

Warsaw, 3rd February 2014

REPORT

**to the Committee on the Elimination of Racial Discrimination
in connection with twentieth and twenty-first periodic reports of Poland**

**submitted by
the Association for Legal Intervention**

We would like to draw the Committee on the Elimination of Racial Discrimination attention to the following issues:

Article 1, 2 and 6

The Act on the implementation of certain European Union provisions on equal treatment entered into force on the 1st of January 2011. The mentioned act from the beginning was the subject of acute criticism of NGOs working to counteract discrimination . The Act introduced into Polish law set for the bare minimum standards required from Member States by the EU directives. This means that in Poland there are still no full regulations provided to combat discrimination and to pursue claims efficiently.

The Polish legislator defined only the basic concepts of anti-discrimination law, aside from the more complex phenomena, like the multiple discrimination or discrimination by association, which may be often take place in the cases of ethnic or national origin discrimination.. An unquestionable weakness of the aforementioned legal regulation is the limitation of the claims for violation of the equal treatment principle only to the compensation. It is worth pointing out that in cases of discrimination the moral damages are often the most serious ailment for victims of discrimination. Therefore, the omission of possibility to seek compensation for damages is incomprehensible under the Act on the implementation of certain European Union provisions on equal treatment.

The Act does not provide any support for victims in their claims of discrimination in the private area, it means the horizontal relations between the citizens. The Human Rights Defender (the Polish Ombudsman), who is performing as plenipotentiary for equal treatment functions, has no statutory authorization to act in this field. The Human Rights Defender's support for the victims is limited to indicate accessible legal instruments. It is essential because the unequal treatment very often appears in the area of private relations.

Another issue is the implementation of the law by the adjudicating bodies. The research conducted by NGOs shows that the provisions of the Act on the implementation of certain European Union provisions on equal treatment do not work in practice¹. At the end of the year 2013, three years after the Act came into force, no judgment based on its provisions has been issued. Only single cases based on mentioned provisions were pending. The important problem, also concerning the judges, is the insufficient awareness of the rules governing the evidence in discrimination cases, in particular the shift in the burden of proof.

In conclusion, the lack of systemic support for victims of discrimination, the dim knowledge of the provisions of the Act on the implementation of certain European Union provisions on equal treatment by professionals who provide legal assistance, and a general lack of legal awareness of society, lead to the conclusion that the protection against discrimination established by the Act is in fact only illusory.

Article 4

Despite of repeated and frequent amendments of the Criminal Code², the hate crimes, including the crimes committed due to racial, ethnic, or national reasons, are still an unsolved problem in Poland. It should be noted that on the one hand, there is a narrow scope of the regulations in force, on the other hand, huge problems of investigation and qualification of this type of crime still exist in Poland. This results that every particular year only about 30-40 cases involving racist crime come to convictions - this is about 11% of detected crimes³. The racist motivation of crime constitutes an element of certain types of crime specified in the Criminal Code (Article 118, 119, 126a, 126b, 256,

¹ M. Wieczorek, K. Bogatko (red.), *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu*. Polskie Towarzystwo Prawa Antydyskryminacyjnego, Warsaw 2013; in: W. Klaus (red.), *Różni, ale równi. Prawo a równe traktowanie cudzoziemców w Polsce*. Stowarzyszenie Interwencji Prawnej, Warszawa 2013, <http://interwencjaprawna.pl/wp-content/uploads/rozni-ale-rowni.pdf>.

² Dz.U. 1997 nr 88 poz. 553.

257). There is no legal regulation obligating the court to adjudicate a punishment for a certain amount in case of the bias motivated crimes. The statutory sentencing guidelines (Article 53 of the Criminal Code), under which the imposed penalty should also acknowledge the racist motivation of the offender, in practice are rarely taken into account by the courts. Under the doctrine of criminal law, it is emphasize the minimal practical significance of those directives: "despite of the broad theoretical studies about a model of directives of degree of penalty, the practice of justice depends more on the specific sense of justice of a particular judge or a judge of the bench than on the law directives of degree of penalty."⁴

As it was mentioned before, other problems comprise the prosecution of hate crimes. In one of the Human Rights Defender's speeches which was addressed to the General Prosecutor, the Defender pointed out the growing number of dismissal and refusal to initiate investigations and the decreasing number of indictments of criminal acts committed because of the racist or xenophobic motivation⁵. The reason may be an unacquaintance with the law by victims of crime and negligible level of support for the victims by the state. However, the main problem is the negative attitude of the police officers or and prosecutors to these types of crime and the reluctance to deal with them. Undoubtedly, it exacerbated the lack of confidence of victims of crime to the law enforcement officers. Many victims of racist crimes criticize police officers' behavior and actions taken in their cases⁶.

Furthermore, it has to be mentioned that there is a lack of a single, comprehensive database, in which all the acts based on racist motives would be collected. There are several systems to collect data in relation to hate crimes, however, these databases do not correlate with each. So more, the data collected in the databases do not reflect the entire image of the situation in

³ K. Karsznicki, *Przestępstwa popełniane z pobudek rasistowskich lub ksenofobicznych*, „Prokuratura i Prawo” 2012, nr 2, s. 30-32.

⁴ A. Grześkowiak, K. Wiak (red.), *Kodeks karny. Komentarz*. Warszawa 2013.

⁵ Pismo z 2.03.2011 roku, sygn. RPO-634137-I/09/MSW, <https://www.rpo.gov.pl/sites/default/files/1550298.pdf>.

⁶ A. Mikulska, *Rasizm w Polsce. Raport z badań wśród osób, które doświadczyły przemocy ze względu na swoje pochodzenie etniczne, rasowe lub narodowe*, Helsińska Fundacja Praw Człowieka, Warszawa 2010, s. 49-52.

Poland. In addition, there is no permanent, uninterrupted monitoring of such acts run by one entity of public authority. Therefore, it is not known, how the cases of hate crime are qualified and carried out from their detection to the court's judgment.⁷

Article 5

The other disturbing issue is the mistreatment by the law enforcement officers of the persons for the reasons of their ethnic origin or nationality. Despite of a small number of the official complaints, there is quite a large number of people who report to the NGOs that they have been mistreated or even abused by the police officers. In many cases the problem is an infinitesimal efficiency of the handling of the complaint what is connected with a lot of difficulties to prove the officers' fault. The difficulties mentioned before could be a consequence of the internal solidarity of the occupational group, the low level of sensitivity or improper hierarchy of values created during the initial training for service. It is important to say that the internal procedure of handling of the complaints for the improper activities of police officers used by the Polish Police is non-effective and thereupon it may be considered as a illusory. So more, the NGOs experience is that in some cases the courts convict the officers' behavior as the crime however the police internal investigation do not find any impropriety in the officers' behavior.⁸

The barrier to the full realization of the foreigners' right to equal treatment is a reference to the principle of reciprocity, as concluded in the Criminal Procedure Code⁹. In the Polish legislation the foreign national's right to compensation for the damages for wrongful arrest or

⁷ Por. informacje zawarte w raporcie: W. Klaus, J. Frelak (red.), *Metodologia przygotowania bazy danych do identyfikacji zdarzeń o charakterze dyskryminacyjnym, ksenofobicznym czy rasistowskim*. Stowarzyszenie Interwencji Prawnej, Instytut Spraw Publicznych, Warszawa 2010, <http://www.interwencjaprawna.pl/docs/metodologia-przygotowania-bazy.pdf>.

⁸ K. Wencel, *Polska dla Polaków? Prawo antydyskryminacyjne wobec migrantów w praktyce Stowarzyszenia Interwencji Prawnej*, w: W. Klaus (red.), *Różni, ale równi. Prawo a równe traktowanie cudzoziemców w Polsce*. Stowarzyszenie Interwencji Prawnej, Warszawa 2013, s. 198-202.

⁹ Dz.U. 1997 nr 89 poz. 555.

detention was made conditional on this principle. It does not seem that this regulation has any justification – for each person who is a victim of the unlawful act of Polish authorities should be granted a compensation or satisfaction which is based on equal rights. The Polish policy on this ground seems to be fixed. As a proof it is enough to be mentioned that while signing the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) Poland raised objections to the Article 30 (2) of this Convention. Under this objection the victim's rights to the compensation from the state are restricted only to the Polish and UE countries citizens.¹⁰

Another important problem is the treatment of foreigners in the detention centers.¹¹ In this respect there are a few issues which need urgent changes. Firstly, it is the practice of detaining minors. . According to the European standards, the placement of the minor in the guarded centre should be used as the last resort instrument and may apply only when other measures are insufficient. It should be emphasized that under the Polish applicable law there is a lack of viable alternatives to detention¹² and hardly no distinction between the detention of minors and the detention of adults in that respect. One of the arguments against the placement of children in the detention centers is e.g. lack of access to education which is confirmed in the official reports released by the Polish Government.¹³ In the opinion of the Association for Legal Intervention the detention of minors should be either prohibited or applied only in exceptional cases. So more, all the children' rights should be provided for all underage placed in the detention centers.

¹⁰ See: <http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=210&CM=&DF=&CL=ENG&VL=1>.

¹¹ W. Klaus, K. Rusiłowicz (red.), *Migracja to nie zbrodnia. Raport z monitoringu strzeżonych ośrodków dla cudzoziemców*. Stowarzyszenie Interwencji Prawnej, Helsińska Fundacja Praw Człowieka, Warszawa 2012, dostępny na: <http://interwencjaprawna.pl/wp-content/uploads/migration-is-not-a-crime.pdf>.

¹² The alternatives to detention shall be introduced by the new act on foreigners, due to come into force on 1 May 2014.

¹³ *Informacja o stanie realizacji praw osób osadzonych w Strzeżonych Ośrodkach dla Cudzoziemców prowadzonych przez Straż Graniczną*. Ministerstwo Spraw Wewnętrznych, Warszawa 2013, s. 20-22, <http://bip.msw.gov.pl/download/4/15845/12-15-37KW378922DKSIWplik2.pdf>.

Secondly, it is a lack of the measures to identify the foreigners who are victims of violence. According to the Polish law the person who is the victim of the torture or other forms of violence should not be placed in the detention. Under the Article 88 point 2 of the Act on granting protection to foreigners within the territory of the Republic of Poland¹⁴ the asylum seekers are not placed in the detention centers if their psychophysical state allows presuming that they were victims of violence. The third – country nationals who have not applied for asylum should not be placed in the guarded centres if it may cause a serious threat to their life or health (Article 103 of the Act on foreigners¹⁵). Nevertheless there are no effective mechanisms put in place that would allow for identifying such persons before their detention and even after they have been already detained. It is worrying that there are no actions, as well as no people who are qualified to lead the identification of the victims of the violence. Another problem is a narrow interpretation of the Article 103 of the Act on foreigners. The adjudicating bodies take into account only the aspect of the physical health of the foreigners and they do not point to the mental health of that foreigners. As a reason of that it is a serious risk of re-victimization of foreigners who are the victims of torture or violence.

Another serious problem is a regime in the detention centers which is based on the provisions of the Executive Penal Code¹⁶ (there are some exceptions which have been implemented in the Act on Foreigners). It is important to say, that in some situations for the foreigners placed in the detention centers more serious code of conduct applies than for the certain categories of prisoners. In particular, it concerns the ability to move around the building, access to fresh air or access to the additional activities. As a reason of that, the foreigners spend time mainly in their cells or in the rooms. In the first place it concerns foreigners who are placed in the arrest for the purpose of expulsion.

¹⁴ Dz.U. 2003 nr 128 poz. 1176.

¹⁵ Dz.U. 2003 nr 128 poz. 1175

¹⁶ Dz.U. 1997 nr 90 poz. 557

It should be emphasized that there is an urgent need to make the psychological assistance in the center for refugees more effective and to broaden it. The psychological assistance provided for at the moment in the centers for the refugees is insufficient. It is provided for only in the forms of consultations or emergency interventions. In spite of the various calls from the NGOs, the conditions for long-term psychological care and regular psychotherapy have not been created yet. Moreover, among the employed psychologists there are no child psychologists and psychotherapists, as well as no professionals working with the victims of PTSD or with the people who experienced the war trauma.¹⁷

It is also observed that the access to justice for foreigners (in the sense, above all, of the right to active participation of concerned party in the proceedings and effective protection of rights) is restricted. In this respect, the restrictions of the access to free legal assistance must be noted. It is an infringement of the Article 15 point 2 of the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee Status and Article 13 point 4 of the Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, in the matter of access to the free legal assistance in the refugee procedure and the procedure of expulsion from the territory of the Republic of Poland.¹⁸ From a formal point of view, the Polish legislation does not create any restrictions for foreigners in the procedure of applying for the legal aid in front of administrative and civil procedure. In practice, granting the legal advice provided by the court is frequently very difficult for the foreigners. The prerequisite is the knowledge about possibility of applying for this free legal aid provided by state. The second condition is a obligation

¹⁷ M. Książak, *Dostęp do pomocy medycznej i psychologicznej osób ubiegających się o status uchodźcy w Polsce*, w: A. Chrzanowska, W. Klaus (red.), *Poza systemem. Dostęp do ochrony zdrowia nieudokumentowanych migrantów i cudzoziemców ubiegających się o ochronę międzynarodową w Polsce*. Stowarzyszenie Interwencji Prawnej, Warszawa 2011, s. 180-182, <http://www.interwencjaprawna.pl/docs/poza-systemem.pdf>.

¹⁸ The regulations of the first directive should have been implemented to the Polish legal order since 01.12.2008 and the second one - since 24.12.2011.

to fill in the official form, which is really complicated, especially for people who do not know Polish language.

So more, in cases concerning detention, criminal courts rarely entrust the assigned counsels. It should be emphasized that the legal aid provided by the professional counsels would ensure the minimum procedural rights of the person who do not know the Polish law or the Polish language. It could also reduce the risk of evidently unreasonable application for placement of a foreigner in the guarded center. The practice shows that the courts have used this legal remedy without making a careful and proper review of a case.

The problem of the access to justice (in the broad meaning of this term) is escalated by the complications with translations of the pleadings and the judgements into a language understandable to the foreigners. According to the practice, in a situation when the foreigner speaks the scarce language, very often the translations are being made into English - even though the person speaks it on a very basic level and does not understand legal terms which are so complicated even for native speakers.

Respect of the foreigners' right to marry Polish citizens is also a problematic issue. Under the Polish Family and Guardianship Code¹⁹ a foreigner should submit a document stating that in accordance with the law of the country of the citizenship he/she has the legal ability to enter into a marriage. In spite of the fact that a lot of foreigners submit this document, the head of civil registry office for unknown reasons direct them to the court procedure within which the court can make exemption from the obligation to submit the document. It seems that the legal rule is extremely clear and, because of that, it should not give rise to any problems with interpretation. Unfortunately, the practice shows something completely different. It is also worrying that the regulation is being applicable in various ways in different civil registry offices.

¹⁹ Dz.U. 1964 nr 9 poz. 59.

The Association for Legal Intervention would also like to point out the unacceptable practice of preventing the marriage in case of one of fiancés' undocumented stay on Polish territory. It happens very often that in the date set for the wedding ceremony the Border Guard officers come along the civil registry office and arrest a foreigner and then, according to the following court's order, they place him/ her in the guarded center. In our opinion, it is not an accident since similar situations take place notoriously, especially in Warsaw. The practice of informing the Border Guard by the head of civil registry office about the foreigner's legal situation is at least thought-provoking, especially if we take into consideration that undocumented stay in Poland is not a crime. If the aim of this action is to make it impossible to get married because of a hypothetical abuse by a foreigner of the provisions on granting the residence permit for a fixed period, this action should be recognize as absolutely needless. It should be emphasized that during the procedure of obtaining the residence permit the administrative body may use a lot of evidences, which allow to determine whether the marriage is or is not of convenience.

Legal regulations that concern performing work in Poland by third country nationals also require a radical change, particularly with regard to the prohibition of discrimination in employment, enshrined in Polish legal order by the Labour Code²⁰. In case the foreigner needs the permit to work legally in Poland, pursuing claims for the infringement of the principle of equal treatment is very difficult in practice. This is due to a very broad definition of the illegal performance of work by foreigners, defined in the Act on employment promotion and labour market institutions' regulations²¹, where illegal performance of work means performing work under the conditions other than specified in the work permit. In reality, foreigners gain less than it is specified in work permit which, as already indicated, means illegal performance of work. The situations when employer has failed to complete formalities related to notify foreigners to public authorities (tax office, social security office) also means illegal work. Despite the lack of the culpability on the part

²⁰ Dz.U. 1974 nr 24 poz. 141.

²¹ Dz.U. 2004 nr 99 poz. 1001.

of foreigner, he/she bears responsibility for the employer's actions. This responsibility is serious because according to the Act on foreigners, illegal performance of work is an obligatory condition for the expulsion of a foreigner from the territory of the Republic of Poland.

Attention should also be paid to fictitious protection of migrant workers before they get exploited by Polish employers. Many foreigners report a problem of abuse in work, although applicable rules make it impossible to recover claims because they lose the basis for residence in Poland by the end of work. Not many people will be willing to start litigation with employer because of the risk of a loss of employment and as a result loss of right for residence. The National Labor Inspectorate gives no help for foreigners, either. This authority, when dealing with foreigners, focuses more on controlling legality of employment than on protection of migrant workers' rights. In case of finding an infringement the National Labor Inspectorate denounces the foreigner to the Border Guard.²²

This construction of law is an evident proof of weakness of Polish law. From the formal point of view, the Polish legislator guarantees the right to claim for infringement of the principle of prohibition of any form of discrimination in employment to all people. However, in reality, in case of foreigners, claiming is often impossible due to negative consequences. Analogical situation can be observed in case of people working under civil law contracts.

In regard to the Public Healthcare²³, it is also necessary to point out that especially foreigners children have a lot of difficulties to access to the healthcare system. It is namely about undocumented foreigners' children or those who, after refusal to grant international protection in the first procedure, re-apply for refugee status and have not received social benefits. The children mentioned above are deprived of access to healthcare, despite the fact that it should be provided

²² W. Klaus (red.) *Ziemia obiecana? Warunki pracy cudzoziemców w Polsce*. Stowarzyszenie Interwencji Prawnej, Warszawa 2011, <http://www.interwencjaprawna.pl/docs/ziemia-obiecana.pdf>.

²³ A. Chrzanowska, W. Klaus (red.), *Poza systemem. Dostęp do ochrony zdrowia nieudokumentowanych migrantów i cudzoziemców ubiegających się o ochronę międzynarodową w Polsce*.

for them pursuant to the regulations of Convention on the Rights of the Child. Even if regulations give access to healthcare for children attending the school, these regulations are limited to preventive health care.

Foreigners who were granted an international protection have formally almost the same rights in the healthcare area as Polish citizens. Barriers to entry to healthcare are results of poor practices and the lack of systematic solutions in providing interpreters in the process of medical treatment. The undocumented foreigners are in much worse situation, they have right to healthcare only in urgent cases.

Article 7

In the field of education one of the biggest barriers is lack of free of charge education for adults refugee migrants (not mentioning other categories of migrants). The problems concern in particular possibility of complementing educational program on each level, which is essential problem especially for refugee migrants. Only children under 18 years have right for free of charge education (in fact, it is their obligation) .

The real problem is also, which was underlined before, the fact that children from guarded centers do not have access to proper education. They can attend „educational classes”, which in fact do not have much to do with completion of the school obligation, which is due to bad adaptation of the school programs and amount of classes to intellectual development of particular child.²⁴

The institution of „assistant for foreigners”, which has been established in the Article 94a of the Act on education²⁵, should be considered a dead one. Until now only several schools in the

²⁴ *Informacja o stanie realizacji praw osób osadzonych w Strzeżonych Ośrodkach dla Cudzoziemców prowadzonych przez Straż Graniczną*. Ministerstwo Spraw Wewnętrznych, Warszawa 2013, s. 20-22.

²⁵ Dz.U. 2011 nr 84 poz. 455.

country decided to hire teachers working in this mode. It is still an area, where NGOs realize its educational integration projects.

Besides, foreigners in Poland still face communications barriers in the offices which are not capable to provide service for multicultural customers.²⁶ The foreigners have to face the situations when offices require documents other than those provided in regulations or require the presence of a sworn translator when it is not necessary, which causes additional expenses for foreigners and extend time of dealing with their problems or cases.

Another problem is registration of residence, which is obligatory in different situation of everyday life. especially that the landlords unwillingly agree to register the foreigners. Sometimes, registration of residence is the application criteria for a council flat, which should be considered unlawful.²⁷

²⁶ W. Klaus, *Przygotowanie polskich urzędów do obsługi cudzoziemców*, in: W. Klaus (red.), *Sąsiedzi czy intruzi? O dyskryminacji cudzoziemców w Polsce*. Stowarzyszenie Interwencji Prawnej Warszawa 2010.

²⁷ K. Wencel, *Dyskryminacja cudzoziemców w dostępie do usług mieszkaniowych w Polsce. Między teorią a praktyką*, in: W. Klaus (red.), *Różni, ale równi. Prawo a równe traktowanie cudzoziemców w Polsce*. Stowarzyszenie Interwencji Prawnej, Warszawa 2013, s. 243-272.

Information about organization submitting the report:

The Association for Legal Intervention (SIP) is a watchdog organization whose mission is to strive for the observance of human rights and against unequal treatment. In order to trigger change in the systems of law and social policies, we take part in conferences and consultations of legal acts, as well as comment on legal regulations, conduct research, carry out monitoring and issue expert opinions. We also educate and provide information.