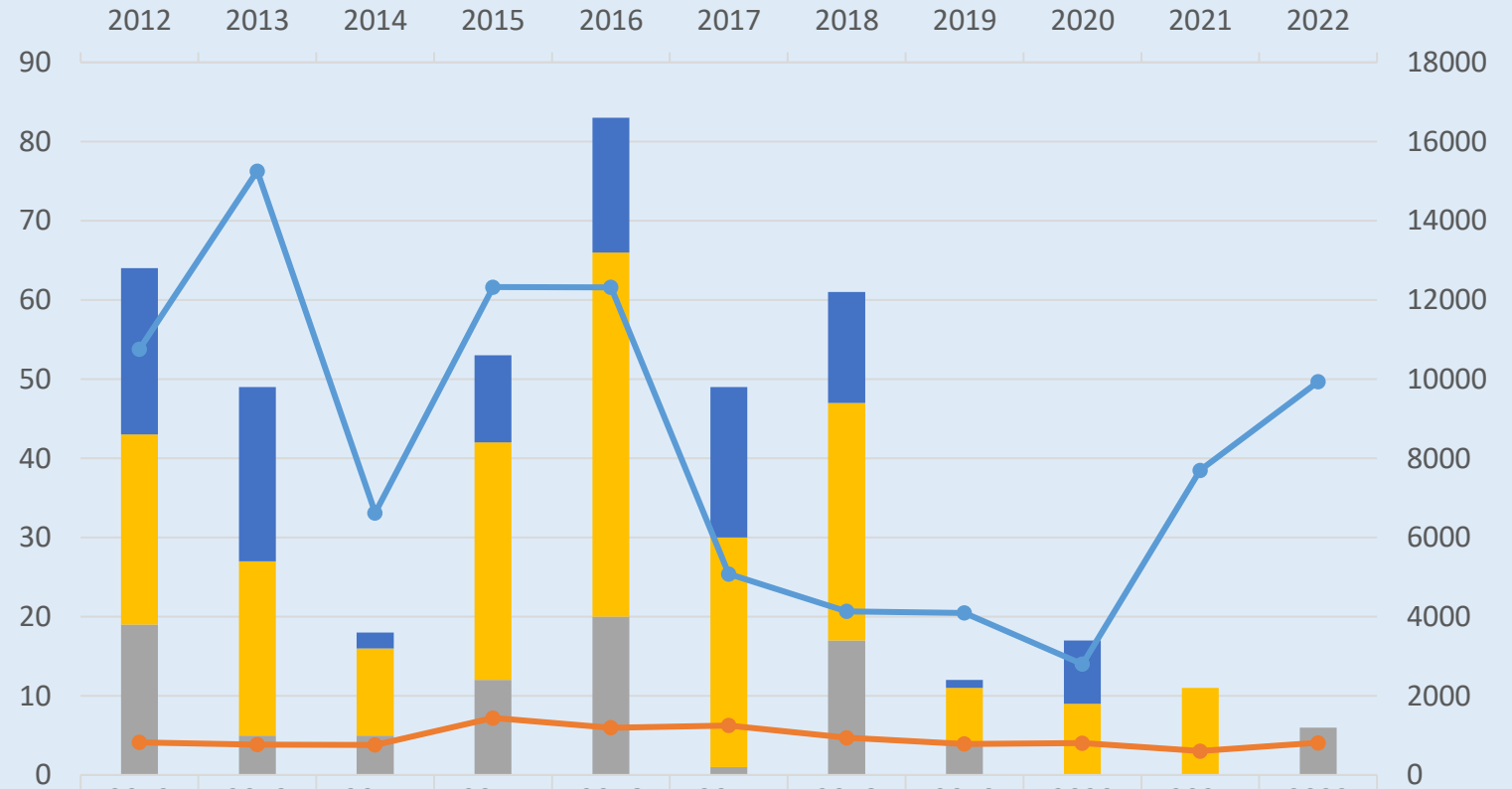


Refugee Board Recognition Rate (2012-2022, persons granted protection in 2nd Instance)



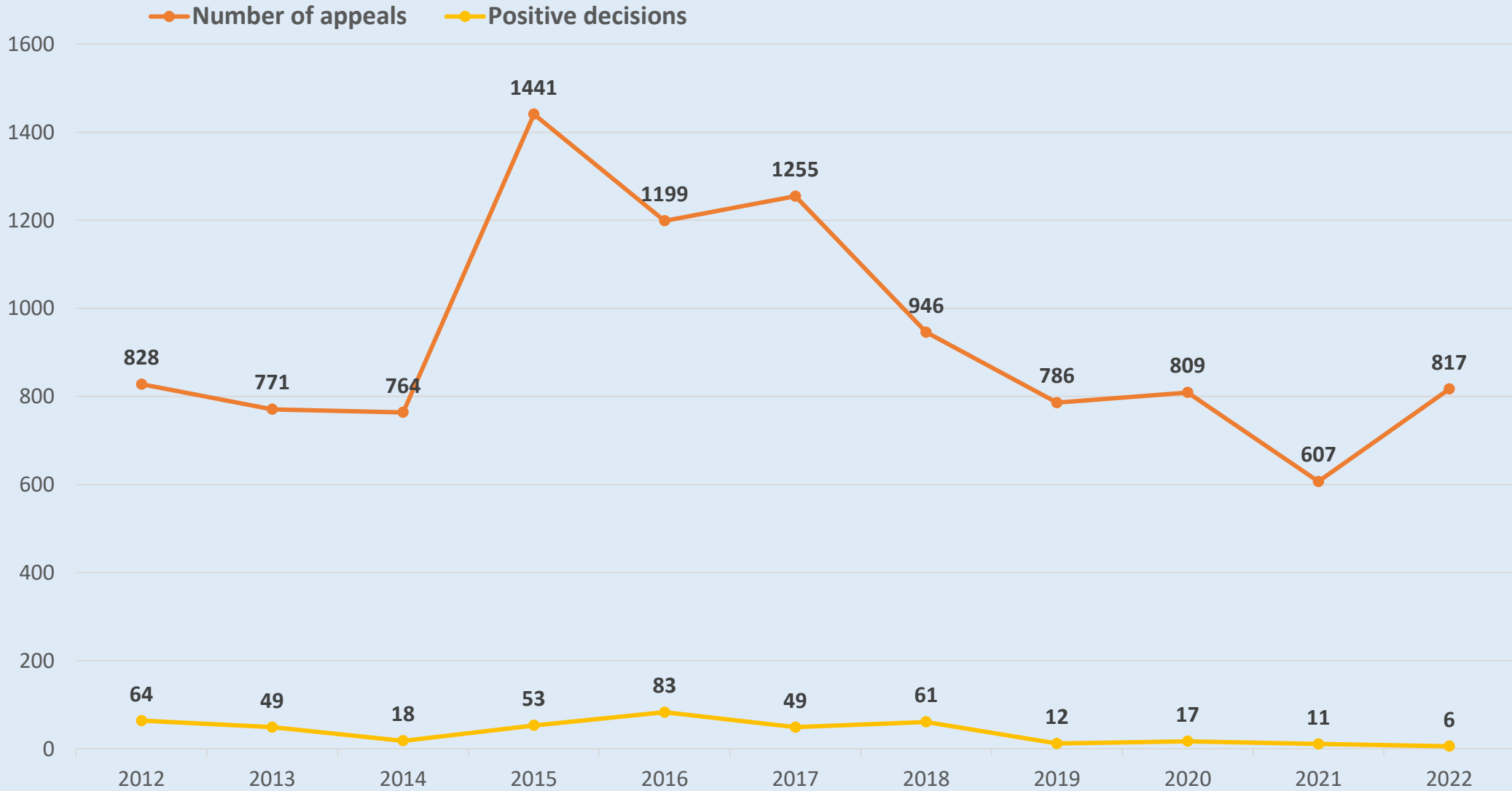


Refugee Board Recognition Rate 2012-2022



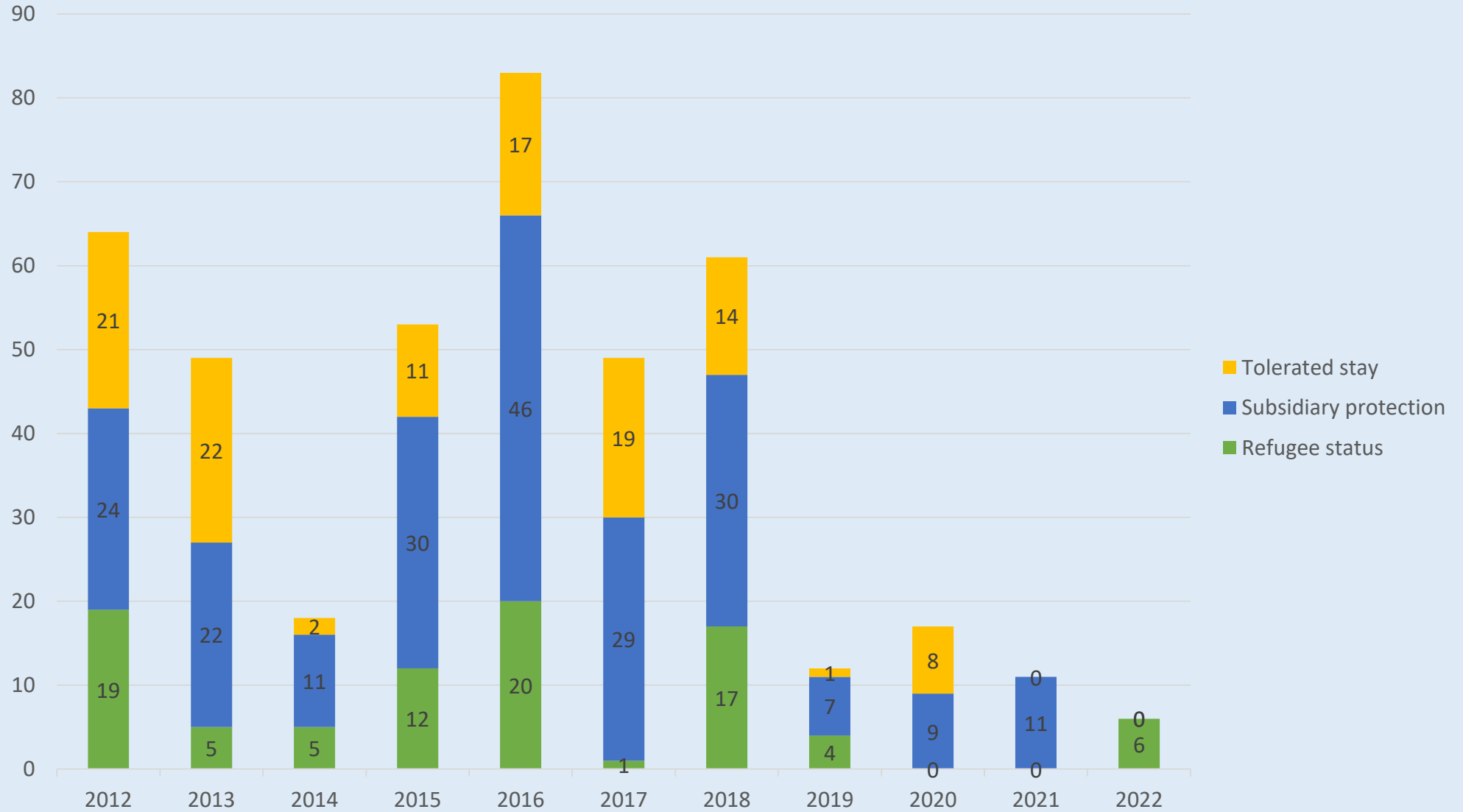
Tolerated stay	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Subsidiary protection	24	22	11	30	46	29	30	7	9	11	0
Refugee status	19	5	5	12	20	1	17	4	0	0	6
Number of foreigners applying for international protection	10753	15253	6621	12325	12319	5078	4135	4096	2803	7699	9933
Number of appeals	828	771	764	1441	1199	1255	946	786	809	607	817

Refugee Board Recognition Rate (2012-2022)



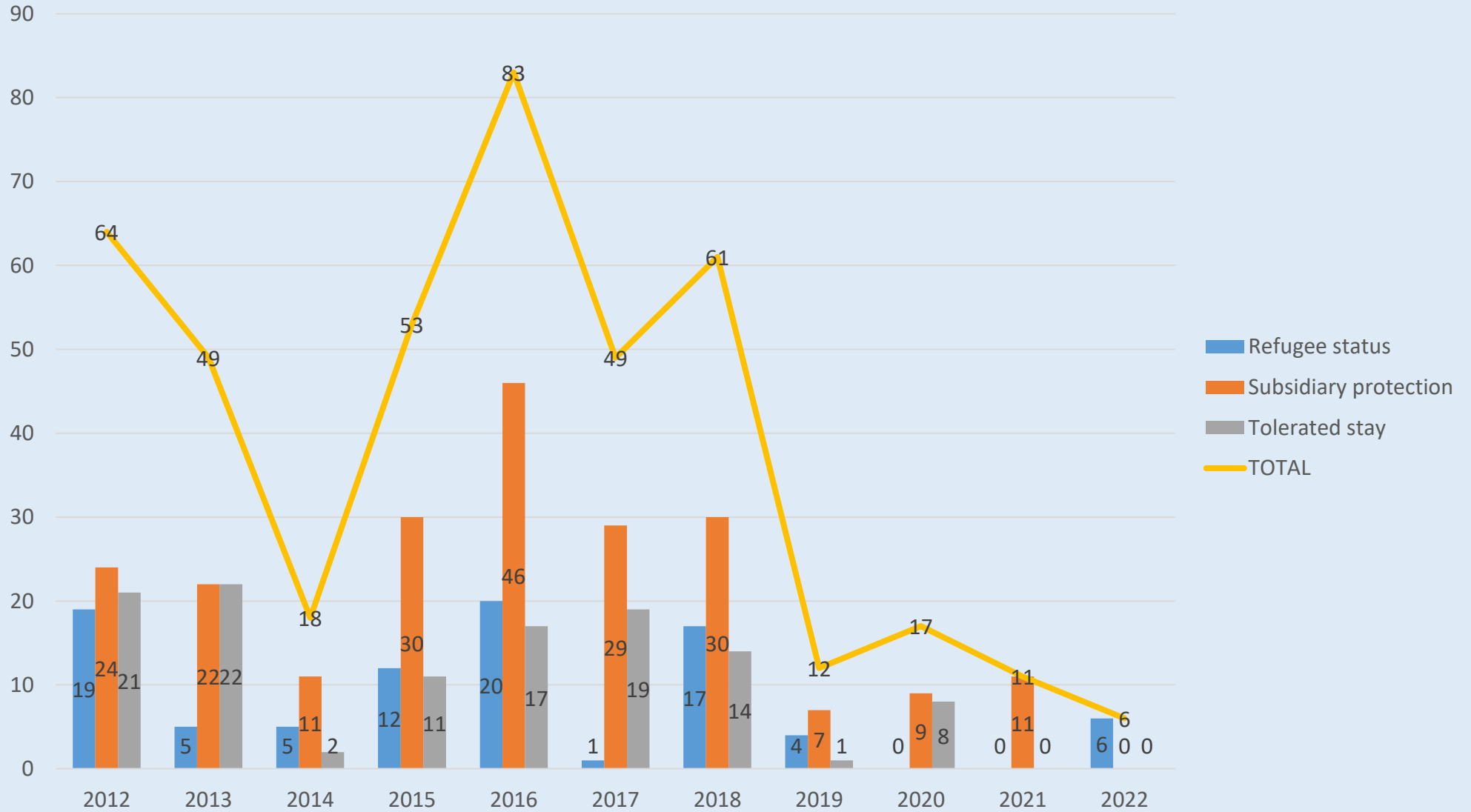


Refugee Board Recognition Rate 2012-2022

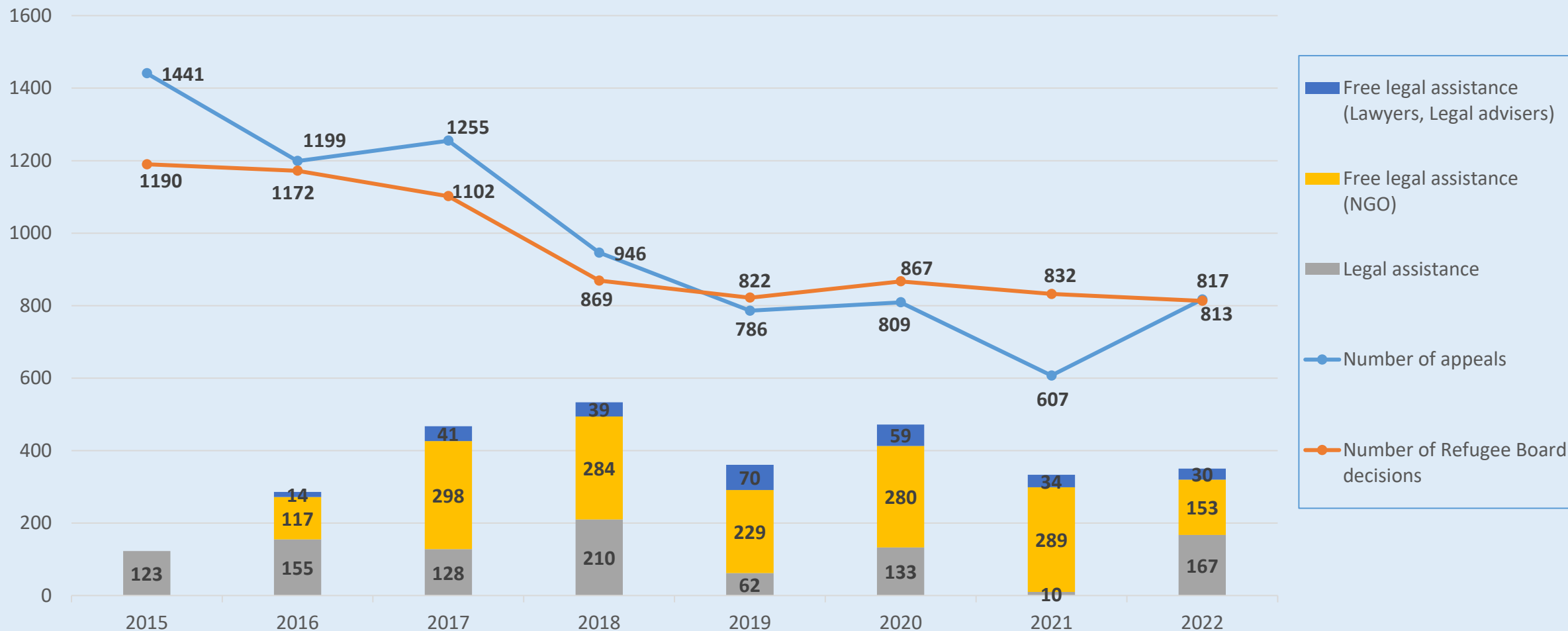




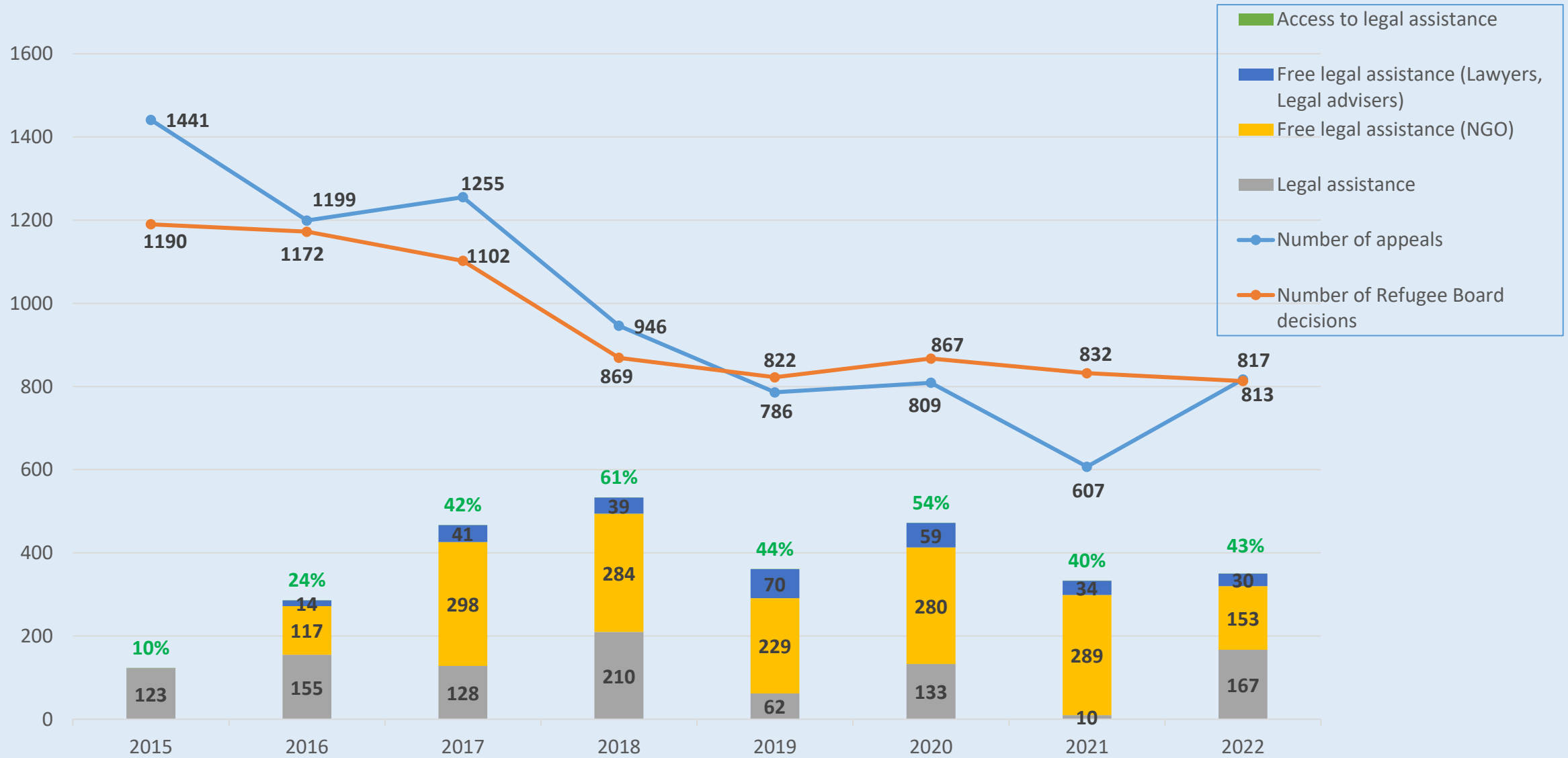
Refugee Board Recognition Rate 2012-2022



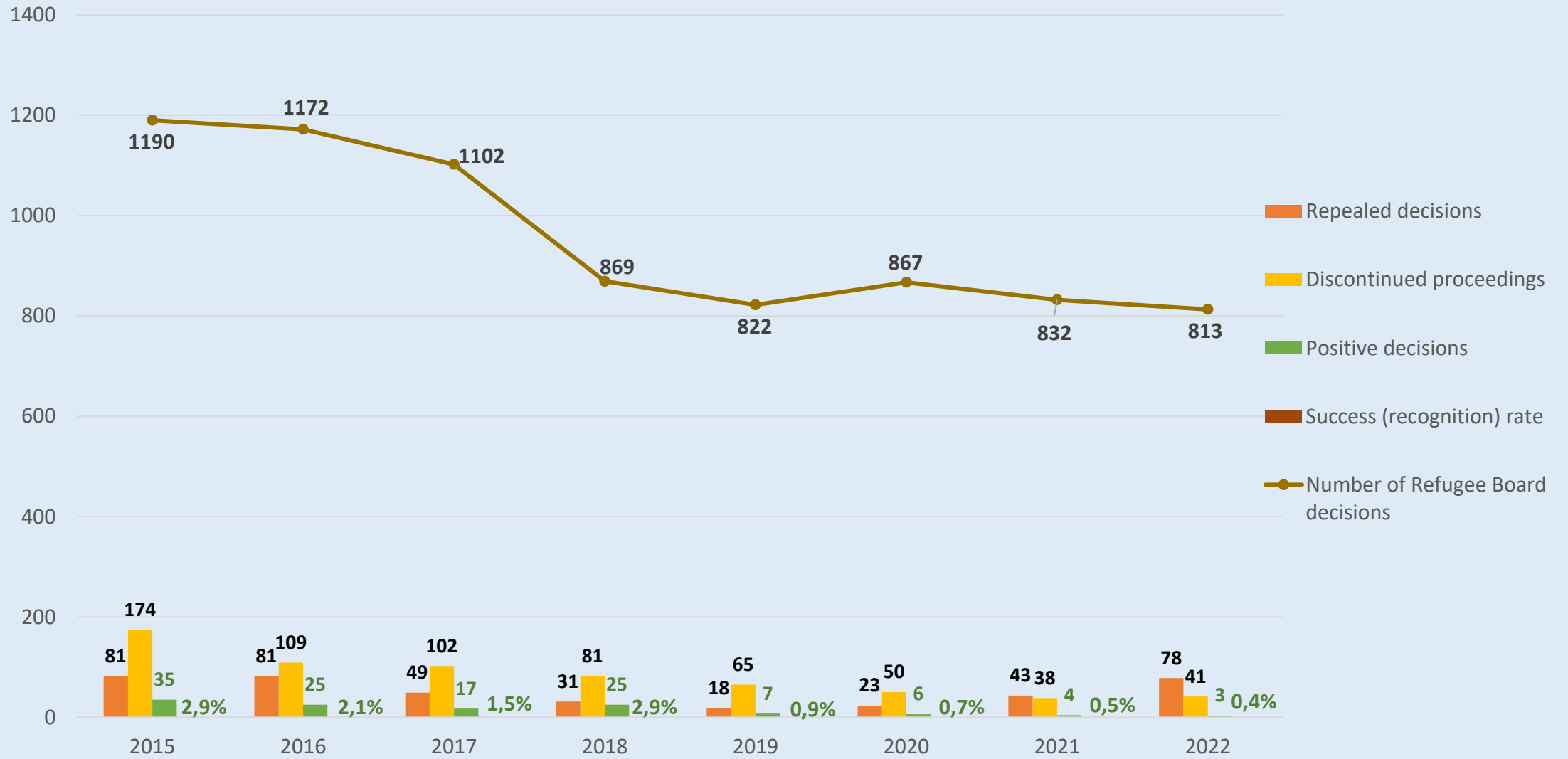
Participation of attorneys in appeal proceedings before the Refugee Board (2015-2022)



Participation of attorneys in appeal proceedings before the Refugee Board (2015-2022)

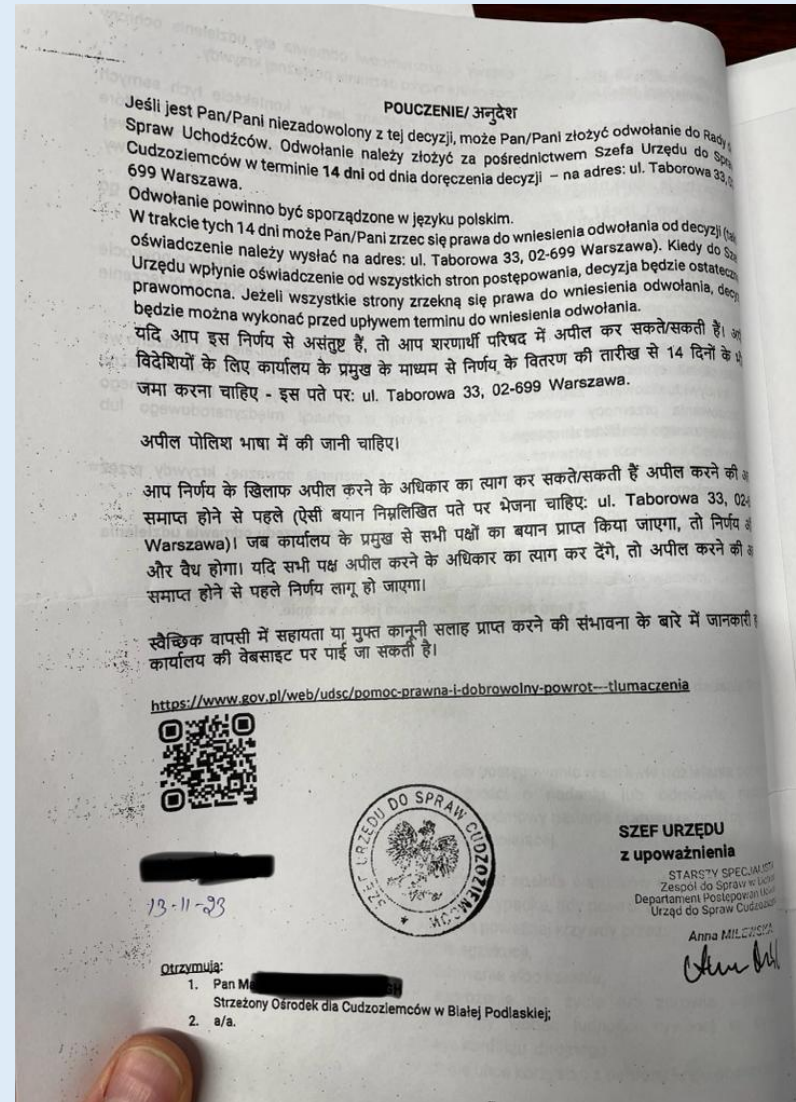


Types of decisions issued by the Refugee Board (2015-2022)



State-funded legal aid in asylum procedures in Poland

Information about legal remedies in asylum procedures with the link to legal aid principles.



State-funded legal aid in asylum procedures in Poland

Conclusions

- state-funded legal assistance costs only 11% of what has been planned
- the number of asylum seekers represented in 2nd Instance proceedings has grown from 10% (2015) to even 61 % (2018)
- the number of appeals has been quite stable
- during this period the recognition rate in the 2nd instance has dropped from 2,9% to less than 1% as compared to 21% (34% including humanitarian stay) in average EU Member State (<https://euaa.europa.eu/asylum-report-2023/41412-recognition-rates-second-or-higher-instances>)
- Asylum seekers have +/- 10% of chances when they file a complaint against the 2nd instance decision to the Warsaw Administrative Court
- two NGO's are responsible for 90% of NPP cases, but this source of funding of statutory activity of SIP and the Rule of Law Institute is less than 10% of their yearly budgets.

State-funded legal aid in RETURN procedures in Poland

- Deadline for transposition of the Return Directive – 24 December 2011
- Act on Foreigners does not include all of the procedural safeguards from the directive
- 30 January 2017 draft of law amending the Act on Foreigners consulted with other stakeholders has included free of charge legal aid system (a mirror system to the one that has been in place in the Act on granting protection to foreigners on the territory of the Republic of Poland)
(<https://legislacja.rcl.gov.pl/docs//2/12294700/12410552/12410553/dokument270819.pdf>)
 - Returnees were supposed to have right to ask for legal assistance (2nd instance administrative organ – before the Board on Foreigners)
 - funded from the budget of the Commander-in-Chief of the Border Guard
- changes were dropped by the government (probably in 2019)
- unofficial explanation – everyone is entitled to free legal aid before the Administrative Court – which is enough to satisfy the EU Return Directive obligation

State-funded legal aid in RETURN procedures in Poland

After our project kick—off meeting the RLI has conducted a study of return files to analyse if foreigners had been informed about their right to legal remedy before administrative courts.

We have reviewed 100 return decisions issued by the Head of the Office for Foreigners in years 2016-2020 (20 cases a years).

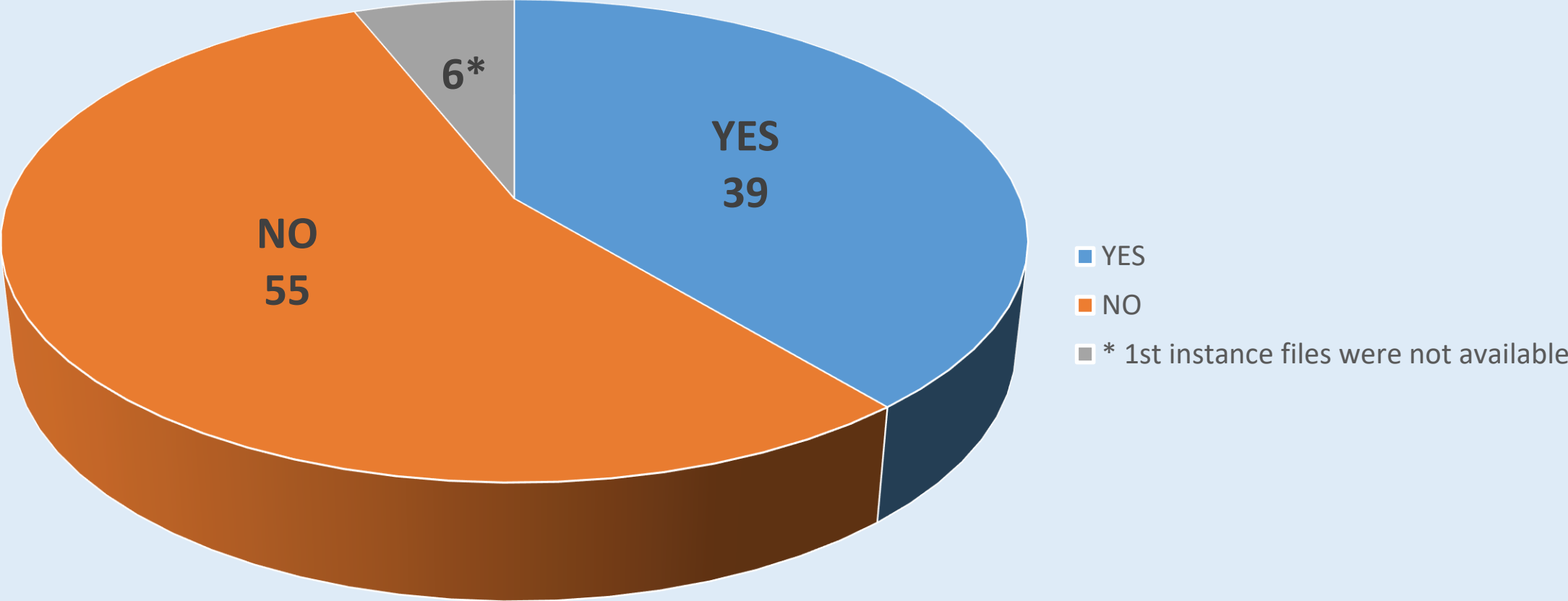
Our questions were, if:

1. BG decisions included an information about remedies (and if they were translated).
2. foreigners were represented by an attorney in 2nd Instance procedure
3. Head of the Office for Foreigners informed returnees about the right to ask for legal aid before the Administrative Court
4. this information was translated into the language of the foreigner?

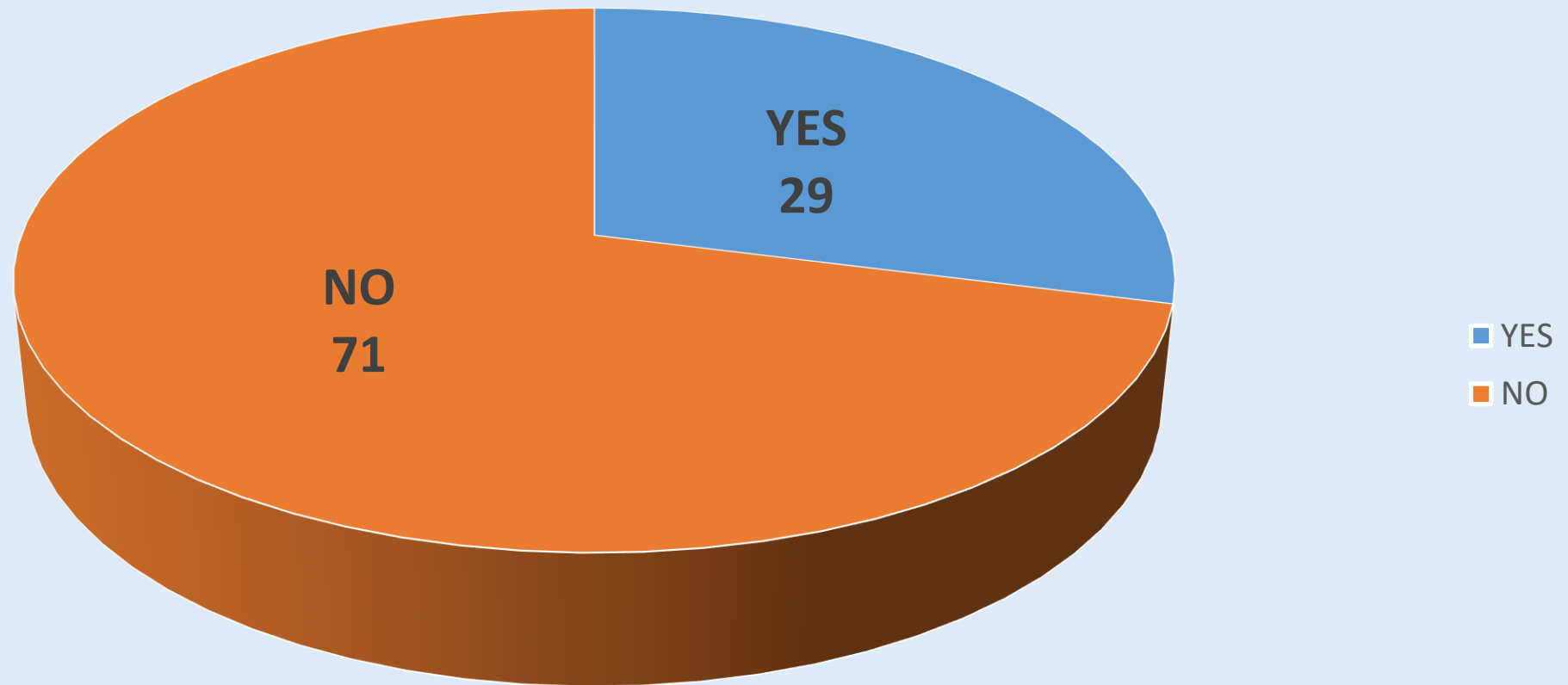
Information to foreigners receiving obligation to return about legal remedies
(1st Instance)

sample 100 procedures from years 2016-2020

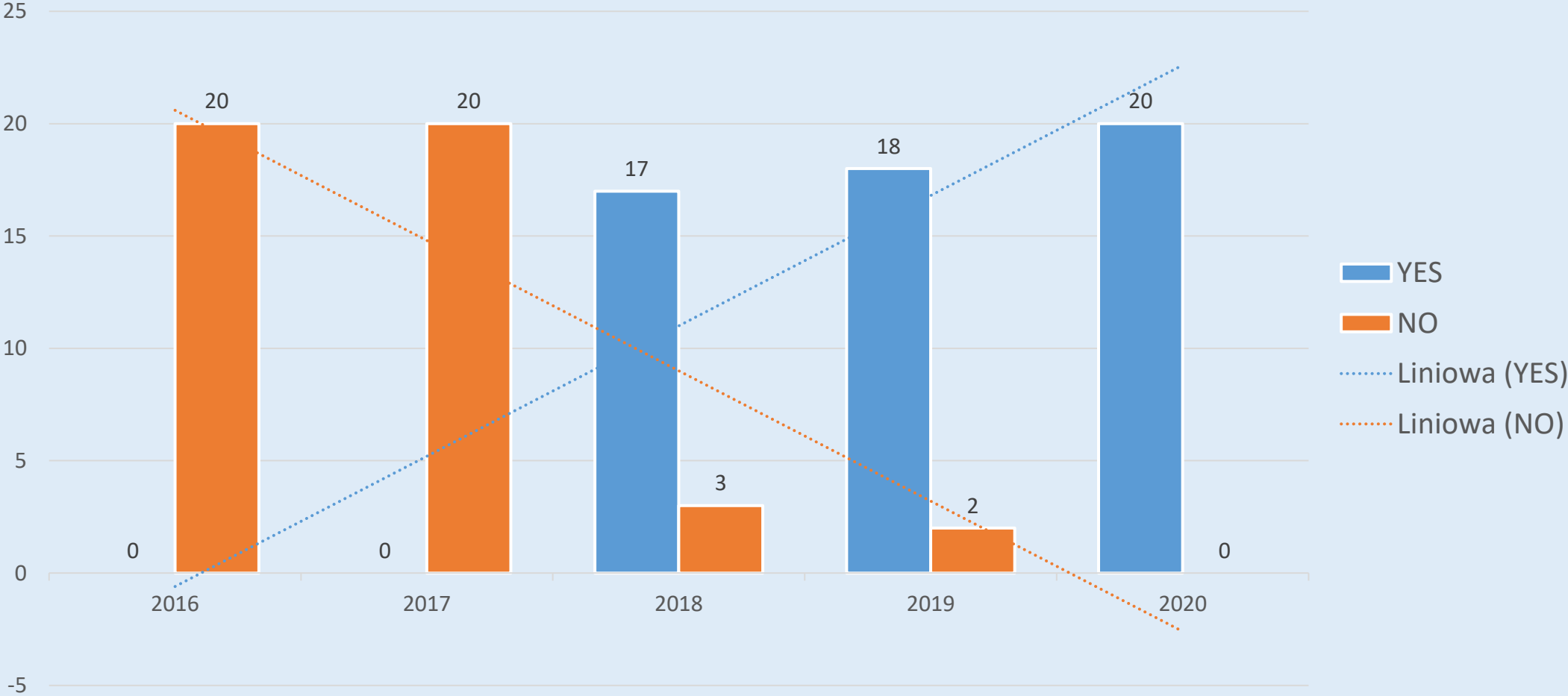
Translation in writing



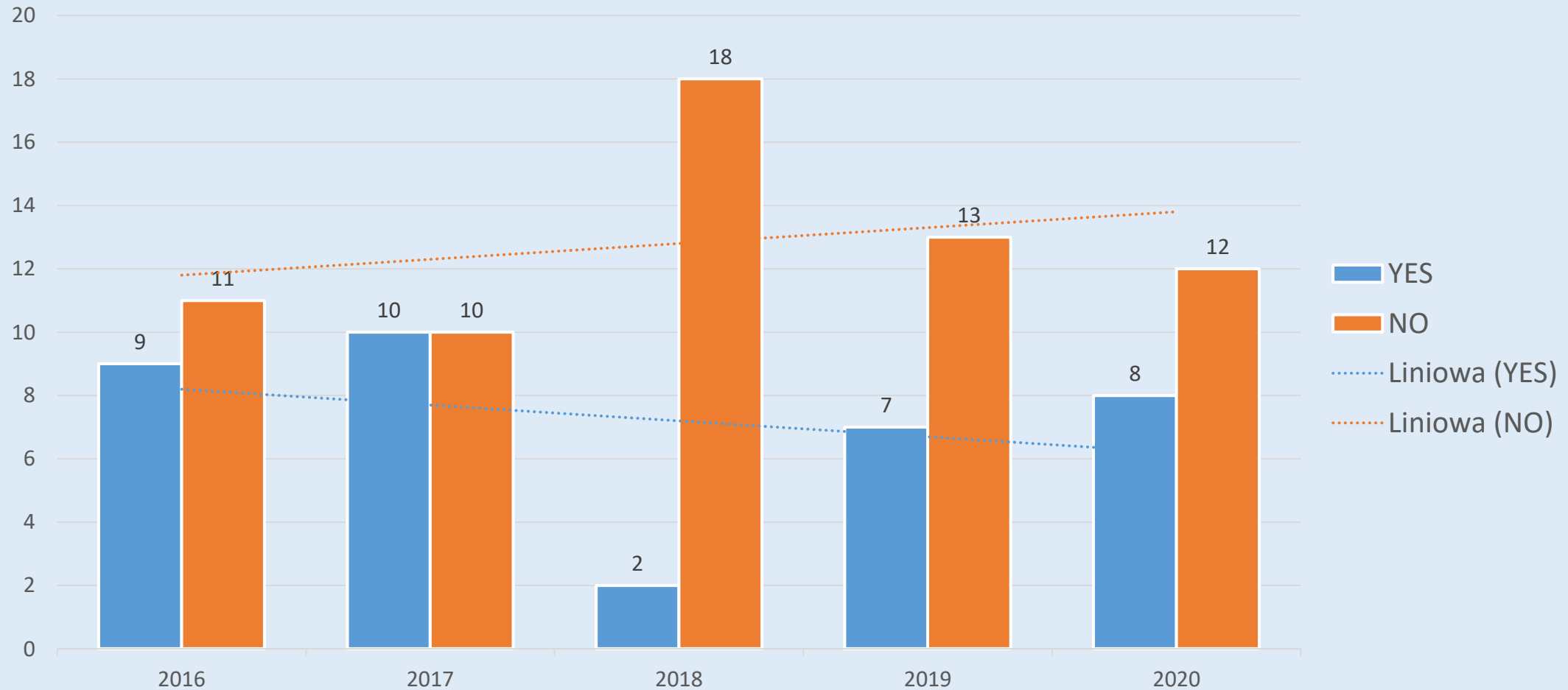
Foreigners represented in 2nd instance return procedures
sample 100 procedures from years 2016-2020



**Information in the 2nd instance decision (Office for Foreigners)
about the right to request free legal aid in Warsaw Administrative Court**



Translation of the information about the legal remedies by the Office for Foreigners (right to file a complaint against return decision to the Administrative Court)



State-funded legal aid in RETURN procedures in Poland

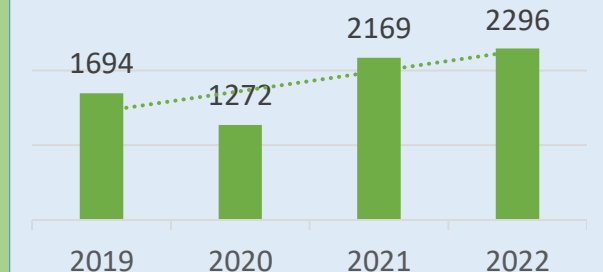
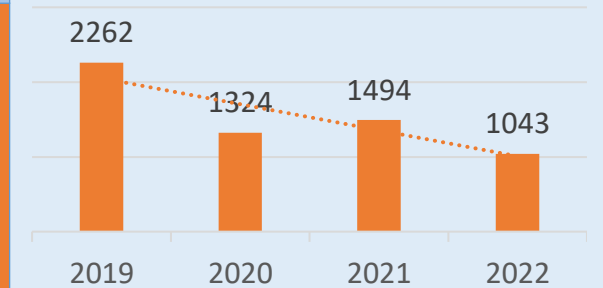
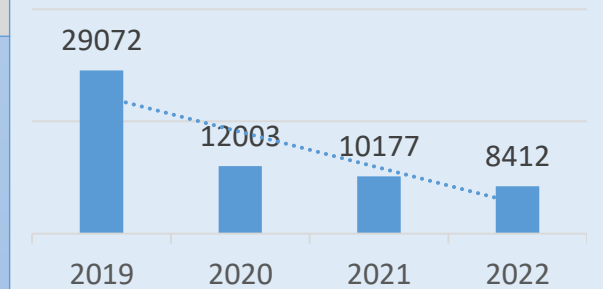
After establishing that returnees were quite often not informed about their right to legal aid and legal representation, we have researched how many foreigners were returned yearly by Poland and how many of them have appealed their return decision.

Finally we have asked Warsaw Administrative Court **how many foreigners** (of almost 60 000 ordered to return to the country of origin) **in years 2019-2022 have applied for a state-funded legal assistance and have been granted it by the Court.**

The answer was quite surprising.

Number of foreigners obligated to return and number of 2nd instance decisions

	2019	2020	2021	2022
Number of foreigners obligated to return (BG decisions)	29 072	12 003	10 177	8 412
Number of appeals against obligation to return (filed to the Office for Foreigners)	2 262	1 324	1 494	1 043
Number of decisions issued by the Head of the Office for Foreigners	1 694	1 272	2 169	2 296



Complaints against return decisions lodged to the Warsaw Administrative Court

	2019	2020	2021	2022	Total 2019-2022
Complaints against return decisions	113	192	169	98	572
Requests for legal aid filed to the court	67	46	33	20	166
LEGAL AID GRANTED BY THE COURT	36	24	13	7	80
Legal aid denied by the court	17	8	9	4	38
Legal aid motions left unrecognized	9	7	7	7	30
Rejected complaints on formal grounds	6	25	20	8	59

Right to an effective legal remedy in return cases in Poland

Crucial arguments

- since October 2020 asylum seekers at Polish-Belarus border as a rule were initially given return decision (only afterwards they were allowed to file application for int'l protection in the detention centres)
- the return decisions at the border were very often issued within 24 hours after stopping asylum seekers at the border – some 15 minutes after the first interview
- foreigners were signing (unknowingly) declarations IN POLISH that they are waiving their right to appeal the return decisions. If they have appealed the return decision after signing the waiver, it was not admissible
- foreigners were never (we had access to 200 files from the border) represented during the initial interview by a lawyer (often they declared that for unspecified reason they were withdrawing a power of attorney signed in the forest – no logic in resigning of the right to a lawyer)

Right to an effective legal remedy in return cases in Poland

Crucial arguments

Amendments to the Act on Foreigners (in force since 7 April 2023):

- reduced deadline for appealing the return decision to 7 days
- transfer of the competence to review the appeal to the Commander-in-Chief of the BG in Warsaw (art. 13 of the Return Directive „a competent body composed of members who are impartial and who enjoy safeguards of independence”?)
- annulled safeguard of suspensory effect during the time of asking for judicial review (art. 331 of the Act on Foreigners repealed)

The practice shows that foreigners with an active administrative return decision are being often deported during awaiting for a judicial review of the rejection of their asylum claim.

Conclusions

- the right to legal aid and representation in 2nd instance **asylum** procedure is formally guaranteed to asylum seekers in Poland
- administrative practice of not granting protection during the 2nd instance proceedings shows that having access to legal aid is irrelevant for asylum seekers' success (at least at this stage of asylum procedure). It is hard to call it an effective legal remedy.
- the procedural safeguards from the **Return** Directive were not transposed to the Act on Foreigners since 24 December 2011.
- the 2023 amendments to the Act on Foreigners and observed practice of collecting waivers from the foreigners as well as not honoring suspensory effect of complaints to the Court leave no doubt that Poland is far from guaranteeing access to the effective legal remedies in return cases.



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pomocy prawnej

Iceland 
Liechtenstein
Norway **Active
citizens fund**



Thank you!

Tomasz Sieniow – principal investigator

E-mail: tsieniow@panstwoprawa.org

The final version of project report will be available on the RLI website

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