Stowarzyszenie
Interwencji
Prawnej

SIP in action

The rights of migrants in Poland in 2020

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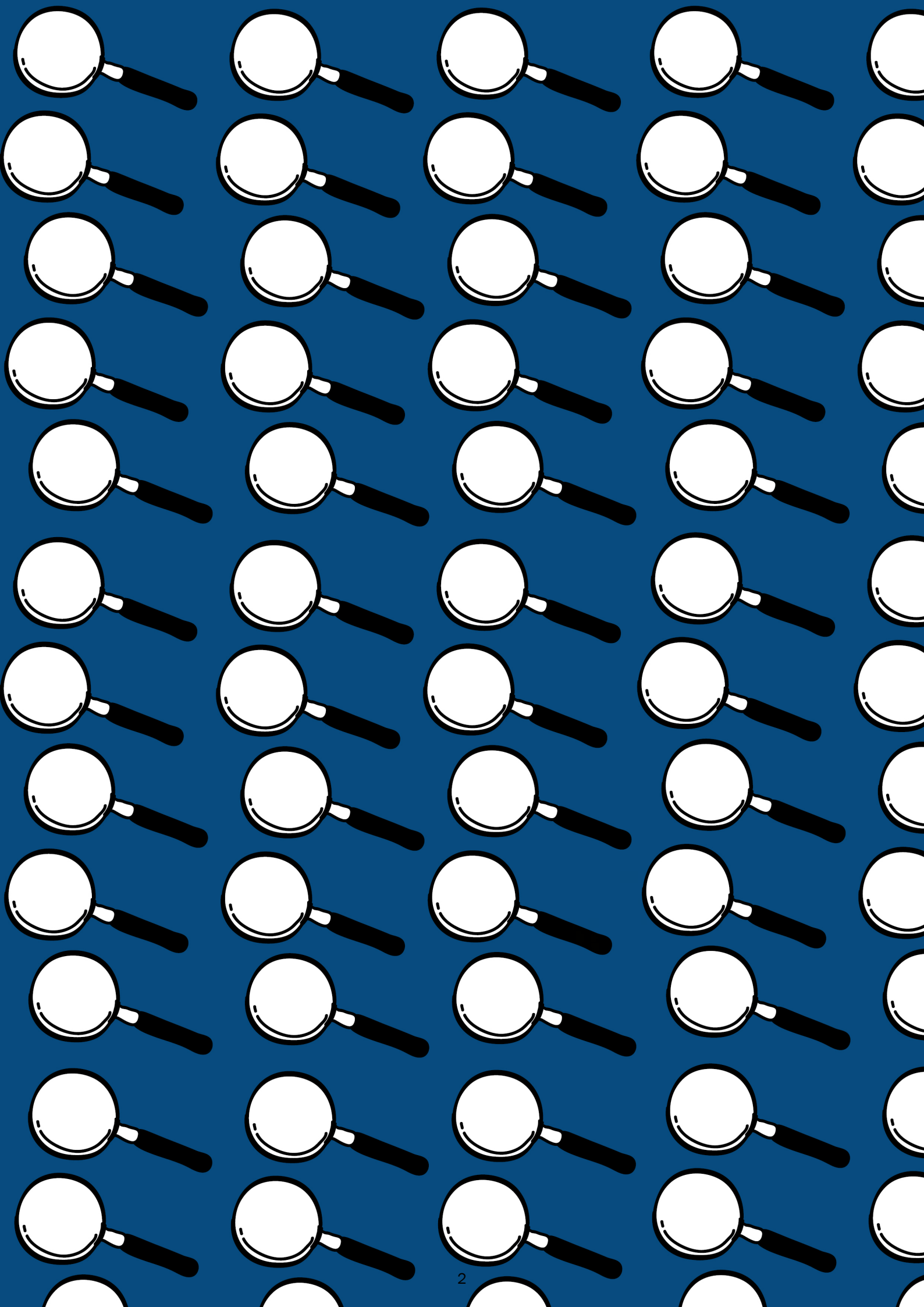
REPORT



About the report

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

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

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

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Our goals

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

OUR ACTIVITIES

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

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

Ladies and Gentlemen,

Katarzyna Słubik

As we were planning activities for the year ahead in December 2019, we were not imaginative enough to anticipate how much the pandemic would change our lives and the way we work.

Nevertheless, as in any massive crisis, the outbreak has had a significant impact on people from groups at risk of marginalisation. Poland's eastern border has become even more hostile to refugees, only a few of whom have managed to apply for international protection and been granted entry into Poland. Those already applying for protection within the territory of our country have encountered problems with continuation of their benefits and access to reception centres.

As a result of the economic downturn a number of people with a migration background who lost their jobs became disadvantaged due to lack of entitlement to social welfare benefits, lack of opportunities to change employers quickly or lack of support networks. Meanwhile, the confusion with the repeatedly changed 'crisis shield' was a huge challenge in reaching migrants with information about their current rights and obligations. A challenge that apparently has not been met by many public administration bodies.

We tried to intervene in all these cases: we took part, without invitation, in the consultations of the anti-crisis shields, highlighting significant gaps in securing the situation of migrants and migrant women. We intervened on the closure of the eastern border and on the controversial immigration detention of male and female migrants in guarded centres from the point of view of epidemic risk. During the most difficult first months of the epidemic, we even helped the office to fill in asylum applications to prevent the discontinuation of social benefits for refugees.

We also attempted to keep our website up-to-date on the kaleidoscopically changing rules on the rights of migrants. Although at least a few organisations are involved in direct material assistance to individuals with a migration experience in a crisis situation, we also managed to make a contribution and organised two food parcel distribution campaigns.

Although coronavirus was by far the prevailing issue, last year we were also active in areas that have long been of concern to us. We have been involved in legal disputes in, among other things, cases of compensation for unfair detention, in cases of violations of the rights of migrant children or wrongful - in our view - refusals to grant international protection. The major part of our work was to counteract the absolute lack of respect for procedural guarantees in the countless administrative and judicial procedures involving people with migration experience in Poland.

Our hidden dream is that our successes and failures will help other people supporting migrants in Poland as well as the people concerned in managing their own affairs.

We are therefore delighted to present you with the third annual report on the activities of the Association for Legal Intervention.

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I. Procedure for granting international protection (asylum)

In 2020, only 2,803 people applied for international protection in Poland. This is the lowest number since 1995 and more than 30% lower than in 2019. Between 2012 and 2016, an average of around 12,000 people applied for asylum in Poland each year. Since 2017, with the intensification of the practice of push-backs on Polish borders, this number began to fall dramatically. Between 2017 and 2019, on average, only around 4,500 people applied for international protection each year. In 2020, there was another sharp decline in the number of applications for international protection.

In 2020, the largest number of applications for international protection was made by citizens of Russia, Belarus and Ukraine. The citizens of Russia, Belarus and Turkey were also the ones who received the highest number of decisions to grant them one of the forms of international protection. However, when considering the recognition of applications for international protection (calculated in relation to all issued decisions, thus also decisions to discontinue proceedings), the highest recognition rates were recorded for refugees from Yemen and Venezuela (100%), as well as Turkmenistan (88%), Sierra Leone (86%), Turkey (70%), Somalia (67%), Belarus (62%), Nepal (60%), Syria (58%) and Libya (50%). Also nationals of Afghanistan, China, Eritrea and Palestine could expect a high recognition rate for their applications for international protection (100%), as long as only decisions on the substance are taken into account, without decisions to discontinue proceedings.[1]

Aleksandra Pulchny
Magdalena Sadowska

1. PERSECUTION FOR REASONS OF SEXUAL ORIENTATION (LGBTQ PERSONS)

The Head of the Office for Foreigners in 2020, as in previous years, did not keep the statistics on the number of persons applying for international protection in Poland on the grounds of sexual orientation. As in previous years, the percentage of such cases run at the Association for Legal Intervention was minor. In 2020, the Association's clients citing non-heteronormative sexual orientation as the reason for their refugee status came from Chechnya, Uganda, Iran and Ukraine.

The Association for Legal Intervention monitored the case of a Chechen who, when submitting a subsequent application for international protection, invoked the fear of persecution on the basis of, inter alia, his sexual orientation. The asylum seeker did not indicate this circumstance when submitting his previous application, as it was a secondary reason for his flight from the country. The Head of the Office for Foreigners refused to grant him international protection, considering the new circumstances as an escalation of the testimony.[2] In other words, the Head of the Office for Foreigners claimed that as the migrant

1. Office for Foreigners statistics available at: https://udsc.gov.pl/statystyki/raporty-okresowe/zestawienia-roczne/.
2. Decision of the Head the Office for Foreigners of 10 November 2020, No. DPU.420.976.2020.

had not invoked this circumstance during the first procedure, it could not be considered credible. Moreover, the authority failed to repeat the interview with the asylum seeker in order to determine the reason for the discrepancy between the first and the subsequent refugee application, nor did it appoint an expert witness to prove that the applicant had experienced serious forms of violence in the past, which had resulted in the deterioration of his mental health and could have influenced his testimony during the previous procedure. An appeal has been lodged against the decision of the Head of the Office for Foreigners. The case is currently pending.

In 2020, both the Head of the Office for Foreigners and the Refugee Board issued a decision on the accelerated examination of an asylum application and refusal to grant international protection to an LGBTQ man from Ukraine. He was an active member of an organisation campaigning for the rights of sexual minorities and had suffered physical and psychological violence in the country because of his sexual orientation. However, the authorities of both instances considered that he had not reported the fact of violence to the relevant authorities of his country. The Ukrainian authorities could not therefore provide him with protection. Moreover, he had not applied for international protection immediately upon arrival in Poland, but only after his visa had expired, which "in the view of the authorities (...) testifies to the instrumental treatment of the refugee procedure".[3] The Refugee Board upheld the position of the authority of first instance, at the same time erroneously indicating that "in the application, the Applicant stated other reasons for submitting the application than those justifying the granting of the refugee status or subsidiary protection (persecution due to sexual orientation). According to the applicant's statements, the source of danger for him in the country of origin were other entities within the meaning of Article 16(1)(3) of the Protection Act. This is the basis for expedited proceedings, which corresponds to Article 31(8)(a) of Directive 2013/32/EU." According to the study by the Information Division on Countries of Origin of the Office for Foreigners (2019) "LGBTI group members in Ukraine, however, face difficulties and abuses that are discriminatory in nature. Sometimes there are also acts of physical violence against them [LGBTI group members] by unknown perpetrators, against which the Ukrainian authorities are unable to protect them. It happens that Ukrainian police refuse to intervene in these cases." In the opinion of the Association for Legal Intervention, such cases should not be considered in an expedited procedure and the situation of LGBTI people in the context of the individual circumstances of the case should be thoroughly examined. The case is pending in the Voivodship Administrative Court in Warsaw.

LGBTI group members in Ukraine, however, face difficulties and abuses that are discriminatory in nature. Sometimes there are also acts of physical violence against them [LGBTI group members] by unknown perpetrators, against which the Ukrainian authorities are unable to protect them.

In 2020, refugee status was granted[4] to a lesbian who fled Chechnya due to persecution by her family members (case described in details in the report SIP in action. Rights of foreigners in Poland in 2019[5]). Because of her sexual orientation, she was afraid of violence from her father, including murder to protect the family honour. The woman could not rely on state protection, as the authorities in Chechnya not only fail to protect LGBTQ people, but also commit persecution themselves.

3. Decision of the Head of the Office for Foreigners of 22 April 2020, No. DPU.420.144.2020; decision of the Refugee Board of 29 October 2020, No. RdU-193-1/S/20. The same in the decision of 31 December 2019, No. DPU.420.1344.2019 and decision of the Refugee Board of 27 April 2020, No. RdU-52-1/S/20.
4. Decision of the Head the Office for Foreigners of 2 July 2020, No. DPU.420.1255.2019.
5. P. 15

Małgorzata Jaźwińska

2. RELIGION-BASED PERSECUTION

Refugee status may be granted to a person who, if returned to his or her country, would face a real risk of persecution because of his or her religion. Persecution on religious grounds can take various forms. For example, changing one's religion can be punished by death, long-term imprisonment or physical violence, as is the case in Iran. It can also manifest itself in the form of systematic discrimination and prevention of participation in religious rites, religious practice or teaching. The Association provides legal assistance to asylum seekers who have fled their country to escape persecution on religious grounds.

In 2020, the Association for Legal Intervention conducted two cases involving female Russian citizens who are Jehovah's Witnesses. In Russia, in 2017, the Supreme Court of the Russian Federation outlawed the Russian religious community of Jehovah's Witnesses and issued a decision to confiscate the religious association's property. Jehovah's Witnesses were declared an extremist organisation. Those who engage in active religious activity face fines, imprisonment, harassment and confiscation of property. Jehovah's Witnesses in Russia are exposed to violence and discrimination in social life.[6]

Changing one's religion can be punished by death, long-term imprisonment or physical violence, as is the case in Iran.

The women carried out missionary activities in Russia and were questioned by the police in connection with their religion. The police also questioned their neighbours about them. The Refugee Board concluded that it was not possible to speak of mass persecution of all Jehovah's Witnesses in Russia or that the asylum seeking women were of interest to the authorities because they had not yet experienced violence or been deprived of freedom. As a result, the Refugee Board refused to grant them refugee status. SIP argued before the Voivodship Administrative Court in Warsaw that persecution on religious grounds could consist in the impossibility of freely professing and practising their religion. The asylum seeking women were actively involved in missionary activities, which additionally exposed them to harassment by the authorities in Russia. The Association claimed that they should not be required to conceal their religion in order to protect themselves from persecution in their country. The Voivodship Administrative Court in Warsaw agreed with the argumentation of the SIP. In the judgment of 13 November 2020, IV SA/Wa 639/20, it indicated that "since professing a religion is connected with practising it, and missionary activity is essential in the practice of Jehovah's Witnesses, resignation from this in fact constitutes submission to orders of the authorities violating human rights to freedom of religion" (analogously in the judgment of the Voivodship Administrative Court in Warsaw of 13 November 2020, IV SA/Wa 640/20). The court found that the detention and questioning in relation to religion, followed by the appearance of a police car in front of the foreign women's house, constitutes persecution. The Voivodship Administrative Court in Warsaw annulled the decision of the administrative bodies of both instances for reconsideration.

Persecution on religious grounds could consist in the impossibility of freely professing and practising their religion.

6. Study of the Country of Origin Information Division of the Office for Foreigners of 7 February 2020, No. DPU-WIKP-424/70/2020.

In 2020, SIP also dealt with the case of an Iranian citizen who had to flee the country because of his change of religion from Islam to Christianity. In Iran, the penalty for apostasy is death or long-term imprisonment. The Head of the Office for Foreigners found that the asylum seeker had not demonstrated that he had actually changed his religion. He identified minor inaccuracies in his theological knowledge. The Association argued that in the case of converts fleeing Iran, their religious knowledge is often not extensive. However, this must not lead to an automatic refusal to recognise them as converts. Indeed, in Iran they are forced to explore their faith in clandestine conditions. They cannot attend mass or participate in larger religious gatherings in Iran, as these are strictly forbidden and punished. The case is currently before the Refugee Board.

The Association argued that in the case of converts fleeing Iran, their religious knowledge is often not extensive. However, this must not lead to an automatic refusal to recognise them as converts. Indeed, in Iran they are forced to explore their faith in clandestine conditions.

Małgorzata Jaźwińska
Aleksandra Pulchny
Magdalena Sadowska

3. SURVIVORS OF VIOLENCE

The experience of physical, psychological or sexual violence is often a reason for fleeing from the country of origin. If this violence was perpetrated by or with the acquiescence of state officials, it may lead to the person being granted refugee status or subsidiary protection. Individuals who have experienced violence in the past are a group of migrants who should receive special state care. Due to the trauma they have experienced, they may have difficulties in describing in detail the violence suffered. It is often a secondary traumatising experience for them.

The challenges described in the report SIP in Action. Rights of foreigners in Poland in 2019[7] with the correct identification of people who have experienced violence in their country are still unresolved. Asylum seekers who have declared that they had suffered violence are not immediately referred for medical and psychological examinations. Asylum authorities (the Head of the Office for Foreigners and the Refugee Board) still fail to appoint an expert to determine whether the scars or other marks on the asylum seeker's body could have been caused by violence against him in the manner he claims. The psychologist participating in the status interview does not conduct a psychological examination or prepare an opinion indicating whether the symptoms of mental dysfunctions may have been caused by violence against an asylum seeker. All these problems continuously contribute to the misidentification of persons who have experienced violence, which translates into the failure to provide them with adequate support, and may also lead to the wrongful refusal to grant them international protection.

Asylum authorities (the Head of the Office for Foreigners and the Refugee Board) still fail to appoint an expert to determine whether the scars or other marks on the asylum seeker's body could have been caused by violence against him in the manner he claims.

State violence

In 2020, the Association for Legal Intervention run a number of refugee status determination proceedings concerning asylum seekers who had been subjected to violence by public officials in the past. The vast majority of these proceedings concerned Russian nationals. In these cases asylum authorities frequently either disputed that the asylum seeker had suffered violence or indicated that in their assessment the violence had not been inflicted by state officials.

In the previous year, the Head of the Office for Foreigners issued a decision in the case described in the report: SIP in Action. Rights of foreigners in Poland in 2019[8], concerning a Russian citizen who was severely beaten by force officers in Chechnya.[9] The administrative authorities initially considered that such violence had occurred, but it constituted an act of a criminal nature and not grounds for granting international protection. The Supreme Administrative Court disagreed with this opinion and reversed the case to the first instance authority for reconsideration. In 2020 the Head of the Office for Foreigners again refused

7. P. 13-14
8. P. 10
9. No. DPU-420-1509/SU/2016.

to grant protection to the migrant. Despite the fact that there was no alteration of any factual circumstances and no new evidence to challenge the asylum seeker's testimony, the first instance authority changed its findings. This time, the Head of the Office for Foreigners decided that the migrant had not suffered violence from public officers, despite the fact that he had submitted photographs of his seriously injured body. In the opinion of the SIP, such grossly different findings of fact on the basis of identical evidence, as to whether the asylum seeker had suffered violence, testifies to an arbitrary assessment of evidence and are incompatible with the principles of a democratic state of law. It is understood that the office made the decision to refuse to grant international protection regardless of the evidence gathered. This decision was appealed against. The case is currently pending.

Despite the fact that there was no alteration of any factual circumstances and no new evidence to challenge the asylum seeker's testimony, the first instance authority changed its findings.

Another case described in the report SIP in Action. Rights of foreigners in Poland in 2019[10], was the issue of a Chechen man, against whom there was a high probability that he had been subjected to torture in his country of origin, ended with the refusal of the Refugee Board to grant international protection.[11] The asylum seeker presented full-blown post-traumatic stress disorder. He declared that officers in his country had broken a rib, a finger and his nose as a result of torture.

The Refugee Board considered that he was escalating his testimony and that it was not possible to link his poor mental state with his experience of violence on the part of officers of his country of origin. When assessing the evidence, the authorities ignored the fact that at the time of submitting the application for international protection, the asylum seeker's psychophysical condition was so weak that, according to psychologists and a psychiatrist, he was unable to participate in the interview. In the opinion of the Association for Legal Intervention, any discrepancies in his testimony were a result of the trauma he had experienced and should not result in it being regarded as unreliable. The authorities did not take into consideration that within at least two years of submitting the application for international protection, the migrant's mental health condition was so poor that it did not allow for an interview. An asylum seeker filed a complaint with the Voivodship Administrative Court in Warsaw. The Association for Legal Intervention has applied to participate in the proceedings as a participant. The case is pending.

Despite the legal prohibition of torture, there are reports that the authorities use torture especially during preliminary investigations. There are cases of blinding, hanging detainees by the wrists, beatings, beating on the feet, electrocution, sexual and psychological abuse, immersion in cold water, sleep deprivation, forcing them to stand for long periods, deprivation of clothing, food and access to the toilet.

In 2020, the Association also dealt with the case of a Lebanese citizen who, due to deserting from the army several times, could be tried and imprisoned if returned to his country. The asylum seeker had already been placed in harsh conditions in a military punishment cell several times in connection with his desertion. He was deprived of food, kept in an overcrowded cell and was slapped by prison guards. General prison conditions

10. P.17
11. The Refugee Board decision of 29 June 2020, No. RdU-410-1/S/19.

in Lebanon are extremely harsh. There is severe overcrowding, inadequate infrastructure, high humidity levels, insufficient sunlight and extreme temperatures in the cells. Conditions in some prisons are life-threatening for detainees. Despite the legal prohibition of torture, there are reports that the authorities use torture especially during preliminary investigations. There are cases of blinding, hanging detainees by the wrists, beatings, beating on the feet, electrocution, sexual and psychological abuse, immersion in cold water, sleep deprivation, forcing them to stand for long periods, deprivation of clothing, food and access to the toilet. The SIP argued that the real risk of the applicant's imprisonment upon return to Lebanon could violate the prohibition of inhuman or degrading treatment due to the harsh prison conditions and during detention. The Voivodship Administrative Court in Warsaw in its judgment of 22 January 2020, IV SA/Wa 2173/19, agreed with this argumentation. It indicated that the administrative authorities incorrectly assumed that there was no risk of torture against the asylum seeker if returned to the country.

Gender-based violence

In 2020, lawyers from the Association for Legal Intervention represented women from the North Caucasus in international protection proceedings who feared returning to their country because of past gender-based violence or the risk of experiencing it in the future. Their fears included: domestic violence by their husband or father, honour killing, separation of mother and children by the children's father or his family (after the parents had separated), and forced marriage. Polish asylum procedures are characterised by the omission of this type of violence as "less important" than political persecution. Women affected by violence are expected to demonstrate that they have tried to obtain assistance from state authorities while still in their country of origin, even though such assistance is often unavailable or involves a high risk for the woman. Authorities also fail to take into consideration how much social rejection women face when trying to escape violence in some communities.

The Board's general, unsupported assertions about the human rights situation in Chechnya based on the violations signalled (domestic violence against women, sexual violence) are unauthorised and do not correspond to the circumstances of the present case.

The first concern faced by women fleeing persecution is the authorities' claim that gender-based persecution does not justify refugee status. In their view, women cannot constitute a "social group" and therefore cannot be at risk of persecution on the grounds of belonging to a female social group.

In its judgment of 30 January 2020, ref. IV SA/Wa 1480/19, the Voivodship Administrative Court in Warsaw ruled that "Determining whether women in the Russian Federation constitute a social group requires a precise examination of the position of women in the country of origin, in particular whether the authorities in the country in question permit persecution." According to the Voivodship Administrative Court in Warsaw, during the proceedings it is important to: "determine whether the party lived in a society, in which inferior treatment of women compared to men is sanctioned, both by public authorities and members of society, including family members. In such circumstances, even if the motives of the persecutor are dictated by personal considerations, it is possible to assume that the condition of persecution on account of membership of a social group is fulfilled, as the perpetrator of persecution knows that his act will remain unpunished." In the cited ruling, the Voivodship Administrative Court in Warsaw indicated that the failure of the Refugee

Board to request the Information Division on Countries of Origin of the Office for Foreigners to establish information on the real possibility of receiving assistance by women victims of domestic and sexual violence in Chechnya, including the possibility of their internal relocation, violates the obligation to take all possible measures necessary to clarify the facts of the case. According to the Voivodship Administrative Court in Warsaw: "The Board's general, unsupported assertions about the human rights situation in Chechnya based on the violations signalled (domestic violence against women, sexual violence) are unauthorised and do not correspond to the circumstances of the present case." In conclusion, in the opinion of the panel, the authority, by failing to establish unequivocally the situation of women in the applicant's country of origin, prematurely concluded that there was no individualised risk to the applicant. This judgment is significant because it consolidates a jurisprudence obliging asylum authorities to establish unequivocally the situation of women in Chechnya in the context of examining an individualised risk of persecution or serious harm to the applicants.[12]

In 2020, the Association for Legal Intervention represented an asylum seeking woman fleeing with her child from a violent ex-husband in Dagestan. The Refugee Board, by its decision of 30 July 2020, No RdU-403-1/S/19, granted her and her minor child subsidiary protection. The Refugee Board emphasised that the cumulative occurrence of a serious threat of violence by the applicant's ex-husband, the removal of her minor child from her by her husband, the lack of support from the alien's family and the potential risk of social rejection made it possible to assume that there was a risk of suffering serious harm by inhuman or degrading treatment in the case.[13] The Refugee Board decided that, although in the case under consideration, "the direct perpetrators of serious harm are private entities, i.e. members of her [the applicant's] family, including above all her ex-husband and his relatives, but their actions can be attributed to the authorities of the State of origin, since those authorities are unable or unwilling to provide protection against such action (...).The evidence on the situation in the country of origin with regard to domestic violence clearly demonstrates this. On this basis, it must be concluded that the legal remedies available to single, abandoned women who find themselves in a situation such as that of the applicant are not effective and do not provide effective and lasting protection against suffering serious harm." Consequently, the authority considered that the fact that the applicant had not sought protection from the authorities of her country of origin was irrelevant in such a situation. This decision indicated that: "the treatment to which the applicant could be exposed if returned to her country of origin, i.e. the serious threat of losing her child from her husband and his relatives; the lack of support from her family, the potential threat of social rejection, the lack of support and protection in the country - falls - cumulatively - within the meaning of the concept of persecution."

The direct perpetrators of serious harm are private entities, i.e. members of her [the applicant's] family, including above all her ex-husband and his relatives, but their actions can be attributed to the authorities of the State of origin, since those authorities are unable or unwilling to provide protection against such action.

Simultaneously, the Refugee Board found that it is impossible to consider women subjected to domestic violence in Dagestan as a social group, as it is difficult to consider that they have a "distinct social identity and are perceived separately from the surrounding

12. Judgment of the Voivodship Administrative Court in Warsaw of 30 October 2019, No. IV SA/Wa 1457/19.
13. Within the meaning of Article 15(2) the Act on granting international protection to aliens on the territory of the Republic of Poland.

society". In the Refugee Board's view, the serious problem of domestic violence affects women worldwide and may be compounded by cultural perceptions of a woman's place in society. However, it is not the mere fact of being a woman that constitutes a reason for their persecution, which does not allow women in Dagestan or Chechnya to be considered as a social group within the convention meaning. According to the authority, "this would only be possible by proving that women in Dagestan or the North Caucasus in general are at risk of persecution simply by virtue of being women. However, this is not the case." The Refugee Board also identified that in the situation of women experiencing domestic violence, the risk of their persecution by their family is not linked to any of the convention grounds. At the same time, there are "no sufficient grounds for assuming that, in the case of women in Dagestan, there is an unwillingness or inability on the part of State authorities to assist them on account of any of the convention grounds and, in particular, due to the mere fact that they are women." The presented position seems to consolidate the Refugee Board line of jurisprudence, according to which women from the North Caucasus do not constitute a social group and thus do not meet the conditions for granting them refugee status, but only possibly for granting subsidiary protection.[14] According to the Association for Legal Intervention, this standpoint is inappropriate. Women should be recognised as a social group because they have a common, irremovable innate feature, which is their sex, and because of this feature they may be at risk of persecution. Only the assessment of additional circumstances indicating their heightened risk of persecution in their country of origin should result in an evaluation as to whether they fulfil the conditions for being granted refugee status.

The main reason why the Polish asylum authorities issued negative decisions in cases where the applicants invoked gender-based violence was to question the credibility of their testimonies.

Meanwhile, according to the practice of the Association for Legal Intervention, in 2020, as in previous years, the main reason why the Polish asylum authorities issued negative decisions in cases where the applicants invoked gender-based violence was to question the credibility of their testimonies.

In the situation when asylum seeking women claimed that they had experienced domestic violence in the past, the administrative authorities questioned the credibility of their testimony, pointing out, inter alia, its generality[15] or inaccuracies[16] e.g. discrepancies between statements made during the application for international protection and during the status interview[17] or between the testimony submitted by the applicant and an adult member of her immediate family currently living in Poland.[18] The authorities have also frequently invoked the premise that the applicants' testimony was not supported by material evidence[19] or lack of logic and consistency in the migrant woman's testimony. It happened that the authority of the first instance found the applicant's testimony unreliable, as despite the violence she had suffered from her husband and mother-in-law, the asylum seeker always returned to their shared home after some time.[20]

14. See also the decision of the Refugee Board of 25 March 2020, No. RdU-57-1/S/2019 revoking the decision of the Head of the Office for Foreigners and requiring him to further consider the material on the current situation of women in Chechnya, in particular those raising children on their own, and to address the question of "whether in Chechen society women who raise children on their own constitute a social group" within the meaning of the Act on granting international protection to aliens.
15. Refugee Board decision of 19 May 2020, No RdU-314-1/S/19.
16. Decision of the Head of the Office for Foreigners of 27 March 2020, No. DPU.420.488.2019.
17. Decision of the Head of the Office for Foreigners of 23 July 2020, No. DPU.420.878.2019.
18. Decision of the Head of the Office for Foreigners of 18 May 2020, No. DPU.420.705.2019.
19. 19. Decision of the Head of the Office for Foreigners of 3 April 2020, No. DPU.420.876.2019 and Decision of the Head of the Office for Foreigners of 27 March 2020, No. DPU.420.488.2019.
20. Decision of the Head of the Office for Foreigners of 3 April 2020, No. DPU.420.876.2019.

When the asylum authorities do not challenge the credibility of the migrant women's testimony, they justify the refusal to grant them international protection by not attempting to obtain assistance from the competent authorities of their country of origin. This also included situations where women chose not to report to the police for cultural reasons or knew that they would not receive real assistance from state authorities.[21]

Women who have fled to Poland from domestic, cultural or gender-based violence often do not receive adequate protection in Poland.

If the applicants indicated as one of the basic premises for their application for international protection in Poland the fear of experiencing serious harm consisting in being separated from their child by their ex-husband or members of his family, the administrative authorities (as in previous years) consistently indicated that: "under Russian and international law, a foreign woman is a full-fledged guardian (...) [of her child] and, if necessary, may assert her rights and their enforcement before the competent court of her country of origin."[22] The asylum authorities did not analyse the actual effectiveness of the judicial protection that female residents of the North Caucasus republics could expect. The authorities also suggested that the fact that the fathers of the children had made no attempts in the past (before the applicants left their country of origin) to take the children away from their mothers was evidence of the fathers' unwillingness to separate the children from their mothers.[23]

Despite the few positive decisions recognising the risk of migrant women experiencing persecution or serious harm related to gender-based violence in the event of return to the country, in the opinion of the Association for Legal Intervention, a significant number of such applications are not correctly recognised. Women who have fled to Poland from domestic, cultural or gender-based violence often do not receive adequate protection in Poland and are forced to return to a country where their fundamental rights are systematically violated.

In the previous year, the Association for Legal Intervention submitted a so-called shadow report to the Committee monitoring Poland's implementation of the Convention on the Prevention of Gender-Based Violence (Istanbul Convention). The Association raised, inter alia, the difficulty for women fleeing gender-based violence in their country of origin to obtain international protection, the difficulty in accessing legal aid, the lack of respect for the principle of non-refoulement for migrant women who might be subjected to gender-based violence upon return to their country of origin, and the detention (imprisonment) of women who have experienced violence.[24]

21. Decision of the Head of the Office for Foreigners of 3 April 2020, No DPU.420.876 .2019; Decision of the Refugee Board of 14 October 2020, No RdU-153-1/S/20 and Decision of the Refugee Board of 6 October 2020, No RdU-356-1/S/19.
22. Decision of the Head of the Office for Foreigners of 18 May 2020, No. DPU.420.705.2019.
23. Decision of the Head of the Office for Foreigners of 6 March 2020, No. DPU.420.1470.2018.
24. Additional information on the shadow report to the Committee monitoring Poland's implementation of the Convention on the Prevention of Gender-Based Violence developed by the Association for Legal Intervention is available on the website: https://interwencjaprawna.pl/en/poland-fails-to-comply-with-the-istanbul-convention/.

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4. CITIZENS OF RUSSIA

Russian citizens constituted the largest group of asylum seekers in Poland in 2020. In 2020, the Head of the Office for Foreigners granted 15 persons from Russia refugee status, 51 subsidiary protection and 8 permits for tolerated stay. From all applications for international protection that were substantively examined, only 5% of the applications submitted by citizens of the Russian Federation received one of the forms of international protection.[25] In 2020, as in previous years, lawyers of the Association for Legal Intervention provided legal assistance to citizens and nationals of the Russian Federation applying in Poland for international protection due to human rights violations committed in Russia.

From all applications for international protection that were substantively examined, only 5% of the applications submitted by citizens of the Russian Federation received one of the forms of international protection.

A significant number of cases conducted by the Association's lawyers involve asylum cases of Russian citizens from the North Caucasus. In the vast majority of cases of people from Chechnya, Ingushetia or Dagestan, the Polish asylum authorities refuse to believe the testimonies[26] and evidence submitted by the parties, for example by ruling that they have been deliberately manufactured for the purposes of the international protection proceedings.[27] Where the asylum authorities found the migrants' testimonies regarding the detention and interrogation experienced in their country of origin credible (when the repression was aimed at obtaining information about the activities of persons other than the applicants), they ruled that the asylum seekers had not been subjected to persecution in their country of origin and had not suffered serious harm, as the actions of the law enforcement authorities were not "targeted directly at the migrant due to his/her individualising characteristics, but were part of the operational activities of those authorities."[28] In one such decision, the Refugee Board found it plausible that an asylum seeker was hit several times during interrogation, was forced to sign documents with unknown content, was intimidated, was released only after a bribe was paid and, in addition, his wife was threatened during a search of his home. However, despite this, the authority ruled that the officers' actions solely bore a criminal nature and were in excess of the officers' powers, and thus: "should in the first instance be the subject of seeking protection from the authorities of the country of origin and not international protection." Such argumentation of the authorities has already been previously questioned by the Supreme Administrative Court in the described in the report SIP in Action. Rights of foreigners in Poland in 2019[29] judgment of 6 March 2019, II OSK 2572/18. Nevertheless, it is still practised by asylum authorities in Poland.

The second rationale indicated by Russian male and female citizens as a reason for applying for international protection was the risk of experiencing gender-based violence (discussed in detail in the subsection "Survivors of violence. Gender-based violence").

25. The Office for Foreigners' statistics available at: https://udsc.gov.pl/statystyki/raporty-okresowe/zestawienia-roczne/.
26. Refugee Board decision of 26 August 2020, No RdU-326-1/S/19;
Refugee Board decision of 15 December 2020, No RdU-184-2/S/04.
27. Decision of the Head of the Office for Foreigners of 17 July 2020, No. DPU.420.603.2019.
28. Refugee Board decision of 1 September 2020, No RdU-2394-1/S/19.
29. P. 10

Aleksandra Pulchny

5. CITIZENS OF TAJIKISTAN

In 2020, citizens of Tajikistan submitted 87 applications for international protection in Poland. During the same year, the Head of the Office for Foreigners issued one decision to grant refugee status and 26 decisions to grant subsidiary protection to citizens of that country. Tajiks were the fourth largest group of persons who applied for international protection in Poland in 2020[30], whereby the number of refugee status decisions issued against them has decreased by 87.5% compared to 2019.[31]

Tajiks were the fourth largest group of persons who applied for international protection in Poland in 2020, whereby the number of refugee status decisions issued against them has decreased by 87.5% compared to 2019.

The problems described in the report SIP in action. Rights of foreigners in Poland in 2019[32] encountered by clients of the Association for Legal Intervention from Tajikistan applying for international protection have not lost their relevance.

The case of a representative of the Tajik Islamic Renaissance Party of Tajikistan (hereinafter: IPOT) and a member of the National Union of Tajikistan, described in the 2018[33] and 2019[34] report has been pending again in the Refugee Board for over a year. While already in Poland, the asylum seeker was actively involved in efforts to democratise Tajikistan. For this reason, he is concerned about returning to his own country. The Association for Legal Intervention indicated that his opposition activities and their significance in the context of the repression of dissidents by the Tajik authorities and the Tajik authorities' actions towards persons in exile should be exhaustively examined. This is crucial in order to assess what consequences the return of this oppositionist to his country may entail.

The so-called "terrorist"[35] list discussed in last year's report , headed by the name of Mr Muhiddin Kibiri (chairman of the IPOT party), created by the Tajik authorities to prosecute oppositionists, was noticed and described by foreign media[36] and the Information Division on Countries of Origin of the Office for Foreigners (hereinafter: WIKP) in 2020. The WIKP study indicates that: "In the opinion of human rights defenders, the such a renewed list includes both persons who committed serious crimes and were involved in money laundering, persons actually involved in terrorist activities (e.g. in Syria), as well as opposition journalists and social activists and representatives of socio-political organisations considered by the Tajik authorities as extremist/terrorist (e.g. from IPOT and 'Grupa24'). Reports from human rights defenders indicate that the Tajik authorities are indeed conducting searches both domestically and internationally for those on the above-mentioned 'terrorist and extremist list'."

30. https://migracje.gov.pl/statystyki/zakres/polska/typ/decyzje/widok/tabele/typSprawy/4/rok/2020/rok2/2019/organ/810/.
31. https://migracje.gov.pl/statystyki/zakres/polska/typ/decyzje/widok/tabele/typSprawy/4/rok/2020/rok2/2019/organ/810/kraj/TJ/. In 2019 citizens of Tajikistan were the second largest group, after citizens of the Russian Federation, to receive international protection in Poland.
32. P. 20-22
33. O. Dobrowolska, O. Hilik, M. Jaźwińska, P. Mickiewicz, A. Pulchny, M. Sadowska, K. Słubik, "SIP in Action. Rights of foreigners in Poland in 2018", Warsaw 2019, p. 17.
34. A. Chrzanowska, O. Dobrowolska, M. Jaźwińska, P. Mickiewicz, A. Pulchny, M. Sadowska, "SIP in Action. Rights of foreigners in Poland in 2019". Warsaw 2020, p. 22.
35. Published on 08 October 2019, the updated version of the 'list of individuals recognised by the authorities of the Republic of Tajikistan as having connections with terrorism' (referred to as the 'list of terrorists and extremists' for short) contains 2,392 names. It also includes opposition journalists, social activists and representatives of opposition parties.
36. Fergana, Opposition journalists and activists remain on new Tajik terrorism list, available at: https://en.fergana.news/news/118601/?fbclid=IwAR3tvvktqYkX5-y46KI_OIKd2xKBRQ8ZXGzPgLe9Xfn1G0h_qKqzCBQgOG0 access: 03.02.2021.

Despite the above, the Association for Legal Intervention notes the underestimation of the list by the asylum authorities. In one of the cases monitored by the Association for Legal Intervention, the decision indicated that "The authority is familiar with this list. It contains names of persons wanted also for financial crimes".[37] It should be noted that the person in question has connections to persons repressed by the regime and to groups outlawed by the Tajik authorities, and that no proceedings for common crimes have been brought against this person in their country of origin. The political nature of the inclusion of this person on the 'terrorist' list should therefore have been noted first, which was not done.

Reports from human rights defenders indicate that the Tajik authorities are indeed conducting searches both domestically and internationally for those on the above-mentioned 'terrorist and extremist list'.

37. Refugee Board decision of 1 April 2020, No RdU-97-2/S/18.

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6. INTERNATIONAL PROTECTION AND FAMILY RELATIONSHIPS

In 2020, several important decisions and judgments were issued regarding the risk of persecution of a family member of a person granted international protection (refugee status or subsidiary protection) on the territory of the European Union. These cases concerned citizens of Russia, Ukraine and Tajikistan.

By decision of 18 February 2020, the Head of the Office for Foreigners granted subsidiary protection to an asylum seeker whose brother received international protection in another EU country. The decision indicated that the immediate reason for granting protection to the client represented by the lawyer of the Association for Legal Intervention was that: "upon his return to his country of origin (...) [the applicant] may face inhuman or humiliating treatment aimed at bringing his brother, who is receiving subsidiary protection in Germany, to Russia (...).(...) the unsuccessful attempt by the General Prosecutor's Office of the Russian Federation to extradite (...) [the applicant's brother] from Germany to his country of origin may give rise to an increased interest in (...) [the applicant] on the part of the force structures, which in turn increases the risk of actions against him amounting to inhuman or humiliating treatment."[38]

The fact that international protection was granted in Poland and Germany to members of the asylum seeker's immediate family may be regarded as a new, relevant factual circumstance significantly increasing the likelihood that international protection will be granted.

Simultaneously, the Refugee Board accepted that the fact that international protection was granted in Poland and Germany to members of the asylum seeker's immediate family may be regarded as a new, relevant factual circumstance significantly increasing the likelihood that international protection will be granted.[39] In such a situation a subsequent application for international protection cannot be regarded as inadmissible.[40]

Also in the jurisprudence of the Voivodship Administrative Court in Warsaw, it was indicated that "The search by the authorities of the (...) [Russian Federation - country of origin] for the applicant's brother, and consequently the request for his extradition, in view of his assistance to the (...) [Chechen] fighters may be relevant in the context of the prerequisites for granting international protection."[41]

Asylum authorities also recognised the risk of returning children to their country when one of their parents has been granted one of the forms of international protection. This was also the case when the child's parents were not formally married and their legal status in Poland was different. In one of the monitored cases the Head of the Office for Foreigners considered as a new circumstance relevant to the case the fact that a child of a migrant who had been granted international protection was born in Poland. The child's

38. Decision of the Head of the Office for Foreigners of 18 February 2020, No. DPU.420.1145.2017.
39. Within the meaning of Article 38(2)(3) of the Act on granting international protection to aliens.
40. The Refugee Board's decision of 17 September 2020, No RdU-220-4/S/15; the Refugee Board's decision of 17 September 2020, No RdU-619-3/S/16; the Refugee Board's decision of 22 September 2020, No RdU-221-4/S/15.
41. Judgment of the Voivodship Administrative Court in Warsaw of 15 September 2020, ref. no. IV SA/Wa 329/20.

mother was the religious wife[42] of the child's father and had applied in Poland for asylum. The decision indicated that "in view of the fact that the Applicant, together with her religious husband, is taking legal steps to enter into a civil marriage, and in view of the inclusion of the minor child of the Foreigners in the application, considering the application in the context of family unity, in close connection with the legal situation of both parents of the Minor (...) and taking into consideration the best interests of the child, it should be considered that he meets the conditions for granting him subsidiary protection due to his father having such protection."[43] Consequently, the Head of Office for Foreigners granted the minor subsidiary protection.[44] At the same time, in accordance with the principle of family unity, it granted subsidiary protection to the applicant mother of the minor.[45]

In 2020, the SIP also handled the case of a asylum seeking woman who was the second wife of a refugee recognised in Poland. Their wedding was concluded in a religious rite. The woman lived and ran a household with her husband and their children, but was not formally recognised as his wife under civil law. As a result, the migrant, his first wife and their joint children were granted refugee status in Poland, while his second wife and their joint children were not. The Refugee Board granted protection to the asylum seeker's spouse and their joint minor children and considered that a difference in the legal situation of the migrant's children from different marriages could be contrary to the obligation to take into consideration the best interests of the minor children.[46] According to the Refugee Board, "Differentiating the status of minor children of a person enjoying international protection in Poland would require an examination and exhaustive justification of the legitimacy of the different treatment of his children."

The Association for Legal Intervention also run the case of a large family who had fled from Ukraine. The wife and children were granted subsidiary protection in Poland because they would have been at risk of extreme poverty if they had been internally relocated.

In the case of the applicant from Tajikistan run by the SIP, the Voivodship Administrative Court in Warsaw ruled, in turn, that "the non-conclusion of a formal marriage under Polish law and the applicant's reliance on the conclusion of a religious wedding, cannot have the effect of preventing the existence of family ties in the applicant with her husband on the basis of a religious wedding."[47] As outlined by the court, in Muslim countries, family law refers explicitly to Sharia law, and thus "In deciding the case, the authorities should therefore assess the circumstance of the applicant's religious wedding from (...) the point of view of her fear of returning to her country of origin. (...) When assessing the evidence gathered in the case, the first instance authority did not take into account the cultural, customary and religious aspects, i.e. it did not examine in publicly available sources whether in Tajikistan religious marriages have legal effects. The adjudicating authorities did not assess whether the applicant might fear returning to her country of origin and be at risk of persecution or suffering serious harm on the ground that, according to the traditions and culture of Tajikistan, she is the wife (...) and mother of his child."

The Association for Legal Intervention also run the case of a large family who had fled from Ukraine. The wife and children were granted subsidiary protection in Poland because they would have been at risk of extreme poverty if they had been internally relocat-

42. The marriage was celebrated in a religious rite, but the couple did not register it in the civil registry records.
43. Decision of the Head of Office for Foreigners of 8 September 2020, No. DPU.420.53.2020.
44. Based on Article 15(2) the Act on granting international protection to aliens.
45. Pursuant to Article 48(2) the Act on granting international protection to aliens.
46. Refugee Board decision of 14 March 2020, RdU-71-1/S/2019.
47. Judgment of the Voivodship Administrative Court in Warsaw of 27 October 2020, case ref. IV SA/Wa 306/20.

ed. The husband, on the other hand, was refused this protection. The decision indicated that he might pose a threat to public protection and security in Poland. He was subject to pre-trial proceedings in connection with the suspected offence of receiving stolen goods. The Association for Legal Intervention indicated that the pre-trial proceedings were suspended. The Refugee Board in its decision of 28 February 2020, RdU-870-3/S/15, indicated that "although the information provided by the institutions responsible for order and security cannot be disregarded, in a situation where there has not even been an indictment, not to mention a final conviction, the circumstances revealed should not so radically determine the further life of the Foreigner and his family." Consequently, the asylum seeker was also granted subsidiary protection in Poland.

To summarise, in 2020, a line of jurisprudence has developed according to which being in a religious marriage and having children in common with a person who has fled from persecution or from the risk of suffering serious harm may result in international protection being granted in Poland. Where, in a given country, family members of refugees or of persons granted subsidiary protection are also at risk of persecution or serious harm, failure to contract an official civil marriage may not automatically result in refusal of protection.

In 2020, a line of jurisprudence has developed according to which being in a religious marriage and having children in common with a person who has fled from persecution or from the risk of suffering serious harm may result in international protection being granted in Poland.

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7. SUBSEQUENT APPLICATION FOR INTERNATIONAL PROTECTION

In 2020, decisions to discontinue proceedings, usually issued in subsequent asylum proceedings, represented more than 30% of all decisions.[48] In the event of a subsequent application for international protection, in order for the application to be examined on its merits, asylum seekers are required to demonstrate that new relevant facts or evidence have emerged in the case which significantly increase the likelihood of granting international protection.

It is apparent from the practice of the Association for Legal Intervention that asylum authorities adopt a very restrictive interpretation of the term 'relevant new facts or evidence', or undermine the relevance of new facts and evidence to the outcome of international protection proceedings. Moreover, the Association's lawyers note the regular practice of not conducting a personal interview in the course of proceedings initiated as a result of a new application, even when the applicant has indicated new reasons for seeking international protection.

It is apparent from the practice of the Association for Legal Intervention that asylum authorities adopt a very restrictive interpretation of the term 'relevant new facts or evidence', or undermine the relevance of new facts and evidence to the outcome of international protection proceedings.

Until now, a uniform line of jurisprudence has not formed in the context of recognising a change in the situation in the asylum seeker's country of origin as a new factual circumstance significantly increasing the likelihood of granting international protection. Lawyers of the Association for Legal Intervention have encountered both decisions to declare a subsequent application filed by Belarusian citizens admissible due to the deterioration of the human rights situation in the country, and decisions to declare an application inadmissible despite raising exactly the same circumstance during the appeal proceedings.

In 2020, asylum authorities issued decisions in the cases described in last year's report: SIP in Action. Rights of foreigners in Poland in 2019[49] cases concerning discontinuation of asylum proceedings due to submission of a subsequent application for international protection.[50] They concerned persons who, after a negative decision in their asylum case, obtained new evidence in the case or returned to the country and were again exposed to persecution. In the judgments issued as a result of appealing the above mentioned decision, the Voivodship Administrative Court in Warsaw stated that "a change in the factual situation with regard to even one of the elements of international protection, concerning both the situation in the country of origin and the individual situation of the foreigner, causes that a subsequent application for granting international protection ceases to be based on the same grounds"[51], should be recognised as admissible and substantively resolved.[52]

48. Data developed on the basis of: https://migracje.gov.pl/.
49. P. 26-27
50. Decisions annulled and referred for reconsideration by judgments of the Voivodship Administrative Court in Warsaw of 10 April 2019, No. IV SA/Wa 3400/18; of 11 April 2019, No. IV SA/Wa 3393/18; of 18 April 2019, No. IV SA/Wa 3394/18; of 10 September 2019, No. IV SA/Wa 3396/18; Voivodship Administrative Court of 18 April 2019, No. IV SA/Wa 3394/18.
51. The judgment of the Voivodship Administrative Court of 18 April 2019, No. IV SA/Wa 3394/18.
52. More on the indicated judgements: M. Sadowska, Subseqent application for international protection, [in:] SIP in Action. Rights of foreigners in Poland in 2019, p. 26-27.

The case was especially interesting as the initially discontinued, "not promising" case, after being returned to the first instance authority, ended with the applicant being granted subsidiary protection. The Head of the Office for Foreigners indicated that, although no new factual circumstances had emerged in the case, in the course of the proceedings the asylum seeker had submitted new and significant evidence, unknown to the administrative authorities in the course of previous asylum proceedings, which proved beyond any doubt that the applicant could face inhuman or degrading treatment in his country of origin. Thus, the authority found that, despite the absence of new circumstances in the case, the mere fact of the submission of new evidence that did not raise doubts as to its credibility constituted a basis for assessing the credibility of the asylum seeker's testimony regarding his concern about the risk of suffering serious harm in his country of origin against this evidence.[53]

In the three other cases, after they had been returned to the Refugee Board, the authority of second instance took the view that it was not entitled to issue a decision and referred the cases to the authority of first instance. The Board considered that its decision could not, as a matter of principle, be of a substantive nature (it could not rule on the grant or refusal of international protection) and that "a new and complete examination of the evidence and assessment of the new circumstances by the body of second instance alone would inevitably constitute a breach of the principle of two-stage administrative proceedings".[54] Therefore, in a situation where the Refugee Board considers that there are no grounds for declaring a subsequent application for international protection inadmissible, it finds itself obliged, in accordance with the principle of two instances of proceedings and the identity of the legal basis of the two decisions, to refer the case back to the authority at first instance for a re-examination.

Fact of the submission of new evidence that did not raise doubts as to its credibility constituted a basis for assessing the credibility of the asylum seeker's testimony regarding his concern about the risk of suffering serious harm in his country of origin against this evidence.

53. Decision of the Head of the Office for Foreignersof 18 February 2020, No. DPU.420.1145.2017.
54. Refugee Board decision of 17 September 2020, No RdU-220-4/S/15; Refugee Board decision of 17 September 2020, No RdU-619-3/S/16; Refugee Board decision of 22 September 2020, No RdU-221-4/S/15.

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8. SUSPENSION OF ENFORCEMENT OF A DECISION FOR THE DURATION OF COURT-ADMINISTRATIVE PROCEEDINGS

As in previous years, also in 2020 the Association for Legal Intervention both monitored and run cases in which asylum seekers applied to the administrative court to suspend the execution of decisions refusing to grant international protection. Asylum seekers awaiting a decision by an administrative court in asylum proceedings are not automatically protected against deportation.[55] Despite a favourable court verdict, this can lead to them being deported to a country where there is a risk of persecution.

In view of the above, in the complaints to the Voivodship Administrative Court in Warsaw against the decisions refusing to grant international protection or declaring the application for international protection inadmissible, the Association for Legal Intervention, providing assistance to asylum seekers in drafting their complaints, formulated a request to suspend the execution of the decision by the Voivodship Administrative Court in Warsaw.

In 2020, there has been a change in the practice of administrative courts in ruling on such an application to the detriment of asylum seekers, that is, administrative courts have begun to refuse to suspend the enforcement of decisions on declaring an application for international protection inadmissible.

In 2020, there has been a change in the practice of administrative courts in ruling on such an application to the detriment of asylum seekers, that is, administrative courts have begun to refuse to suspend the enforcement of decisions on declaring an application for international protection inadmissible.[56] In its decisions refusing to suspend the execution of decisions, the Voivodship Administrative Court in Warsaw indicated that the CJEU judgment in case C-181/16 Sadikou Gnandi v. Belgium (as a result of which courts began to suspend the execution of decisions at the request of a party) may only be applied in a situation when an asylum seeker has first applied for international protection in a given Member State of the European Union.[57] Simultaneously, the Voivodship Administrative Court in Warsaw reverted to the position that: "the decision to declare the application for international protection inadmissible does not contain a decision in the form of a ruling to expel the applicant from the territory of the Republic of Poland, and its direct effect is not to deport the foreigner. Consequently, the need for temporary protection motivated by the need to leave the territory of the Republic of Poland does not arise."[58]

Another unfavourable change in the line of jurisprudence concerned the possibility of obtaining social assistance while waiting for a court judgment on the refugee status. Such assistance is granted during the period of the international protection procedure before the administrative authorities. It allows waiting for a decision in conditions which guar-

55. More on cases highlighting this problem in the reports: SIP in Action. Rights of foreigners in Poland in 2018. (p. 22-24) and SIP in Action. Rights of foreigners in Poland in 2019. (p. 28-29).
56. Until 2019, a similar practice was in place until the judgment of the Court of Justice of the European Union of 19 June 2018, in Case C-181/16 Sadikou Gnandi v Belgium, came into force.
57. Decision of the Voivodship Administrative Court in Warsaw of 7 July 2020, No. IV SA/Wa 1281/20; decision of the Voivodship Administrative Court in Warsaw of 6 June 2020, No. IV SA/Wa 974/20.
58. Decision of the Voivodship Administrative Court in Warsaw of 3 July 2020, No. IV SA/Wa 450/20; decision of the Voivodship Administrative Court in Warsaw of 3 September 2020, No. IV SA/Wa 1698/20; decision of the Voivodship Administrative Court in Warsaw of 6 June 2020, No. IV SA/Wa 974/20; decision of the Voivodship Administrative Court in Warsaw of 3 September 2020, No. IV SA/Wa 1698/20.

antee the basic needs of refugees. Previously, in the case of a withholding of execution of a decision on international protection, such assistance was also provided at the judicial stage. In 2020, the Voivodship Administrative Court in Warsaw found that in a situation where the right to benefits had already expired and "at the same time the prerequisites for extending this assistance under Art. 74(3) of the Act (...) on granting protection to foreigners (...) have not been met; there is no legal basis to support the position on the possibility to restore these benefits after suspending the execution of the appealed decision. The refusal to suspend implementation of the contested decision does not therefore have the effect of depriving the applicant of social assistance. Contrary to the applicant's expectations, the possible suspension of the contested decision would not extend the period for granting social assistance".[59] Contrary to the position of the administrative court, so far the right to benefits was automatically extended for asylum seekers along with the suspension of the execution of the decision.

Simultaneously, the Voivodship Administrative Court in Warsaw continues the line of jurisprudence formed in 2019 with regard to adjudicating on the suspension of the execution of a decision to refuse to grant international protection in connection with the submission of a first asylum application. In its decisions to suspend the execution of decisions on refusal to grant international protection issued this year, just as last year, the Voivodship Administrative Court in Warsaw referred to the wording of Article 46(5) of the Procedural Directive, indicating that "in the past it happened that an obligatory decision was executed before the end of the judicial proceedings on the refusal to grant refugee status. Interim protection in cases of this kind is intended to guarantee the realisation of the right of the foreigner to an effective remedy within the meaning of Article 46(3) of the Procedural Directive 2013/12, since until a decision dismissing a complaint against the refusal of refugee status has become final, it is not possible to initiate proceedings to oblige the foreigner to return."[60]

In conclusion, in 2020 it was observed that the practice of withholding the execution of decisions refusing international protection when the complaint was filed in connection with the first application for international protection had become established. However, the administrative courts refused to treat cases concerning subsequent applications for international protection in an analogous manner.

59. Decision of the Voivodship Administrative Court in Warsaw of 3 July 2020, No. IV SA/Wa 450/20; decision of the Voivodship Administrative Court in Warsaw of 3 September 2020, No. IV SA/Wa 1698/20; decision of the Voivodship Administrative Court in Warsaw of 6 June 2020, No. IV SA/Wa 974/20; decision of the Voivodship Administrative Court in Warsaw of 3 September 2020, No. IV SA/Wa 1698/20.
60. Decision of the Voivodship Administrative Court in Warsaw of 11 September 2020, No. IV SA/Wa 1699/20; decision of the Voivodship Administrative Court in Warsaw of 10 August 2020, No. IV SA/Wa 1615/20. Same ruling: decision of the Voivodship Administrative Court in Warsaw of 4 June 2020, No. IV SA/Wa 1014/20.

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9. PROCEDURAL GUARANTEES

Compliance with procedural guarantees of persons applying for international protection is essential to issue a lawful and fair decision. According to the Association for Legal Intervention, asylum authorities in Poland still do not sufficiently respect the procedural guarantees of asylum seekers. This applies both to the stage of collecting and assessing evidence and to respecting the party's right to legal aid. This may lead to an unjust refusal of protection to a person whose fundamental rights (right to life, right to safety, freedom from torture) are at real risk if returned to the country.

Asylum authorities in Poland still do not sufficiently respect the procedural guarantees of asylum seekers.

Collection and assessment of evidence

According to the Association for Legal Intervention, asylum authorities still make insufficient use of all means of evidence available to them.

In 2020, as in previous years, neither the Head of the Office for Foreigners[61], nor the Refugee Board[62], appointed any expert in the course of asylum proceedings. Considering that a significant number of asylum seekers indicate that they have experienced violence and still have marks on their bodies from it, refusal to appoint experts may prevent a reliable assessment of whether the asylum seeker in question was in fact subjected to violence at the time and in the manner indicated by him. This prevents the effective and rapid identification of survivors of violence and may also result in a defective refusal to grant international protection.

Despite the fact that the hearing of an asylum seeker is a key element of his/her proceedings, these hearings are still not recorded. The Head of the Office for Foreigners justifies this with the lack of such a need. It indicates that drafting the protocol in Polish, which is read out to the asylum seeker before signature, is sufficiently effective.[63] In the opinion of the Association for Legal Intervention, this is a flawed practice that may result in errors that cannot be reversed at a later stage of the proceedings. Asylum seekers usually do not speak Polish, and thus reading out the protocol prepared in Polish to them does not allow for the verification of its accuracy and correctness.

Refusal to appoint experts may prevent a reliable assessment of whether the asylum seeker in question was in fact subjected to violence at the time and in the manner indicated by him. This prevents the effective and rapid identification of survivors of violence and may also result in a defective refusal to grant international protection.

In 2020, the practice of holding status hearings by means of distance communication (videoconferencing) continued. This mainly concerned persons detained in guarded centres for foreigners. It is of concern that persons who indicated that they require

61. The Office for Foreigners response of 3 February 2021, BSZ.0656.2.2021/RW, to the SIP's request for public information.
62. Refugee Board response of 1 February 2021 to the SIP's request for public information.
63. The Office for Foreigners response of 3 February 2021 inf. cit.

special treatment, inter alia due to their experience of violence, were also subjected to such questioning.

Irregularities at the evidence-gathering stage, such as failure to appoint an expert, incorrectly drafted interrogation report or conducting the interrogation in conditions not adjusted to the psychophysical condition of asylum seekers, may be impossible to rectify at a later stage of proceedings. The characteristics of asylum proceedings indicate that the hearing by the authority of first instance is the main evidence in most cases. In the second instance proceedings, the authority extremely rarely sees the need to re-hear the party. This may be one of the reasons for the extremely low recognition rate of appeals and complaints in these proceedings. In 2020, the Refugee Board changed or reversed the decision of the body of first instance in only approx. 4%, while the Voivodship Administrative Court in Warsaw reversed only approx. 13% of examined cases.

Asylum seekers usually do not speak Polish, and thus reading out the protocol prepared in Polish to them does not allow for the verification of its accuracy and correctness.

In 2020, there were two important decisions of the Voivodship Administrative Court in Warsaw concerning procedural guarantees in proceedings before the Refugee Board.

In the ruling of 15 September 2020 the Voivodship Administrative Court in Warsaw found "insufficient action on the part of the Refugee Board consisting of limiting itself to general statements in the justification of the decision that it shares the findings and assessments made by the body of first instance. The applicant (...) was entitled to expect the Board to explain in the justification of the decision why it did not consider his specific claims to be justified and for what reasons." Moreover, according to the Court, "the authority was obliged to respond to the requests for evidence submitted, even if such evidence was not taken into consideration, and to indicate the reasons for its non-acceptance."[64]

The Voivodship Administrative Court in Warsaw also questioned the manner of collecting and assessing information on the asylum seekers' country of origin. The information on the country of origin gathered by the Office for Foreigners unit - the Information Division on Countries of Origin is, apart from the interview of the male or female applicant, a key factor influencing the decision in the proceedings. In the judgment of 27 October 2020, ref. IV SA/Wa 306/20, the Voivodship Administrative Court in Warsaw stated that "The reference by the authority of first instance in a general manner to the studies of the Information Division on Countries of Origin of the Office for Foreigners does not allow to assess why, in the individual case of a foreigner, the authority refused to grant the applicant refugee status and refused to grant subsidiary protection." The court emphasised that "Findings of low reliability of the foreigner's statements must be verified according to the relevant country of origin information. Country of origin information in asylum proceedings - which is often the only evidence on the facts of the case in such proceedings - must be closely related to the legal basis of the asylum application (i.e. the fear of persecution/risk of suffering serious harm and lack of protection) and must objectively reflect (confirm or refute) the relevant facts related to it. Information on the country of origin becomes irrelevant if it concerns only general problems or relates only to secondary elements of the asylum application."

Incomplete or incorrect collection of evidence or its fragmentary assessment may be a significant reason for the exceptionally low recognition of applications for international protection submitted in Poland. While the average recognition of refugee claims at first

64. Judgment of the Voivodship Administrative Court in Warsaw of 15 September 2020, No. IV SA/Wa 329/20.

instance in the European Union countries in 2019 was about 45%[65], this recognition in Poland in 2020 is only 11.2%[66], and in 2019 13%[67]. A prerequisite for correct classification of migrants as persons in need of international protection is the collection of reliable and comprehensive evidence by asylum authorities and its subsequent comprehensive assessment in line with the principles of knowledge, life experience and logic. Violations in this respect may lead to unjustified refusal to grant them international protection and, consequently, to an exceptionally low recognition rate of asylum claims in Poland.

Interrogation of children

One of the groups requiring special treatment is children who apply for international protection in Poland. In 2020 as many as 113 minors residing in Poland without parents or legal guardians (unaccompanied minors) have applied for asylum in Poland.[68] Also children who reside in Poland with their families may require special treatment during asylum proceedings.

In the course of the proceedings an unaccompanied minor residing in Poland shall be interviewed by a specially qualified employee[69] in the presence of a guardian.[70] However, the regulations do not contain any provisions concerning the standards that should be ensured during the hearing of a minor who stays in Poland together with his/her legal guardian. The questioning of a child in such a situation rarely takes place when the child, and not his/her legal guardian, has been subjected to persecution or serious harm in the country of origin. The interview may be a highly stressful event for the minor. Bearing in mind that children under guardianship should not be treated worse than children staying in Poland without parental care, in the opinion of the Association for Legal Intervention, interrogation of a minor should always be conducted in the presence of a guardian or legal custodian. This standpoint was shared by the Refugee Board indicating in its decision of 25 March 2020 that "the authority of first instance wrongfully allowed the interview of the minor without the presence of his or her legal guardian, i.e. the mother or the guardian appointed in the case".[71] Simultaneously, in the same decision, the Refugee Board acknowledged that the indicated violation could not condition the annulment of the decision of the body of first instance, because at the time of the Board's decision the minor at that time was already an adult, and thus there is no possibility to convalidate his interrogation in the presence of his/her mother. However, the decision of the Refugee Board is a guideline for the first instance authority on how to interview child refugees in the procedure.

Incomplete or incorrect collection of evidence or its fragmentary assessment may be a significant reason for the exceptionally low recognition of applications for international protection submitted in Poland. While the average recognition of refugee claims at first instance in the European Union countries in 2019 was about 45%, this recognition in Poland in 2020 is only 11.2%, and in 2019 13%.

65. *After: https://ec.europa.eu/eurostat/databrowser/view/MIGR_ASYDCFSTA__custom_555772/default/table?lang=en/.*
66. *After: https://udsc.gov.pl/ochrona-miedzynarodowa-w-2020-r/.*
67. *After: https://ec.europa.eu/eurostat/databrowser/view/MIGR_ASYDCFSTA__custom_555772/default/table?lang=en/.*
68. *The Office for Foreigners response of 3 February 2021, inf. cit.*
69. *Pursuant to Article 65(3)(1) of the Act on granting international protection to aliens.*
70. *Article 66 of the Act on granting international protection to aliens.*
71. *Refugee Board decision of 25 March 2020, No. RdU-57-1/S/2019.*

Length of the refugee procedure

According to the provisions of EU law[72], a procedure for granting international protection should be completed within 6 months from the date of submitting the application, and in particularly complicated cases or if the asylum seeker does not comply with the obligations imposed on him/her - within 15 months, but it should never last longer than 21 months.

In 2020, in Poland, first instance asylum proceedings lasted on average almost 7 months (207 days), i.e. a month longer than provided for in the Directive, and moreover 2 months longer than in 2019. In 2020, 1337 cases were pending for more than 6 months, 246 cases were pending for more than 15 months and as many as 103 cases were not decided within the maximum permissible Directive period of 21 months. These periods do not take into consideration proceedings before the authority of second instance. Before the body of second instance alone, more than half of the cases completed in 2020 lasted more than 6 months. Approximately 3.5% of completed cases lasted more than the maximum period of 21 months.[73]

Long-term asylum proceedings often increase the sense of instability among refugees, who have often experienced violence or other traumatic events. They are concerned about their safety, including their legal security, which makes it difficult for them to receive effective psychological and psychiatric treatment, and also negatively affects their degree of integration into the host society.

Legal aid in the course of administrative proceedings

Asylum seekers in Poland are guaranteed the right to free legal assistance at the stage of drafting an appeal against a negative decision of the Head of the Office for Foreigners and representation before the second instance authority - the Refugee Board. Legal assistance provided by non-governmental organisations, legal counsels and attorneys is financed by the Head of the Office for Foreigners. It is essential to ensure that an asylum seeker is able to communicate with a lawyer in a language that he/she understands. Therefore, the support provided may also involve covering the costs of translation. In 2020, the Head of the Office for Foreigners began to dispute the right of asylum seekers to use the assistance of an interpreter when contacting lawyers providing legal assistance ex officio. In 2020, the Head of the Office for Foreigners refused in 2 cases to pay the Association for Legal Intervention the remuneration for providing the service of free legal aid. Whereas in 22 cases there was a refusal to reimburse the costs of using an interpreter or travelling to a guarded centre or detention centre for foreigners and to the Refugee Board.[74] Refusal to provide remuneration or reimburse translation or travel costs significantly restricts the right of asylum seekr to actual, and not only illusory, legal assistance and representation.

A lawyer, legal adviser or a non-governmental organisation conducting public benefit activity entitled to provide unpaid legal assistance is entitled to reimbursement of necessary and documented costs related to the provision of interpreter services to an entitled asylum seeker.[75] In 2020, the Office for Foreigners summoned the Association for Legal

72. Article 31 (3-5) of 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.
73. The Office for Foreigners response of 3 February 2021 inf. cit.; Refugee Board response of 1 February 2021 inf. cit.
74. The Office for Foreigners response of 3 February 2021 inf. cit.
75. Article 691(1)(3) the Act on granting international protection to aliens.

Intervention, after legal aid had been granted, to submit (together with documents confirming that the translation had been completed and the translation costs incurred) additional explanations concerning, inter alia, what the translation consisted of, what it concerned and what effect it was to have in the course of the proceedings. The authority also requested the attorneys to submit the final decision of the Refugee Board.

Refusal to provide remuneration or reimburse translation or travel costs significantly restricts the right of asylum seekr to actual, and not only illusory, legal assistance and representation.

As a result of the above summonses, and as a consequence of the refusal to cover the costs already incurred, the Association lodged eight complaints with the Voivodship Administrative Court in Warsaw against the public administration action of the Head of the Office for Foreigners, concerning the refusal to reimburse to the Association for Legal Intervention the necessary and documented costs related to the use of an interpreter for the purposes of providing legal assistance to an asylum seeker entitled to gratuitous legal assistance. In five cases, the Voivodship Administrative Court in Warsaw declared the appealed action of the Head of the Office for Foreigners ineffective, indicating that "the authority unjustifiably assumed that the cost of translating the decision of the body of the first instance indicated in the card of free assistance to a foreigner as part of the legal assistance provided in the appeal proceedings, which was confirmed by a submitted invoice issued by the translator, does not constitute a necessary and sufficiently documented cost. In the present case, the authority unjustifiably called on the party to prove the necessity of that act and its documentation in a different manner than was done. (...) legal assistance to a foreigner generally entails the use of an interpreter".[76] Furthermore, as the Voivodship Administrative Court in Warsaw ruled in these same decisions, "In the circumstances of a specific case, the authority should assess whether the indicated costs of the interpreter's services are related to the foreigner's case, are justified in relation to the activity described in the card by the proxy and the documents attached thereto, e.g. a bill, and thus it may assess whether it considers the interpreter's time devoted exclusively to interpreting the decision of the body of the first instance to be necessary, or whether it does not constitute an abuse of entitlement to use the services of an interpreter more than once in the course of the proceedings, without the foreigner's proxy specifying a particular need. Should the authority in such cases entertain doubts, it shall be entitled to call upon the representative to clarify the doubts in greater detail."[77] In the opinion of the Court, considering the standards of procedure resulting from the Procedural Directive[78], it should be assumed that: "The foreign national and his or her representative have the right to ensure the quality of mutual contact such that the foreign national's right to an effective remedy and his or her right, fundamental in the appeal proceedings initiated, to participate actively in them can be realised. The use of an interpreter should be assessed as necessary to familiarise the foreigner with his/her legal situation, to determine the appropriate procedural tactics, including the assessment of the possibility to provide means of evidence, to develop the argumentation of an appeal. (...)The assessment of the necessity of the interpreter's costs may not affect the illusory nature of the right

In the present case, the authority unjustifiably called on the party to prove the necessity of that act and its documentation in a different manner than was done.

76. Judgment of the Voivodship Administrative Court in Warsaw of 5 November 2020, No. IV SA/Wa 1370/20; judgment of the Voivodship Administrative Court in Warsaw of 5 November 2020, No. IV SA/Wa 1371/20; judgment of the Voivodship Administrative Court in Warsaw of 5 November 2020, No. IV SA/Wa 1369/20.
77. Ibid.
78. Articles 20(1), 23(1), 46(1) and (3) as well as point 25 of 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.

to unpaid legal assistance. The authority cannot assume that legal aid begins and ends when the appeal is lodged, it cannot interfere in the legitimacy of the procedural tactics adopted, nor can it control on this occasion the quality of the legal aid provided."[79]

However, the above-mentioned line of jurisprudence questioning the possibility for the Head of the Office for Foreigners to challenge translation costs incurred in the course of providing legal assistance is not uniform. In three cases, the Voivodship Administrative Court in Warsaw dismissed a complaint filed by the Association for Legal Intervention against the refusal to reimburse the costs of using an interpreter.[80] A cassation appeal was filed against these judgments. The cases are currently pending.

Restricting a lawyer's contact with an asylum seeker by refusing to cover the costs of interpreting such a conversation violates the fundamental procedural guarantees of persons applying for international protection in Poland. A foreign national does not have the possibility to effectively communicate relevant information on the case to his/her lawyer. This clearly has a negative impact on the effectiveness of his/her representation. The possibility of real communication with a lawyer is an indispensable element of a party's right to an effective remedy. Through the indicated actions of the Head of the Office for Foreigners, this entitlement is once again restricted.

The use of an interpreter should be assessed as necessary to familiarise the foreigner with his/her legal situation, to determine the appropriate procedural tactics, including the assessment of the possibility to provide means of evidence, to develop the argumentation of an appeal.

79. Judgment of the Voivodship Administrative Court in Warsaw of 5 November 2020, No. IV SA/Wa 1370/20; judgment of the Voivodship Administrative Court in Warsaw of 5 November 2020, No. IV SA/Wa 1371/20; judgment of the Voivodship Administrative Court in Warsaw of 5 November 2020, No. IV SA/Wa 1369/20.
80. Judgment of the Voivodship Administrative Court in Warsaw of 9 October 2020, No. IV SA/Wa 1367/20; judgment of the Voivodship Administrative Court in Warsaw of 3 November 2020, No. IV SA/Wa 1368/20; judgment of the Voivodship Administrative Court in Warsaw of 3 November 2020, No. IV SA/Wa 1366/20.

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10. IMPACT OF THE COVID-19 PANDEMIC ON INTERNATIONAL PROTECTION PROCEEDINGS

Poland closed its borders in mid-March 2020 following the declaration of an epidemiological emergency and then an epidemic. Only migrants belonging to a few categories were allowed to enter Poland.[81] Refugees - despite the fact that the Geneva Convention does not provide for the possibility of not letting them in under any circumstances - were not on the list. According to the Regulation, they could possibly be admitted after obtaining individual permission from the Commander of the Border Guard.

In response to an enquiry by the Association for Legal Intervention in this matter, the Director of the Board for Foreigners of the Border Guard Headquarters informed that "the Border Guard, in urgent cases, will continue to accept asylum applications"[82], without, however, specifying who and on what basis the applications would be assessed and where they would be accepted.

In practice, the Polish borders have been quite tightly closed to refugees. Since mid-March, there has been no railway connection between Brest and Terespol (the most frequented border crossing by persons seeking international protection in Poland). Border Guard data reveals that in the second quarter of 2020, no application for protection was accepted in Terespol[83]. In the whole of 2020 only 1,532 applications covering 2,650 people were accepted[84], which is about 30% less than in the already record low year of 2019 for 20 years.[85]

Failure to initiate a new asylum procedure would deprive them of their right to housing in refugee centres, medical services and livelihood (in these situations they do not have the right to work or to any benefits other than those resulting from the refugee procedure). This was directly linked to the risk of homelessness, lack of livelihoods and lack of access to medical care.

From 16 March to 25 May, the Office for Foreigners suspended direct service for asylum seekers in its headquarters at 33 Taborowa Street[86], which made it impossible to submit asylum applications in Warsaw during that period, where this activity is frequently performed by asylum seekers at the Border Guard Post located in the building of the Office for Foreigners. This applies in particular to repeat applicants whose asylum application has been rejected, or who have new circumstances in their case, or who are waiting for a decision on their appeal to the Voivodship Administrative Court, or who are still subject to other administrative proceedings in the course of which they hope their stay will be legalised. Failure to initiate a new asylum procedure would deprive them of their right to housing in refugee centres, medical services and livelihood (in these situations they do not have the right to work or to any benefits other

81. Ordinance of the Minister of Internal Affairs and Administration of 13 March 2020 on temporary suspension or restriction of border traffic at certain border crossing points (Journal of Laws 2020, item 435, as amended).
82. Document No KG-CU-ZSS.072.3.2020 of 17 March 2020.
83. Statistics of the Border Guard Service for 2020: https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html (accessed 4.02.2021).
84. Statistics of the Border Guard Service for 2020: https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html, Table 4, p. 8 (accessed 4.02.2021).
85. The Office for Foreigners statistics: https://udsc.gov.pl/statystyki/raporty-okresowe/ (accessed 4.02.2021).
86. https://udsc.gov.pl/zawieszenie-bezposredniej-obslugi-klientow/, https://udsc.gov.pl/wznowienie-bezposredniej-obslugi-klientow/ (accessed 4.02.2021).

than those resulting from the refugee procedure). This was directly linked to the risk of homelessness, lack of livelihoods and lack of access to medical care. During the COVID-19 epidemic, this posed a threat to the health and lives of individuals and could translate into a public health risk.

The Department of Social Assistance of the Office for Foreigners, whose management negotiated that the Border Guard would register as a declaration of will to apply for international protection applications filled in by asylum seekers living in refugee centres (usually with the help of the Office of Foreigners employees) and sent in the form of a scan, followed by postal applications. This enabled the Department of Social Assistance of the Office for Foreigners to ensure continuity of benefits. However, outside this makeshift system there were people not living in the centres but receiving so-called "off-centre" benefits. Due to the epidemiological threat, they were not allowed to enter the centres and therefore could not receive assistance from the Office for Foreigners employee in completing the sophisticated 20-page application. With such persons, applications for international protection were completed by staff of certain NGOs, including the Association for Legal Intervention.

Furthermore, in view of the situation, on 1 April 2020 the Association for Legal Intervention asked the Chairman of the Refugee Board to consider suspending the execution of the Board's decisions appealed to the Voivodship Administrative Court in Warsaw.[87] This would allow asylum seekers who have complained to an administrative court about a negative refugee decision to continue to receive benefits. In response to the Association's letter, on 28 April 2020 the Refugee Board adopted Resolution No. 1/2020 recommending its members to suspend by operation of law the implementation of negative decisions on the granting of international protection where the Board's decision has been appealed before an administrative court during the period of an epidemic emergency or a state of epidemic declared due to COVID-19. As a consequence of its resolution, the Refugee Board suspended ex officio the execution of a decision to refuse to grant international protection[88], as well as in the case of a decision to consider an application for international protection inadmissible.[89] In its decisions, the Refugee Board took into consideration "the special circumstances resulting from the epidemic state introduced in Poland in connection with the spread of the COVID-19 virus. The impossibility for persons who have received a final negative decision to continue living in Poland and receiving social and medical benefits could expose such persons to homelessness, inability to provide for themselves and their families and to medical care. Furthermore, the lack of adequate support for such people may result in an increased risk of the virus spreading."[90] Thus, in the Refugee Board's view, the suspension of a decision to refuse to grant international protection automatically prolongs the period for which foreigners applying for such protection in Poland may receive benefits.[91]

Through the interventions of the Office for Foreigners and civil society organisations, including the Association for Legal Intervention, the problem was not systemically resolved

87. The SIP letter to the Refugee Board, No. L.Dz.1/4/2020/MS.
88. Resolution of the Refugee Board of 8 May 2020, No. RdU-140-2/S/19.
89. Resolution of the Refugee Board of 30 October 2020, No RdU-786-6/S/16.
90. Resolution of the Refugee Board of 30 October 2020, No RdU-786-6/S/16.
91. With the implementation on 16 May 2020 of Art. 15(8) of the Act of 2 March 2020 on special arrangements for preventing, counteracting and combating COVID-19, other communicable diseases and emergencies caused by them, the extension of the deadline for providing social assistance and medical care was extended by operation of law to the duration of the state of epidemic emergency or state of epidemic declared due to COVID-19.

until mid-May in relation to the change of the so-called Crisis Shield.[92] The new legislation extended the right to the benefits until the 30th day after the cancellation of the epidemic emergency or sanitary and epidemiological risk to all persons who received any final decision in the asylum proceedings during the epidemic.

After 25 May, when the Office for Foreigners restored direct services for migrants in its premises in Taborowa Street, the Border Guard again started accepting asylum applications in Warsaw.

Considering the fact that over 40% (637 out of 1532)[93] of asylum applications were submitted at the Border Guard Post in Warsaw (at 33 Taborowa Street), i.e. by persons already staying on the territory of the Republic of Poland, it may be concluded that the epidemic situation has been used to restrict even more than in previous years the ability of persons seeking international protection to enter Poland.

The epidemic situation has been used to restrict even more than in previous years the ability of persons seeking international protection to enter Poland.

92. Art. 46 (13) of the Act of 14 May 2020 on the amendment of certain acts in relations to the support program in relation to the spread of the SARS-CoV-2 virus (Journal of Law 2020, item 875).
93. Statistics of the Border Guard Service for 2020: https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html, tab. 4, s. 8 (accessed 4.02.2021).

II. Return procedure

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1. REFUSAL TO INITIATE PROCEEDINGS

Migrants, whose deportation to their country would violate human rights or the rights of children, should be granted a residence permit for humanitarian reasons or tolerated stay permit in Poland. To apply for those types of permits appropriate procedure must be initiated. In 2020, as in previous years, the Association for Legal Intervention observed the continuation of the practice of the Border Guard refraining from initiating ex officio procedures for residence permit for humanitarian reasons, despite sufficient circumstances for initiating such procedure. The described practice[94] consisted of either leaving the application of the Association for Legal Intervention without a reply (while not initiating the requested procedure ex officio) or sending an informal letter by the Border Guard authorities.

In 2019, the Association submitted a complaint to the Head of the Office for Foreigners about the described practice of the Border Guard. As a consequence, the Head of the Office for Foreigners declared the complaint inadmissible, pointing out that an informal letter from the Border Guard authority could not be considered a decision. At the same time, the Office for Foreigners obliged the Border Guard authority to issue a decision. The Commander of the Warsaw-Okęcie Border Guard Post formally refused to initiate the procedure. The Association, therefore, filed another complaint challenging this decision. On 4 February 2020, the Head of the Office for Foreigners reversed the appealed decision in its entirety and decided to initiate ex officio the administrative procedure regarding the return decision of the indicated migrant. In the justification of the decision, the Head of the Office for Foreigners indicated that "Considering the Association's request to initiate administrative proceedings regarding the obligation to return (...), the Head of the Office for Foreigners concluded that the conditions set out in Art. 31 § 1 point 1 of the Code of Administrative Procedure, conditioning the possibility of initiating the above-mentioned procedure, i.e. the consideration of the Association's request is justified by the statutory objectives, i.e. demands are supported by the public interest."[95] The second instance authority also ruled that due to the unregulated stay of the migrant on the territory of the Republic of Poland, the social interest also spoke in favor of initiating the requested procedure. In the case, there were statutory grounds justifying the initiation ex officio of the return procedure, in the course of which the authority will determine whether the migrant meets the conditions for granting the residence permit for humanitarian reasons.

The initiation of procedure for granting the residence permit for humanitarian reasons, in cases where such reasons exists, is important for migrants who should be granted the right to stay in Poland to protect their human rights. In a situation where the authorities unlawfully refuse to initiate appropriate procedure, migrants have no real possibility to exercise their rights.

94. Composed on the basis of art. 31 § 1 point 1 of the Code of Administrative Procedure.
95. Decision of the Head of the Office for Foreigners of February 4, 2020, No. DL.WIPO.412.887.2019 / JPP.

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2. CHILDREN'S RIGHTS

In 2020, children's rights were not always taken into account when issuing return decisions. It happened that in the return decision for a minor migrant, the Border Guard did not examine whether, in the event of the family's return, the child's rights would not be violated to a degree that would significantly threaten her/his psychophysical development.[96] It clearly violates the Polish law and is incompatible with the obligation to take into account the best interests of the child in all decisions concerning him or her. In the shadow report submitted in 2020 to the Committee on the Rights of the Child, The Association for Legal Intervention, together with other non-governmental organizations indicated, inter alia, the problem of an insufficiently thorough examination of the best interests of the child in return procedure, including the failure by administrative bodies to appoint an expert psychologist or child psychiatrist in those proceedings.[97] Often, only an expert opinion allows for a comprehensive determination whether the return to the country would adversely affect the development and health of the child.

The circumstances that the return of a migrant to her or his country would violate the rights of the child to a degree significantly threatening his or her psychophysical development is one of the conditions for granting a residence permit for humanitarian reasons.[98] The risk of the violation of the child's rights is most common when the child is well integrated within the Polish society, when there is the risk of violating his or her fundamental rights in the event of a return to the country, including separation from the parent, or in a situation where due to the child's health condition her or his development or health could be endangered.

In 2020, the Border Guard granted residence permits for humanitarian reasons or a tolerated stay permit to 29 children[99], and the Head of the Office for Foreigners - 140 children. More than half of the children were of Russian or Ukrainian nationality.[100]

The risk of the violation of the child's rights is most common when the child is well integrated within the Polish society, when there is the risk of violating his or her fundamental rights in the event of a return to the country, including separation from the parent, or in a situation where due to the child's health condition her or his development or health could be endangered.

Integration in Poland

In 2020, the Association for Legal Intervention run or joined several cases concerning children who, due to their long stay in Poland, integrated with Polish society. They have friends and acquaintances, have started or have completed most of their education in Poland, they speak Polish fluently, know Polish culture and customs, and often no longer have any memories of their country of origin. In most of these cases, parents actively supported their

96. Decision of the Commander of the Border Guard Post in Narewka of 16 November 2020, No. PD-NW / 14 / D-ZDP / 2020.
97. Shadow report to the Committee on Children's Rights, August 2020, p. 7-8, available at: https://interwencjaprawna.pl/wp-content/uploads/2020/09/RAPORT-ALTERNATYWNY-WERSJA-POLSKA.pdf
98. Art. 348 (3) of the Act on Foreigners.
99. Response of the Headquarters of the Border Guards of 12 February 2021, KG-OI-VIII.0180.20.2021.JL, to the SIP request for access to public information.
100. The reply of the Office for Foreigners of 3 February 2021, inf. cit.

children in their integration process. In the opinion of the SIP, the return decision and deportation of such families may constitute a highly traumatic event for children and adversely affect their psychophysical development, and thus their further life. In cases where the psychologist confirmed such a suspicion concerning specific children and their families, the SIP joined the return procedure. The Association requested to refrain from deportation of such families, and instead granting them residence permit for humanitarian reasons in Poland, as it was required to protect children's rights.

That it is often the psychological opinions showing the impact of deportation on the development of the child that play a key role.

One of the cases concerned a family with many children in which children attended a Polish school and attended extracurricular activities. One of the reasons why the family received a residence permit for humanitarian reasons was the four-year and uninterrupted stay in Poland and fulfilling the schooling obligations, as a result of which the children "integrated with their peer community, finding approval and trust in it, feel good in Poland, achieve good results in science, willingly participate in social activities and are involved in extracurricular activities. " The Head of the Office for Foreigners decided that the main argument in favour of such a decision was "to prevent breaking of social ties that children managed to create in the Polish community not without a difficulty and the loss of the sense of security they had acquired during their stay in Poland so far, which is crucial for their psychophysical development." The key evidence in the case were "the psychological and environmental expert opinions concerning children and their parents, which show that the return could very likely pose a significant threat to the proper psychophysical development of children and would violate the right to family and private life of migrants."[101] The practice of the Association for Legal Intervention shows that it is often the psychological opinions showing the impact of deportation on the development of the child that play a key role in those proceedings. If it is clear from such opinions that the return to the country would entail negative consequences for the child's development or health, the family most often obtains the right of residence in Poland.

The protection of family life and children's rights covers not only children and their biological parents, but may also include their actual guardians. In 2020, the Commander of the Warsaw-Okęcie Border Guard Post decided that the separation of children from their stepfather who was bringing them up, may violate the rights of the children. It was indicated that the stepfather fully participates in the life of children who, due to their health condition, require his constant care and support. At the same time, the Commander of the Border Guard Post emphasized the strong bond that had developed between the children and their stepfather.[102] In the described facts, the stepfather is not the legal guardian of children and is not in a legally recognized relationship with the mother of the children (the mother of children concluded with her partner marriage only in a religious rite - Muslim). Nevertheless, due to the strength of the bond between him and his partner's children and the support he provided, he received a residence permit for humanitarian reasons in Poland. This prevented children from having to be separated from their actual caretaker and one of their closest relatives.

The protection of children's right to stay with both parents does not seem to be equally well protected in a situation where one of the parent is a Polish citizen. In the opin-

101. Decision of the Head of the Office for Foreigners of 9 March 2020, No. DL.WIPO.412.61.2019.HJ.
102. Decision of the Commandant of the Border Guard Post Warsaw-Okęcie of 27 March 2020, No. NW-WA-Gds.C-Zds.M.422.

ion of the Association for Legal Intervention, such a situation may lead to the unjustified worse treatment of given families. In 2020, the Association run the case of a migrant father to a Polish child. The mother of the child was also a Polish national. The Commander of the Border Guard Post in Warsaw issued a return decision to the migrant stating that in the event of return the child's rights would not be violated as "the deportation of a migrant from Poland is not tantamount to a complete severance of contact with his son. Nowadays, there are public and free means of communication that ensure daily conversations with the transmission of images. There are also no legal or factual obstacles for (...) [the mother - Polish citizen] and her minor son (...) [Polish citizen] to locate their life centre in another country. (...) the child's welfare depends only on the conditions created for him by his parents, and not on the place where he is located."[103] In the present case, the Association joined the administrative proceedings and requested the intervention of the Ombudsperson for Children. The Association for Legal Intervention argued that the obligation of the father of a minor Polish citizen to return would constitute not only a violation of the child's right to be brought up by both parents, but also - if the child's mother decides to leave Poland to live outside the territory of the Republic of Poland with the child and his father - the right to an identity.

A child may not be punished or discriminated against due to decisions made by her or his parents.

Unfortunately, in 2020, as in previous years, the dominant interpretation was to narrow down the notion of "children's rights", limiting this sphere to the child's right to stay together with other family members (who are migrants) and the right to education.[104] The administration authorities recognized that in a situation where a return decision is issued to the whole family, there is no violation of the rights of the child to a degree that significantly threatens their psychophysical development[105], because "there is no risk of depriving minor children of (...) care, which could adversely affect their psychophysical development."[106] The Association for Legal Intervention has repeatedly intervened in such cases, pointing out that in the event of strong integration of the child within the Polish community, return to the country, even with the rest of the family, may adversely affect the development of the child.

It happens that the Polish authorities, when refusing to grant children residence permits, incorrectly do not take into account the degree of their integration, pointing to the fact that when deciding to leave the country of origin and not legalizing their stay in Poland, parents exposed their children to the risk of changing their place of residence and the resulting stress.[107] In 2020, in cases run by the Association, such a position was approved at least once by the Voivodship Administrative Court in Warsaw. In the judgment of the Voivodship Administrative Court in Warsaw of 6 November 2020, No. IV SA / Wa 547/20, the court ruled that "it does not follow that the life centre of a migrant woman and her family cannot be transferred to their country of origin. This assessment cannot be altered by the fact that the applicant's country of origin is a country which her son does not remember and with which he does not feel any ties. These circumstances, constituting unquestionable practical difficulties resulting from the decision of the migrant woman and her husband to take the risk of living in the country without legalizing their stay in that country, are not, however, grounds for granting residence permit for humanitarian reasons." The Association for Legal Intervention filed a cassation appeal against the above ruling, arguing that under the Convention on the Rights of the Child, a child may not be punished or discriminat-

103. Decision of the Commander of the Border Guard Post in Warsaw of 11 September 2020 No. NW-WW / 1034 / D-ZDP / 2019.
104. Decision of the Commander of the Border Guard Post in Warsaw of 16 September 2020, No. NW-WW / 018 / D-ZDP / 2020.
105. Decision of the Commander of the Border Guard Post in Szudziałów of 2 December 2020, No. PD-SD / 2 / D-ZDP / 2020.
106. Decision of the Head of the Office for Foreigners of 18 January 2020, No. DL.WIPO.412.189.2019.KGr.
107. Ibid.

ed against due to decisions made by her or his parents. Thus, the administrative bodies should not prioritize the findings that the boy's parents decided to stay in Poland despite the lack of a regulated stay but were obliged to examine whether the implementation of the return decision, taking into account the long stay in Poland of the child, will violate the child's rights to a degree significantly threatening his psychophysical development. The case is pending.

Risk of separation from the parent

A distinct group of cases related to the protection of children's rights and the right to family life are cases in which mothers of children from the North Caucasus indicate that in the event of a return to their country, they will be separated from their children by their former husbands and fathers of children. These women refer to the custom and tradition in their country that does not allow them to effectively defend themselves against the separation from the child. The Polish administrative authorities assume that in such situations there is no risk of violating the rights of the child, as "federal courts of higher instance, often located in other regions of Russia, grant custody of children also to mothers. Under the law adopted in the territory of (...) [the Russian Federation], custody of children after divorce is vested in both parents. Thus, (...) a migrant woman may take legal action in this matter in her country of origin."[108] It is impossible to agree with such a position. As shown in the report of the Department of Information on the Countries of Origin of the Office for Foreigners of 30 June 2020, No. DPU-WIKP-424/249/2020 "Russian social activists dealing with the defense of human rights, mainly helping women in North Caucasus, note that more and more often local district courts, i.e. branches of federal courts in the Republic of Chechnya, if a case concerning the right to raise children after divorce go to them on the docket, they settle it by the Chechen adats (customary laws). These, in turn, granted the right to custody of children by the father and his family, sometimes even before they reach the age of 6-7. By contrast, federal courts of higher instance, often located in other regions of Russia, grant custody of children also to mothers. According to the law adopted in the Russian Federation, both parents have the right to custody of children after divorce. However, if the father's family and children are in Chechnya, it is very difficult (usually impossible) for mothers to enforce such court sentences. The father's family does not allow them to do so, it does not even allow them to have temporary contact with their children."[109] Thus, the Office for Foreigners' study confirms that although Russian law is formally in force in the territory of the Russian Caucasian republics, in practice it is not applied and/or respected. Consequently, the position of the administrative authorities regarding the possibility of claiming the rights to custody of children by mothers from the North Caucasus should be considered as not finding confirmation in objective sources.

If the father's family and children are in Chechnya, it is very difficult (usually impossible) for mothers to enforce such court sentences. The father's family does not allow them to do so, it does not even allow them to have temporary contact with their children.

108. Decision of the Commander of the Border Guard Post in Warsaw of 16 September 2020, No. NW-WW / 018 / D-ZDP / 2020.
109. Study of the Information Division on Countries of Origin of the Office for Foreigners of 30 June 2020, No. DPU-WIKP-424/249/2020, p. 18-19.

Children with special needs

In 2020, the Association for Legal Intervention provided legal support to vulnerable groups. One of these groups were children with special needs against whom return proceedings were pending. Two of the cases run by the Association resulted in granting residence permits for humanitarian reasons to families with children with special needs.[110] In both cases, migrants applied for a humanitarian stay due to the strong integration of children within the Polish society and the need for continuous and intensive rehabilitation for children with special needs.

The first case concerned a family from Chechnya. One of the children had cerebral palsy, was in a wheelchair and was well integrated within the Polish society. According to experts, in Poland the boy was given a chance for proper development and the opportunity to live independently, which he used thanks to his family.

Despite these facts, the Commander of the Warsaw-Okęcie Border Guard Post issued the return decision. He did not take into account the degree of integration of children within the Polish society, their concerns about returning to their country of origin and threats to their psychophysical state in the event of a return to their country of origin, in particular of a child with special needs. For this reason, the decision was revoked by the Head of the Office for Foreigners, who shared the arguments brought up by the Association for Legal Intervention. The Head of the Office for Foreigners decided that the Border Guard violated the principle of taking into account the best interests of the child and ordered the case to be re-examined. The Commander of the Warsaw-Okęcie Border Guard Post, examining the case for the second time and ordered a hearing of children in the presence of a psychologist. After the Association's intervention, a disabled child was also heard, as he was the only one in the family who had not been interviewed before.

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The second case led by the Association for Legal Intervention concerned a family from Tajikistan. One of the children suffered from cerebral palsy and was fully integrated within the Polish society.

In both cases, the psychological opinions prepared by, among others, a psychologist appointed by the Border Guard indicated that the return to the country of origin of children would harm their psychophysical development, and the pedagogical opinions indicated a high degree of integration of children within the Polish society. Moreover, the doctors in both cases pointed to the need for continuous and intensive rehabilitation of children.

In both cases, the Commander of the Border Guard Post at Warsaw-Okęcie finally granted all families residence permits for humanitarian reasons. In the decisions, it was emphasized, inter alia, that obliging migrants to return could have a significant impact on the psychophysical development of children and would violate family ties and children's rights. It was taken into account that children do not know any country other than Poland and thus identify themselves only with the Polish culture and society.[111]

110. Decisions of the Commander of the Border Guard Post Warszawa-Okęcie of 19 March 2020, No. NW-WA/199/D-ZPH/2020, NW-WA/212/D-ZPH/2020 and the decision of the Commander of the Border Guard Post Warsaw-Okęcie of 27 April 2020, No NW-WA/212/D-ZPH/2020.
111. Decision of the Commander of the Border Guard Post Warszawa-Okęcie of 19 March 2020, No. NW-WA/199/D-ZPH/2020 and the decision of the Commander of the Border Guard Post Warszawa-Okęcie of 27 April 2020, No. NW-WA/212/D-ZPH/2020.

It should be noted that in the above-mentioned cases, both the lawyers of the Association and the migrants themselves put a lot of effort into proving that the return of children with special needs to their country of origin may be associated with a specific risk for them. Bearing in mind that, as a rule, migrants still do not have the right to free legal assistance in return procedure, there is no certainty that in other cases, where the legal support was not provided, the interests of children with special needs are equally secured.

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Magdalena Sadowska

3. THE RIGHT TO FAMILY AND PRIVATE LIFE

As mentioned above, a migrant, whose right to family or private life would be threatened if he returns to the country of origin, should obtain a residence permit for humanitarian reasons.[112] The spouses living together in Poland after the wedding, running a common household, raising children and supporting the family financially are the circumstances examined in this procedure. The lack of a formal relationship between partners under civil law does not preclude the possibility of obtaining protection against return decision. In 2020, the Association for Legal Intervention run several cases concerning migrants for whom returning to the country would mean breaking family or social ties with members of their immediate family.

One of the cases run by the Association concerned a migrant whose partner (a Muslim wife) and children had permission to stay in Poland for humanitarian reasons and could not return to their country. The Commander of the Border Guard Post in Augustów, in the decision of 3 December 2020, No. PD-AG / 01 / D-ZPH / 2020, permitted him to stay in Poland for humanitarian reasons. The decision indicated that "the fact that your wife and children have (...) protection against expulsion in our country, excludes the possibility of free enjoyment of family life in another country, especially in the country of origin. " The Commander of the Border Guard Post noted that "changing the current living conditions of the family (...), in particular children who are tied to their father from birth and are dependent on him, could contribute to traumatic experiences, and it is unacceptable to disturb the family's sense of stability, which found itself in Poland and has a chance to be fully assimilated. Moreover, the State (...) strives to legalize their relationship in the registry office so that it is recognized as valid under Polish law and produces legal effects."

A similar case concerned a migrant who was very well integrated within the Polish society, who had lived in Poland for 10 years, and for 8 years had been in a relationship with a migrant living permanently in Poland. Together they had three minor children. In the past, the migrant received a return decision, but due to the lack of documents, this decision could not be enforced. The Border Guard decided to initiate procedure for granting him residence permit for tolerated stay (this is a type of stay issued to, among others, migrants who cannot be deported, because e.g. their state does not agree to their admission or it is not possible to obtain documents necessary for the deportation). The Association for Legal Intervention joined the procedure and showed that due to the family life and the welfare of underage children, the migrant should obtain a residence permit for humanitarian reasons (this permit is granted, inter alia, to protect family life. It provides broader rights that the tolerated stay, including the right to travel and obtain permanent residence in Poland). The Commander of the Border Guard Post in Warsaw acceded to the Association's request, stating, inter alia, that obliging the migrant to return would violate his right to family life and would not allow children to fully and harmoniously develop, respect their dignity and subjectivity, and would also violate the law of these children to life and health protection, the right to be brought up in a family, the right to decent social conditions, as well as the right to education.[113]

112. Based on Article 348 point 2 of the Act on Foreigners.
113. Decision of the Commander of the Border Guard Post in Warsaw of 10 March 2020, No. NW-WW/345/D-ZPH/2019.

As indicated previously, the right to family life covers not only marital relationships but also informal relationships. In another case, the Commander of the Border Guard Post Warszawa-Okęcie in the decision of 27 March 2020, No. NW-WA-Gds.C-Zds.M.4226.11.2020, decided that participating fully in the partner's family life (living and bringing up children from a previous cohabitation relationship and their children), with whom the migrant remains only in a religious (Muslim) marriage, can be classified as having a family and private life in Poland. The Border Guard took into account the fact that members of the migrant's family require his constant care and support due to their health condition.

Participating fully in the partner's family life (living and bringing up children from a previous cohabitation relationship and their children), with whom the migrant remains only in a religious (Muslim) marriage, can be classified as having a family and private life in Poland.

The protection of the right to family and private life can often stand in the way of the deportation of long-term migrants, as well as well-integrated families of migrants. Typically, such persons should obtain residence permit for humanitarian reasons.

Aleksandra Pulchny

4. STATELESS PERSONS

According to available data, the number of stateless persons - people whom no state recognizes as its citizens - in Poland is difficult to estimate, but most likely it is relatively small.[114] Difficulties in assessing the number of such people result, among others, from the absence of a specific statelessness determination procedure and official statelessness statistics. Poland - despite setting standards in the field of counteracting statelessness in the past[115] - is not a party to any convention on stateless persons that would require the regulation of the legal status of this group.[116] National regulations also do not facilitate the regulation of their legal status, including the right to stay in Poland. This may lead to an actual restriction of their fundamental rights. Stateless persons have difficulties in Poland not only with legalizing their stay but also with obtaining any document confirming their identity or authorizing them to travel. They may have problems opening a bank account, as well as dealing with everyday official matters.

Due to the lack of legalization procedures dedicated to stateless persons, they apply for residence permits for other reasons.

In 2020, in asylum cases, the Head of the Office for Foreigners granted refugee status to 4 stateless asylum seekers. Moreover, in cases conducted by the Border Guard against migrants without citizenship or with undefined citizenship, four decisions were issued granting them residence permit for tolerated stay, one decision on granting residence permit for humanitarian reasons and one return decision.[117]

The only stateless migrant who was granted in 2020 a residence permit on humanitarian grounds was a client of the Association for Legal Intervention.

The migrant has been living in Poland since 2010. He came from the Soviet Union. He never had a passport, and due to political changes and personal circumstances, he was never able to prove his citizenship. In Poland, he leads a family life with a Russian citizen and they have three minor children. The migrant, during his 10-year stay in Poland, perfectly integrated into the Polish society. Due to the lack of documents, the Border Guard was unable to deport him for many years. The Association for Legal Intervention applied for a residence permit for humanitarian reasons to protect his right to family life and the rights of the child.

The Border Guard complied with the request of the Association for Legal Intervention and granted the migrant a residence permit for humanitarian reasons. The Commander of the Border Guard Post in Warsaw decided that if a migrant meets the conditions for

Stateless persons have difficulties in Poland not only with legalizing their stay but also with obtaining any document confirming their identity or authorizing them to travel. They may have problems opening a bank account, as well as dealing with everyday official matters.

114. https://www.unhcr.org/pl/wp-content/uploads/sites/22/2016/12/UNHCR-Statelessness_in_Polland-POL-screen.pdf s. 25, access 25.01.2021.
115. D. Pudzianowska, Statelessness in public law, Warsaw 2019, p. 300.
116. 1954 Convention relating to the Status of Stateless Persons and 1961 Convention on the Reduction of Statelessness.
117. Data of the Department of Analysis and Migration Statistics of the Head of the Office for Foreigner.

obtaining a tolerated stay permit (due to the impossibility of deportation) and a humanitarian stay permit (e.g. the need to protect family life), he should receive the latter, more favourable form of stay for him. The administrative authority also stated that despite thelack of an identity document and the inability to confirm the citizenship of the migrant, he may obtain a residence permit for humanitarian reasons.[118]

118. Decision of the Commandant of the Border Guard Post in Warsaw of 10 March 2020, No. NW-WW/345/D-ZPH/2019.

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5. A MIGRANT RECOGNIZED AS A THREAT TO SECURITY

In 2020, the Association for Legal Intervention undertook several interventions in cases concerning the rights of migrants considered a threat to security. Polish authorities when consider a given person a threat to security often do not explain the reason for such a decision. The migrant does not know and cannot find out why he was recognized as such a threat. This precludes him from carrying out any effective defence.

The rights and procedural guarantees of this group are often violated to the extent that any defence against the deportation is impossible. In 2020, as many as 564 return decisions for security reasons were issued, and 521 people were forcibly deported.[119] In such cases, return decisions may be enforced even before the migrant's appeal is examined.[120] Despite having such a possibility, in 2020 the Head of the Office for Foreigners did not suspend any of the execution of the return decision until the appeal in the case was examined.[121] The Border Guard Headquarters does not collect data allowing to determine how many of these decisions were enforced before the appeal or complaint was examined by the court.

Determining what behaviours allow to assume that a given migrant poses a threat to public safety and order is often crucial in this type of case. In 2020, one of the case run by the SIP and described in the report SIP in action. The rights of foreigners in Poland in 2019[122] had ended. The case concerned a migrant leading family life in Poland, who, due to a positive criminological and social prognosis, was conditionally released from prison to the community. The first instance authority considered him a threat to public safety and issued a return decision. The Association for Legal Intervention joined the case and participated in the procedure as a party. The Association argued that in a democratic state governed by the rule of law, it is unacceptable for one authority to recognize the same person as being rehabilitated and not posing a threat to public safety and order, and the other authority to reach a different conclusion based on the same evidence. The second instance administration authority (the Head of the Office for Foreigners), by decision of 20 February 2020, No. DL.WIPO.412.116.2019/JPP, revoked the return decision and granted him residence permit for humanitarian reasons. The Head of the Office for Foreigners drew attention to the fact that the migrant had ended the probationary period positively, the probation officer had prepared a positive opinion from the supervision, the long period since the last crime had been committed, a positive opinion among the neighbours, the migrant's critical attitude towards the crimes committed and the expressed regret, as well as the migrant's high commitment to the family life. All those circumstances

In a democratic state governed by the rule of law, it is unacceptable for one authority to recognize the same person as being rehabilitated and not posing a threat to public safety and order, and the other authority to reach a different conclusion based on the same evidence.

119. Reply of the Border Guard's Headquarters of 12 February 2021, inf. cit.
120. Article 315 (5) of the Act on Foreigners and art. 329a (2) of the Act on Foreigners.
121. The reply of the Office for Foreigners of 3 February 2021, inf. cit.
122. P. 40

have led to the conclusion that the migrant no longer poses a threat to public safety and order, and due to the long-term legal stay of his closest family in Poland, it is justified to grant him a residence permit for humanitarian reasons.

In 2020, the Association for Legal Intervention also run a case in which the Commander of the Warsaw-Okęcie Border Guard Post refused to grant a well-integrated family a residence permit for humanitarian reasons, citing the threat to the protection of safety and public order that the father of the family was supposedly posing. This happened even though the father of the family was subject to separate procedure, regarding the return decision, which did not include his family, wife and children.

The Commander of the Warsaw-Okęcie Border Guard Post did not take into account the degree of integration of children with Polish society, relying solely on the fact that the father of children had been sentenced to imprisonment conditionally suspended. The criminal cases referred to by the first instance authority had ended a few years earlier and since then the migrant has had no problems with the administration of justice. The Commander of the Warsaw-Okęcie Border Guard Post did not take into account both the time that had passed since the crimes committed, the migrant's current attitude, and the fact that the migrant had been sentenced to suspended sentences, which are issued only if there is a positive criminological prognosis (i.e. that the person is likely to comply with the law and does not pose a threat to others).

It is not sufficient to demonstrate any threat to the protection of public safety and order, but it must be stated that that the degree of threat is so high as to interfere with the rights to respect for family and private life.

The Association for Legal Intervention pointed to the need to assess the proportionality of the interference with the right to family and private life concerning the threat posed by the migrant. Not only the issue of a potential threat to state defence or security or the protection of public safety and order should be taken into account, but also the degree of integration of children within the Polish society and the impact of return on their development. In the case at hand, the evidence indicated that the return of the family to the country could have a significant negative impact on both their further education, as well as intellectual, social development and the children's sense of identity. The Head of the Office for Foreigners acceded to the position of the Association for Legal Intervention and ordered the Commander of the Border Guard Unit Warszawa-Okęcie to re-examine the case in terms of possible violations of the right to family and private life and the rights of children in the event of deportation.[123] In the context of the father of the children, the Head of the Office for Foreigners ordered the Border Guard to establish, inter alia, whether the educational goal of the judgments handed down against the migrant has been achieved. The second instance authority also drew attention to the judgment of the Supreme Administrative Court of 4 October 2017, No. II OSK 362/17, in which it was indicated that it is not sufficient to demonstrate any threat to the protection of public safety and order, but it must be stated that that the degree of threat is so high as to interfere with the rights to respect for family and private life. The case is currently pending.

In 2020, the Association for Legal Intervention also run an important human rights case, concerning the possibility to return a migrant in a situation where his return to the country could expose him to the risk of torture. The Minister of the Interior and Administration issued a return decision due to the fear that he might conduct terrorist or espionage

123. Decisions of the Head of Office for Foreigners of 13 March 2020, No. DL.WIPO.412.790.2019/JPP, DL.WIPO.412.882.2019/JPP.

activities, or that he is suspected of committing one of these crimes.[124] In the issued decision, it was not examined whether the migrant's return to the country of origin would expose him to the risk of being subjected to torture, other inhuman or degrading treatment or punishment. Voivodship Administrative Court in Warsaw in the judgment of 12 November 2020, No. IV SA / Wa 1347/20, dismissed the migrant's complaint (and thus upheld the return decision). In the justification of the judgment, the court found that the Minister was not authorized to investigate whether the migrant's return to his country would be related to the violation of the prohibition of torture. In the court's opinion, if there is a fear that a migrant is engaged in terrorist or espionage activities, the Minister must issue a return decision, even if it would expose the migrant to torture in his country. The Association for Legal Intervention could not agree with such an argumentation. The cassation appeal indicated the absolute nature of Art. 3 of the European Convention on Human Rights, prohibiting torture, other inhuman or degrading treatment or punishment. According to the settled case-law of the European Court of Human Rights, it is unacceptable to expel a migrant, irrespective of his behaviour, if he or she would be at risk of torture in the country of origin (e.g. the judgment of the ECtHR in the case of Soering v. Great Britain, §§ 125-126; Othman (Abu Qatada) v. Great Britain, §§183-185).

It is unacceptable to expel a migrant, irrespective of his behaviour, if he or she would be at risk of torture in the country of origin.

In addition, the cassation appeal contained a request for a preliminary ruling aimed at resolving the issue of whether the Return Directive[125] and the Charter of Fundamental Rights prohibit the return decision a migrant posing a threat to state security if in the event of his deportation he would be at risk of torture, and whether the indicated legal acts oblige the Member States to check each time before issuing a return decision that the migrant will not be at risk of torture, other inhuman or degrading treatment or punishment if he returns to the country of origin. In the opinion of the Association for Legal Intervention, in each decision obliging a migrant to return, regardless of whether he or she poses a threat to state security or not, administrative bodies must check whether his return to the country of origin will not violate the prohibition of torture. If the migrant could be at risk of torture, it is unacceptable to oblige him to return. The case is currently pending.

In this case, a complaint was also submitted to the European Court of Human Rights, in which it was alleged a violation of the material and procedural aspects of the prohibition of torture, other inhuman or degrading treatment against a migrant (application no. 37042/20). The case has not yet been communicated.

124. Article 329a (1) of the Act on Foreigners.
125. 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.

Małgorzata Jaźwińska

6. SUSPENSION OF THE EXECUTION OF THE RETURN DECISION

Despite the final return decision issued by administrative authorities, the deportation of a migrant will not always be possible and legal. Both the national administrative courts and the European Court of Human Rights can temporarily prohibit such deportation. It happens when the deportation of a migrant would cause consequences for him/her difficult or impossible to reverse, and also if it could result in violation of the right to life or freedom from torture, other inhuman or degrading treatment or punishment. It happens that due to the scale of human rights violations, the Border Guard suspends all deportations to a given country. In 2020, deportations to Syria, Yemen, Eritrea, Venezuela and China were suspended (to Yemen until July 2020, to China from October 2020).[126]

In the opinion of the Association for Legal Intervention, adequate protection against deportation, in line with the standard set by the European Convention on Human Rights, is not ensured, inter alia, for persons suspected of terrorist or espionage activities. This may give rise to Poland's liability before the European Court of Human Rights concerning the violation of the prohibition of torture, other inhuman or degrading treatment, as well as the obligation to provide an effective remedy.

Deportations to Syria, Yemen, Eritrea, Venezuela and China were suspended.

In 2020, the Association for Legal Intervention run the case of a migrant who received a return decision due to the fear that he might conduct terrorist or espionage activities, or he was suspected of committing one of these crimes.[127] Under the national regulations, the issued decision was subject to immediate and compulsory enforcement. Appealing against that decision, a motion was submitted to the administrative court to suspend its enforcement due to the risk of the migrant might be subjected to torture in the event of his return to the country. In the opinion of the SIP, this should result in the suspension of the migrant's deportation until the case is examined by the administrative court.[128] In the reply to the complaint, the Minister of the Interior and Administration did not agree with this position, pointing out that the administrative court was not entitled to suspend the execution of the return decision, which was issued due to the fear of terrorist or espionage activities carried out by a migrant. This argumentation was not approved by the administrative court. The Voivodship Administrative Court in Warsaw, despite its refusal to suspend the execution of the contested decision, did not question the court's competence to suspend the execution of the return decision in such cases (decision of 12 August 2020, No. IV SA / Wa 1347/20). In the decision, however, it was found that the circumstances invoked by the migrant, i.e. the risk of being subjected to torture in the country of origin, were not sufficiently individualized and could not constitute grounds for suspending the enforcement of the return decision "as they in fact concern residence permit for humanitarian reasons or permit for tolerated stay, i.e. the content-related aspects" of the complaint.

The Association filed a complaint against that decision, bringing, inter alia, the violation of the standards of human rights protection established in the jurisprudence of the European Court of Human Rights. According to the case-law of the Court, if there is a risk that, in the event of a return to the country, the migrant will be subjected to torture, other inhuman or degrading treatment, Art. 3 of the European Convention on Human Rights does not allow for his/her deportation before the appeal or complaint is heard. Polish regula-

126. The reply of the Border Guard's Headquarters of 12 February 2021, information cit.
127. Article 329a (1) of the Act on Foreigners.
128. Article 331 (1) of the Act on Foreigners.

tions do not respect this requirement concerning persons suspected of terrorist or espionage activities. The submitted complaint has not yet been examined.

Due to the refusal to suspend the enforcement of the return decision by the Voivodship Administrative Court in Warsaw, the SIP applied to the European Court of Human Rights with a request for an interim measure under Art. 39 of the Rules of Court. It was argued that, according to publicly available reports of international organizations, in Tajikistan suspected terrorists are exposed to unlawful imprisonment, unfair trial, as well as torture or other inhuman or degrading treatment. The European Court of Human Rights granted the interim measure and prohibited the deportation of the migrant during the procedure before the Court (application no. 37042/20). The Association filed a complaint with the European Court of Human Rights, pointing out that the Polish law, contrary to the requirements of the European Convention on Human Rights, does not provide for an automatic suspensive effect (ban on deportation) in the event of an appeal or complaint by a migrant considered a threat to security if there is a risk that in the event of return he might be subjected to torture (complaint no. 37042/20). The complaint has not yet been communicated.

In Tajikistan suspected terrorists are exposed to unlawful imprisonment, unfair trial, as well as torture or other inhuman or degrading treatment. The European Court of Human Rights granted the interim measure and prohibited the deportation of the migrant during the procedure before the Court.

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7. PROCEDURAL GUARANTEES

A faulty return decision may result in far-reaching, often irreparable consequences for the lives of individuals. It may result in the deportation of a migrant to a country where he or she will be subjected to torture or unlawful imprisonment. It can lead to the breakdown of family ties or development difficulties of deported children. In 2020, the Border Guard granted a residence permit for humanitarian reasons or a permit for tolerated stay in less than 1% of return cases.[129] In cases considered by the appeal body, approximately 91% of cases were upheld.[130]

Bearing in mind the importance of the decisions made, it is crucial that the deciding authorities respect all procedural guarantees of the parties. This allows them to minimize the risk of issuing an unfair decision. Polish practice shows, however, that there are still many violations of procedural rights in the proceedings concerning the return process. Some of these violations are systemic.

Gathering and assessment of the evidence

In 2020, the Association for Legal Intervention run several cases related to improper collection or evaluation of evidence in cases related to the return procedure.

By a decision of 19 December 2018, the Commander of the Border Guard Post in Warsaw obliged the family with minor children to return, indicating that the psychological opinion prepared by a child psychologist, request by the Border Guard, indicates that they are not sufficiently integrated within the Polish society. At the same time, the Commander of the Border Guard Post did not assess all the evidence collected in the case, including opinions issued by a school attended by underage children, the content of which contradicted the psychological opinion ordered by the Border Guard.[131] The reasons for this discrepancy have not been explained. The Association for Legal Intervention assisted migrants to appeal against the indicated decisions due to an incomplete assessment of the evidence. The Head of the Office for Foreigners agreed with the position of the Association. In the decision, he considered the "very important psychological and environmental opinions contained in the case files concerning children and their parents, from which it follows that the execution of the appealed decision could likely pose a significant threat to the proper psychophysical development of children and would violate the migrants' right to a family and private life."[132] The aforementioned ruling strengthens the procedural standard, according to which the Border Guard may not ignore some of the collected evidence that supports the integration of children in Poland and rely solely on a negative psychological opinion commissioned by the

The aforementioned ruling strengthens the procedural standard, according to which the Border Guard may not ignore some of the collected evidence that supports the integration of children in Poland and rely solely on a negative psychological opinion commissioned by the Border Guard.

129. The reply of the Border Guard's Headquarters of 12 February 2021, inf. cit.
130. The reply of the Office for Foreigners of 3 February 2021, inf. cit.
131. Decision of the Commandant of the Border Guard Post in Warsaw of 19 December 2018, No. NW-WW/5-DZP/2018.
132. Decision of the Head of the Office for Foreigners of 9 March 2020,No. DL.WIPO.412.61.2019.HJ.

Border Guard. Assessment of the relevant facts, such as the integration of children, must be based on all the evidence gathered in the case.

In another case run in 2020, the Head of the Office for Foreigners took the position that the first instance authority should conduct its assessment of the "situation in the migrants' country of origin and the possible risk that may be associated with her return"[133] to the country. It may not automatically duplicate the findings of another authority made within the asylum procedure. The Head of the Office for Foreigners also stressed the need to interview the migrant, even if she or he had already been interviewed in the asylum proceedings.

No legal aid

The lack of access to legal aid during the return proceedings remains an unresolved problem. It is detailed in the report SIP in action. The rights of foreigners in Poland in 2019.[134] Migrants who have received a return decision cannot apply for free lawyer's assistance to draw up an appeal against a return decision, regardless of their financial situation, knowledge of Polish and Polish regulations. It can effectively prevent them from submitting an appeal, from raising material charges, or from supplementing evidence with key evidence. In the opinion of the Association for Legal Intervention, the lack of such legal assistance negatively affects the number of appeals submitted, as well as their effectiveness. In 2020, migrants appealed against the return decisions in less than 10% of cases. In 2020, the effectiveness of the submitted appeals also decreased significantly. In 2019, it was approx. 17%, while in 2020 it was only approx. 9%.[135]

In 2020, the Association for Legal Intervention piloted a strategic case regarding the lack of access to legal aid at the stage of appeal proceedings. In the opinion of the SIP, the EU law guarantees migrants who do not have sufficient financial resources the right to an ex officio lawyer in the case of an appeal against the return decision.[136] However, Polish regulations allow for the possibility to apply for and award an ex officio lawyer only at the stage of proceedings before an administrative court, i.e. when no evidence is collected in the case.

In a case run by the Association for Legal Intervention, a migrant staying in immigration detention centre was served with a return decision. He required special treatment due to his post-traumatic stress disorder and the experience of violence in the past. His mental state was severe. Moreover, the migrant did not communicate in Polish and therefore was not able to draw up an appeal on his own. He also did not have sufficient financial resources to pay for attorneys' fees. He successfully contacted the SIP and obtained assistance in drawing up an appeal against the return decision only after the appeal deadline. Therefore, the appeal also included a request to reinstate the deadline for drawing up an appeal against the return decision.

In 2020, migrants appealed against the return decisions in less than 10% of cases. In 2020, the effectiveness of the submitted appeals also decreased significantly. In 2019, it was approx. 17%, while in 2020 it was only approx. 9%.

133. Decision of the Head of the Office for Foreigners of 6 November 2020, No. DL.WIPO.412.530.2018/MO.
134. P. 42
135. The reply of the Office for Foreigners of 3 February 2021, inf. cit.
136. Article 13 (1) and (4) 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 in connection with art. 47 of the Charter of Fundamental Rights of the European Union.

Administrative bodies and the Voivodship Administrative Court in Warsaw (decision of 28 January 2020, No. IV SA / Wa 2478/19) refused to reinstate the deadline for the appeal. In the prepared cassation appeal, it was argued that due to the failure to transpose into the Polish legal system the EU provisions guaranteeing the possibility of applying for an ex officio lawyer at the stage of appeal proceedings, it cannot be said that the migrant had not appealed against the decision on time due to the fault of his own. Taking into account his specific health situation, deprivation of liberty, lack of knowledge of the Polish language and the inability to apply for an ex officio lawyer, the deadline for drawing up an appeal against the return decision should be restored.

In the cassation appeal, a request was made for a preliminary ruling to determine whether the provisions of the Return Directive and the EU Charter of Fundamental Rights impose an obligation on the Member States to guarantee the possibility to request an ex officio lawyer at the appeal stage if an appeal is necessary for the return decision to be subject to judicial review, and whether, in the event of failure to do so, Member States should allow for an appeal later than required by national law. The justification of the submitted request indicated that the proceedings before the second instance administration authority (the Head of the Office for Foreigners) do not meet the requirements of an effective remedy because the Head of the Office for Foreigners is supervised by the executive authority, may be dismissed at any time, and thus is not an independent body. It was argued that the introduction of a compulsory intermediate instance between the first instance administration authority and the court, without providing access to an ex officio lawyer, excessively restricts a party's access to an effective remedy before a court. Moreover, the Return Directive requires the possibility of requesting an ex officio lawyer at the stage of appeal proceedings, and such proceedings should be considered before the Head of the Office for Foreigners, regardless of whether the appeal to this office may be considered an effective remedy. In the opinion of the SIP, the failure to provide adequate access to an ex officio lawyer at the appeal stage is an important justification for failure to meet the deadline for submitting an appeal against the return decision and should result in reinstating the deadline for submitting such an appeal. The case is currently pending. The decision of the Supreme Administrative Court may be of key importance from the point of view of the protection of procedural rights of migrants who were subject to a return decision.

The introduction of a compulsory intermediate instance between the first instance administration authority and the court, without providing access to an ex officio lawyer, excessively restricts a party's access to an effective remedy before a court.

Right to an effective remedy

In 2020, the Association for Legal Intervention run strategic litigation in connection with three identified problems violating the right of migrants in Poland to an effective remedy in return proceedings. They concerned the right to an ex officio lawyer in the course of administrative return proceedings, the right to stay in Poland when the appeal is being examined and access to files in cases related to the return procedure of migrants deemed a threat to security.

The litigation measures taken concerning the access to ex officio legal aid are described in detail in the section "Procedural guarantees: No legal aid"[137], and regarding the

137. P.55

right to remain in Poland for the time the appeal is examined, in the section "Protection against deportation."[138]

In 2020, the Association for Legal Intervention represented a migrant who, due to the confidentiality of a significant part of the justification of the return decision and the case file, was deprived of basic procedural guarantees enabling him to effectively defend himself. In Poland, the problem related to the restriction of access to the case files concerning the obligation to return in a situation where a migrant has been recognized as a threat to security has been signalled for years. In the jurisprudence of the Supreme Administrative Court to date, it has been assumed that these restrictions are necessary and proportional to the need to protect the security of the state, and thus do not violate the provisions of the European Convention on Human Rights nor the EU law.

In Poland, the problem related to the restriction of access to the case files concerning the obligation to return in a situation where a migrant has been recognized as a threat to security has been signalled for years.

In the case run by the SIP, the migrant received a return decision because, in the opinion of the authorities, there was a fear that he might conduct terrorist or espionage activities, or be suspected of committing one of these crimes. The decision did not indicate whether he was suspected of terrorist or espionage activities. It was also not indicated what behaviour of the migrant led to such a conclusion. There were no criminal proceedings brought against the man. The key part of the case files has been classified and the factual justification has been abandoned as regards to the determination of whether the migrant engaged in espionage or terrorist activities or was suspected of committing one of these crimes. Despite the deficiencies in the justification of the decision and the classification of the case files for reasons of public security, Polish press agencies provided information allowing for partial recognition of the authorities' findings.[139] However, this did not result in the party or its representative getting access to the files in this respect. The migrant indicated that due to the refusal to justify the decision and the classification of some files, he was not able to effectively defend his rights. He does not know what and why he is suspected of. The Voivodship Administrative Court in Warsaw upheld the return decision (judgment of 12 November 2020, No. IV SA / Wa 1347/20). It indicated that due to the guarantee of judicial review of the decision and the fact that the migrant was represented by a lawyer, his right to an effective remedy, despite the limitations, had not been violated.

The prepared cassation appeal raised several issues that had not been examined by the Supreme Administrative Court so far. In the opinion of the complainant, the EU law allows for the limitation of the procedural guarantees of a party when it is required for reasons of protection of the state security. In the return decision, the migrant must, however, learn about the basic facts that led to his recognition as a threat to security. Simply stating that he poses such a threat is not enough.[140] Moreover, in the opinion of the Association, the mere fact of a judicial review of the decision is insufficient if the administrative court is not authorized to examine the legitimacy of keeping evidence from a party and cannot declassify it. This year's judgment of the Grand Chamber of the European Court of Human Rights in the case of Muhammad and Muhammad v. Romania (application no. 80982/12) seems to further strengthen this position.

138. P. 52
139. https://www.gov.pl/web/sluzby-specjalne/zatrzymano-werbownikow-panstwa-islamskiego/.
140. Judgment of the Court of Justice of the European Union of 4 June 2013 in case C-300/11, ZZ v. Secretary of State for the Home Department.

In the cassation appeal, a request was also made for a preliminary ruling to determine whether, in the light of the Return Directive and the Charter of Fundamental Rights, in the return decision classified for security reasons, the migrant should be informed of the key facts that led to the finding that a threat to security, and also whether the domestic court should be empowered to examine the legitimacy of classifying and, if necessary, order the migrant to be acquainted with such documents to provide the party with an effective remedy. The case is currently pending.

Małgorzata Jaźwińska

8. MONITORING OF DEPORTATIONS

In 2020, as in previous years, an effective deportation monitoring system was not introduced in Poland. Deportations of migrants should be monitored by non-governmental organizations or bodies independent of the Border Guard carrying out the deportations. In Poland, a system for monitoring deportations by non-governmental organizations is provided for, but no funds have been provided to enable these activities. In 2020, a total of 955 migrants were forcibly deported from Poland. Despite the obligation to ensure an effective return monitoring mechanism, only 4 return operations were monitored, and three of them were monitored only at the stage at the airport in Poland, and not for the entire flight. In 2020, no child deportation was monitored. Although the vast majority of forced returns (758) took place by land in 2020, none of these operations was monitored by external observers.[141] In a situation where less than 1% of return operations are subject to monitoring, it is impossible to talk about ensuring an effective deportation monitoring system.

Although the vast majority of forced returns (758) took place by land in 2020, none of these operations was monitored by external observers.

In the opinion of the Association for Legal Intervention, Poland has still not properly implemented the provisions of the EU law[142] requiring the provision of an effective forced return monitoring system.

141. The reply of the Border Guard's Headquarters of 12 February 2021, inf. cit.

142. Article 8 (6) 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.

III. Immigration detention

Małgorzata Jaźwińska

1. IMMIGRATION DETENTION OF SURVIVORS OF VIOLENCE

Migrants whose psychophysical state can justify the assumption that they are survivors of violence, cannot be detained due to their immigration status (placed in a guarded center for foreigners). In this regard, regulations are unequivocal, allowing for no exceptions.

Despite the clarity of the abovementioned regulation, the Border Guard still utilizes an internal algorithm standing in opposition to the law that allows for the immigration detention of migrants who are survivors of violence ("The rules of procedure of the Border Guard regarding migrants in need of special treatment"). The issue is discussed in detail in the report SIP in action. Migrant rights in Poland in 2019[143] and continues to be relevant.

As in the previous year, in 2020 the courts deciding on placing or prolonging immigration detention did not take advantage of the possibility of appointing experts to assess whether a given migrant had experienced violence. This prevented quick and reliable identification of persons who should not be detained due to being a survivor of violence. In 2020, none of the district and regional courts deciding on placing or prolonging the immigration detention appointed an expert witness. In 2020, these courts decided about 777 cases.[144]

Even if medical or psychological expert opinions in the possession of the Border Guard indicate that a given migrant experienced violence, such documentation is not always passed on to the court. This results in unlawful immigration detention of persons who are survivors of violence, which in turn leads to their further traumatization.

The Association's observations show that the courts are reluctant to use the experts' opinion when deciding whether the migrants' psychophysical state justifies the assumption that they are survivors of violence. The judges base their decisions mainly on the information provided by the Border Guard. It often lacks medical and psychological records that allow for a thorough and independent assessment of a migrant's psychophysical health, as well as for determining whether they are survivors of violence. The Border Guard appears to provide the court only with the medical records stating that there are no health contrain-

143. P.48

144. Replies from the President of the Regional Court in Kętrzyn, the President of the Regional Court in Przemyśl, the President of the Regional Court in Krosno Odrzańskie, the President of the Regional Court in Grójec, the President of the Regional Court in Białystok, the President of the Regional Court in Biała Podlaska, The President of the District Court in Olsztyn, the President of the District Court in Białystok, the President of the District Court in Radom, the President of the District Court in Przemyśl, the President of the District Court in Zielona Góra, the President of the District Court in Lublin at the request of the Association for access to public information.

dications to immigration detention, i.e. information that further stay in the detention center does not pose a threat to health or life. Such information is insufficient for the assessment of whether the psychophysical state of a migrant justifies the assumption that they were are survivors of violence. Even if medical or psychological expert opinions in the possession of the Border Guard indicate that a given migrant experienced violence, such documentation is not always passed on to the court. This results in unlawful immigration detention of persons who are survivors of violence, which in turn leads to their further traumatization.

In one of the cases run by the Association, a migrant placed in a detention center had several scars from gunshot wounds on his body. This was not questioned by the Border Guard officers. Moreover, due to the prolonged deprivation of liberty, the migrant had, inter alia, a significantly lowered mood, and an almost daily negative emotional state: negative thoughts causing great stress and suffering, loss of interests, a significant reduction in the feeling of pleasure, feelings of loneliness and lack of support, thoughts of death or harming oneself. Nonetheless, the Border Guard found that he did not exhibit obvious symptoms indicating that he had been subjected to serious forms of violence, and thus denied his release. In the Border Guard's application submitted to the court deciding on the prolongation of the migrant's detention, no information or documentation was indicating that the migrant had been shot in the past and that detention adversely affected his mental health. The Border Guard included only a medical certificate informing of no danger to migrant's life and health in an event of continued detention, as well as an information about the possibility of providing medical and psychological help in the detention center. It was only as a result of the Association's intervention that the regional court obtained documentation held by the Border Guard, but not disclosed to the court, namely a psychological opinion drawn up by a psychologist who was a Border Guard officer, which indicated that the migrant had most likely been shot at in the past and that there were negative psychological effects of his detention. By a decision of the Regional Court in Olsztyn from 2 November 2020, No. VII Kz 420/20, the migrant was immediately released from the immigration detention center. The Regional Court underlined that "regardless of the basis for detention, type of violence that the migrant experienced, or place and circumstances in which the abuse happened, they should be released from detention."

The reluctance to use the expert witnesses by courts, failure to bring migrants to court sessions, as well as the incomplete documentation provided by the Border Guard to the courts appears to pose a structural problem resulting in unlawful detention of migrants who experienced violence. If this circumstance was thoroughly examined on every stage of the proceedings, both by the Border Guard and the courts, the number of cases in which migrants are unlawfully detained would be significantly lower.

In 2020, the Association for Legal Intervention represented migrants who were detained despite experiencing violence in cases seeking compensation for wrongful placement in detention centers. Two of the cases described in the report SIP in action. Migrant rights in Poland in 2019[145] concluded with granting migrants compensation for unlawful detention.

A case in which the Regional Court in Warsaw fully rejected the motion for compensation (ruling from 24 September 2019), even though the migrant was diagnosed with post-traumatic stress disorder, ended in granting the migrant and their family 90,000.00 PLN compensation for wrongful six-month detention (a verdict of the Court of Appeal in Warsaw from 3 December 2020, No. I AKa 415/19). In verbal justifications, the Court of Appeal noted that a psychologist working in the detention center was aware of the family's bad health because he had been informed about it. Additionally, the Court emphasized that the credibility of the migrant's testimony could not be denied based on its contradiction

145. P. 50

with the protocols drawn up by the Border Guard at the border crossing in Medyka. These protocols state that the migrants speak Polish, which is not credible. Given the contradiction of the protocols with the migrant's testimony, the court found the migrant's testimony credible and awarded compensation for his unlawful detention.

Poland admitted a violation of Article 5 (1) (f) and Article 5 (4) of the European Convention on Human Rights with regard to the migrant and undertook to pay her compensation of EUR 9,000.00.

Second of the cases handled by the Association for Legal Intervention, which took place in the European Court of Human Rights, ended with the case being struck out from the list of cases in view of the unilateral declaration of the Polish government admitting that it had violated the law (complaint no. 47888/19). The case concerned Ms. A.A., who experienced rape in her country. This circumstance was not disputed by the Polish authorities or the court. Despite the gradual deterioration of her health in the detention center, she had been detained for more than eight months. Ms. A.A. alleged that Poland had violated the prohibition on arbitrary detention and procedural guarantees by failing to bring her to the hearing for the extension of her immigration detention. Poland admitted a violation of Article 5 (1) (f) and Article 5 (4) of the European Convention on Human Rights with regard to the migrant and undertook to pay her compensation of EUR 9,000.00.

2. IMMIGRATION DETENTION OF CHILDREN

For years the Association for Legal Intervention has called for a total ban on immigration detention of children.[146] In 2020, the Association along with a group of Polish NGOs prepared a Shadow Report to the Children's Rights Committee, in which infringement of children's rights by the Polish government by the immigration detention of children was pointed out. According to the research, children detained due to their migratory status often manifest separation anxiety, disruptive behavior, bedwetting, sleep problems, and cognitive impairment. Some also exhibit severe symptoms of "psychological stress," including mutism or undertaking hunger strikes. Detaining children results in anxiety disorders, depression, and in some instances, it leads to the development of post-traumatic stress disorder.[147] The stay of children in detention conditions is very likely to have negative consequences in their adult lives.[148] Children detained in immigration detention centers are also deprived of an adequate right to education. Classes in detention centers do not follow the core curriculum.[149]

In 2020, a total of 101 children were placed in immigration detention centers and accounted for approximately 14% of all migrants detained for migration reasons. That's 30 persons fewer than in 2019. The average duration of detention of children was 70 days. In one of the detention centers that host children (Guarded Center for Foreigners in Przemyśl), the average duration of child detention was over 40% longer than that of all migrants (the average period of stay of children was 64 days and of all migrants 45 days).[150] Although the average duration of stay of children in detention has decreased compared to 2019, in the opinion of the Association for Legal Intervention it remains too long and may lead to the violation of children's rights.

Children detained due to their migratory status often manifest separation anxiety, disruptive behavior, bedwetting, sleep problems, and cognitive impairment.

The failure of the courts to conduct a reliable assessment of the impact of detention on children's mental and physical health, the failure to call expert witnesses on this issue, the failure to take into account the duty to ensure the best interests of the child in all decisions concerning children, have been widely discussed in the report SIP in action. Migrant rights in Poland in 2019.[151] These issues continue to be relevant. In 2020, district and regional courts that decide about prolonging the detention of children did not appoint an expert witness in any case. The reluctance to use expert opinions in this regard makes it impossible to reliably determine the impact of the detention on the psycho-physical state of children, and thus to determine the legality of their detention.

146. Association for Legal Intervention and Helsinki Foundation for Human Rights - Migration is not a crime. Report from the monitoring of immigration detention centers, 2012; Still behind bars. Report on the monitoring of immigration detention centers conducted by the Helsinki Foundation for Human Rights and the Association for Legal Intervention, 2014; https://interwencjaprawna.pl/razem-przeciwko-detencji/.
147. IDC, Camptured childhood. Introducing a new model to ensure the rights and liberty of refugee, asylum seekers and irregular migrant children affected by immigration detention, p. 48-57, available at: https://bit.ly/37XQUMy/.
148. Australian Human Rights Commission, The Forgotten Children. National inquiry into children in immigration detention, p. 197-206, available at: https://bit.ly/34xvYK6/.
149. Shadow Report to the Children's Rights Committee from August 2020, p. 30 i 33, available at: https://interwencjaprawna.pl/wp-content/uploads/2020/09/RAPORT-ALTERNATYWNY-WERSJA-POLSKA.pdf.
150. The reply of the Border Guard's Headquarters of 12 February 2021, inf. cit.
151. P. 51-52

In 2020, the Warszawa-Praga Regional Court in Warsaw recognized a motion filed by the Association for Legal Intervention to compensate a wrongful, over 15-month stay in the immigration detention center of a single mother with a child. The case has been described in the report SIP in action. Migrant rights in Poland in 2019.[152] The Regional Court Warszawa Praga-Południe in Warsaw, in its verdict of 6 July 2020, No. V Ko 201/19, dismissed the motion in its entirety. In that judgment, it indicated that the courts deciding on the detention of the child "took into account the welfare of the minor [...] when applying detention. Indeed, the reasoning of the order may be perceived as laconic, no less, it cannot be assessed as wrong." The Regional Court did not indicate the basis of its reasoning and did not give more extensive reasons as to why the almost 500-day detention of a young child is consistent with the duty to safeguard the best interests of the child. This verdict was appealed by the SIP in its entirety. The appeal argued, inter alia, that such a long immigration detention of a young child is incompatible with the obligations under Articles 3, 5(1)(f) and 8 of the European Convention on Human Rights and Article 3(1) of the Convention on the Rights of the Child. The case is pending.

The issue of detaining unaccompanied minor migrants – children who are in Poland without their parents or legal guardians, remains a separate problem. Information included in the report SIP in action. Migrant rights in Poland in 2019[153], regarding the systemic issues related to ensuring effective and efficient guarantees of rights protection, including procedural rights, for unaccompanied minors remain relevant.

In 2020, 22 unaccompanied children were placed in immigration detention centers (two fewer than in 2019). A significant majority of them (14) were from Afghanistan. There were two unaccompanied minors per Iran, Sudan and Russia, and one per Morocco and Vietnam. While in 2019 all unaccompanied children in detention centers were from Afghanistan or Vietnam, in 2020 children of different nationalities were placed in those facilities.[154]

According to the information obtained from the courts deciding on the extension of the immigration detention, in 2020, all applications of the Border Guard for the extension of the immigration detention of unaccompanied minors were granted by the courts in the first instance. In none of the cases a complaint was filed by a guardian representing an unaccompanied child.[155] This calls into question the reliability of the actions of the appointed guardians, as well as the reliability of the judgments of the first instance courts.

In 2020, all applications of the Border Guard for the extension of the immigration detention of unaccompanied minors were granted by the courts in the first instance. In none of the cases a complaint was filed by a guardian representing an unaccompanied child.

In 2020, the Association for Legal Intervention joined in one of the proceedings concerning the immigration detention of an unaccompanied child. The minor came to Poland with a group of friends. He had applied for asylum here. The Border Guard concluded that the older colleague traveling with him was his legal guardian. The friend was not related to the boy, did not exercise actual custody over him and was not appointed his guardian by the court. However, for almost 8 months the Border Guard, as well as the courts deciding on placing the boy in the detention center and prolonging his stay there, ignored this circumstance,

152. P. 52
153. P. 52-53
154. The reply of the Border Guard's Headquarters of 12 February 2021, op.cit.
155. Reply of the President of the Regional Court in Kętrzyn, the President of the District Court in Olsztyn, the President of the Regional Court in Krosno Odrzańskie, and the President of the Regional Court in Zielona Góra to the Association's request for access to public information.

concluding that the boy is under custody of his older colleague. As a consequence, no guardian was appointed for the boy in matters concerning his detention, and the courts did not in practice examine the individual grounds for detaining him, limiting themselves to justifying the legitimacy of detaining his older colleague. The boy was detained in the course of the asylum procedure, even though Polish legislation unconditionally prohibits placing an unaccompanied child in immigration detention in this proceedings.[156] As a result of the intervention of the Association, the Regional Court in Olsztyn, by its decision of 30 October 2020, No. VII Kz 420/20, released the boy from the immigration detention center. The Regional Court noted that no steps had been taken in the case to establish the boy's actual relationship with his alleged guardian, with the result that he was represented "purely illusorily".

The boy was detained in the course of the asylum procedure, even though Polish legislation unconditionally prohibits placing an unaccompanied child in immigration detention in this proceedings.

The case indicates gross negligence and violation of children's rights by the Border Guard and the courts towards the minor. It may be an indication of the inefficiency of the current system, its insufficient and ineffective supervision, which allows for months of illegal detention of a person who should be under special state protection, i.e. a child who is in Poland without parents or legal guardians.

156. Article 88a (3) (3) of the Act on granting international protection to aliens.

3. IMMIGRATION DETENTION IN ASYLUM PROCEDURE

The report SIP in action. Migrant rights in Poland in 2019[157] highlighted the problem of an automatic immigration detention of asylum seekers in order to gather information on which the asylum application is based with the migrants' participation. Neither Border Guard nor the courts verify if such information is actually being collected or when the information will be collection. In the Association's assessment this problem is still persistent.

The Association for Legal Intervention continues to represent before the European Court of Human Rights a migrant and her family who were placed in an immigration detention center in order to collect the information on which the asylum application was based, although no such information was not collected (application no. 11247/18). The case commenced in 2019 and is currently pending. The second of the cases before the European Court of Human Rights described in last year's Association's report was concluded following a unilateral declaration by the Polish government admitting a violation of the prohibition on arbitrary detention against the asylum seeker (Application No. 47888/19).

The case described in the abovementioned report concerning compensation for wrongful detention, concluded in the first instance by the verdict of the Regional Court in Warsaw, No. XII Ko 59/18 AWW, is currently waiting for review in the appeal proceedings.

In 2020, the possibility of demanding compensation for wrongful detention during the asylum procedure was challenged. In the case run by the Association, the Warszawa-Praga Południe Regional Court in Warsaw in its verdict from 6 July 2020, No. V Ko 201/19, claimed that the law did not consider the possibility of seeking compensation for immigration detention in the course of the asylum procedure. According to the court, the act on granting protection to migrants on the territory of the Republic of Poland does not contain any regulations relating to the compensation for wrongful detention, and "the legislature did not provide for the possibility of according application of the provision [...] of the act on migrants or the provisions of the criminal procedure." The judgment contradicts all previous case law on compensation for wrongful detention, including the case law of the Supreme Court, and as such has been appealed in its entirety. The appeal emphasizes the obligation under Article 5(5) of the European Convention on Human Rights to provide for compensation for wrongful detention. The case is pending.

If, in the opinion of the Head of the Office for Foreigners, there is a high probability that a given migrant will be granted refugee status or subsidiary protection, he or she may be released from the immigration detention center. In 2020, The Head of the Office for Foreigners released 93 out of 739 people detained in the centers under this procedure. Most of the released persons were from Afghanistan (61 persons) or Iraq (12 persons).[158]

157. P. 54
158. The reply of the Office for Foreigners of 3 February 2021, op.cit.

4. IMMIGRATION DETENTION IN RETURN PROCEEDINGS

In some situations, migrants waiting for issuing or the execution of the return decision can be placed in an immigration detention center in order to facilitate the process of the deportation. Detention, however, has to constitute a measure of last resort and should be used for the shortest time possible. In an event where there is no real chance of deporting a given migrant, for example because of the closure of the borders or no possibility to attain needed documents, they should be immediately released from the detention center.

According to the Association for Legal Intervention, migrants are not always immediately released from a detention center when it is clear that they will not be deported.

In 2020, the Warszawa-Praga Regional Court in Warsaw reviewed the request for compensation for wrongful immigration detention lodged by the client of the the Association for Legal Intervention. The applicant was detained as a result of alleged delays in acquiring documents from third countries needed for deportation. The migrant and her underage daughter were detained in an immigration detention center with the view of their deportation. In order to deport them, the Polish authorities waited for documents to be issued by their country of origin. Contrary to the courts' claims, the documents were issued within the time limit set out in international agreements, and thus in the Association's assessment there were no grounds for detaining the migrants. In fact, the third country was not in delay in issuing those documents. This case was described in the report SIP in action. Migrant rights in Poland in 2019.[159]

The Regional Court Warsaw Praga-Południe in Warsaw, in the verdict of 6 July 2020, No. V Ko 201/19, dismissed the motion in its entirety. In the justification of the judgment, it was indicated that the courts deciding on the extension of the period immigration detention were entitled to conclude that there had been a delay in obtaining the necessary documents from third countries after the lapse of a month and 2 days from the date of filing the application for such documents. This judgment was appealed by the Association in its entirety. In the appeal, it was argued, inter alia, that the relevant readmission agreement allows for the possibility of responding to a readmission application within 60 days, and this deadline was met. There was thus no delay in obtaining the necessary documents from third countries. It was additionally stressed that even despite obtaining these documents, the deportation of the migrant was unfeasible for legal reasons, as the court had suspended its execution, and thus there was no causal link between the impossibility of deportation and the failure to obtain the documents from the third country. In the opinion of the Association, this led to an unlawful detention of the migrant. The case is pending.

159. P. 57

5. PROCEDURAL GUARANTEES

Problems with ensuring procedural guarantees to migrants who were detained for immigration reasons, such as failure to conduct an expert examination in cases related to the detention of children and survivors of violence, failure to bring migrants to a hearing, difficulties in applying for an attorney ex officio, failure to serve applications for the prolongation detention are still relevant. These are described in detail in the report SIP in action. Migrant rights in Poland in 2019.[160]

In 2020, the practice of first-instance courts granting all requests of the Border Guard to extend the period of an immigration detention was particularly worrying. Taking into consideration the fact that migrants are not provided in advance with the motion for the prolongation of their stay in the detention center, nor an attorney ex officio, and as a rule are not brought before the court on the date of the hearing, they have no real possibility of defending their rights before the first-instance court.

Table 1. Fair trial guarantees in district courts (DC) grouped by their jurisdiction over immigration detention centers in Poland.

	Biała Podlaska DC	Grójec DC	Kętrzyn DC	Krosno Odrzańskie DC	Przemyśl DC	Białystok DC
Number of decisions issued	51	152	43	95	132	172
Percentage of Border Guard's motions awarded	100%	100%	100%	100%	100%	100%
Cases with an ex officio attorney	3 (5,88%)	2 (1,32%)	0	0	0	1 (0,58%)
Cases reviewed in the presence of a migrant	2	9	0	0	0	0
Experts appointed	0	0	0	0	0	0

160. P.58-59

According to the Association for Legal Intervention, the procedural guarantees of migrants placed in detention centers are also not fully respected at the stage of second instance proceedings - before regional courts. In 2020, despite 132 cases concerning the prolongation of detention of migrants being heard, no expert was appointed by any of the regional courts and no migrant was brought to the hearing. In only about 7% of the cases, the migrant was represented by an ex officio attorney. With regard to the effectiveness of migrants' complaints and the number of appointed ex officio attorneys, there are significant differences between individual courts. In the Regional Court in Olsztyn, in as many as 40% of the examined cases the attorney ex officio was appointed. Also, in this court, in 2020, the highest reversal of first instance decisions was recorded (as much as 30%). In the regional courts in Zielona Góra, Białystok and Przemyśl no ex officio attorney was appointed. In those courts the revocability of decisions on detention of migrants ranged from 0 to approx. 3.5%.[161]

Table 2. Fair trial guarantees in regional courts (RC) grouped by their jurisdiction over immigration detention centers in Poland.

	Białystok RC	**Lublin RC**	**Olsztyn RC**	**Przemyśl RC**	**Zielona Góra RC**	**Radom RC**
Effectiveness of appeals	0,00%	0,00%	30,00%	3,23%	0,00%	8,82%
Cases with an ex officio attorney	0,00%	8,33%	40,00%	0,00%	0,00%	11,76%
Cases reviewed in the presence of a migrant	0	0	0	0	0	0
Experts appointed	0	0	0	0	0	0

Domestic courts do not seem to notice any infringement of the guarantee of migrants' procedural rights in the form of failure to serve them applications for prolonging their immigration detention, or failure to inform them about or bring them to the relevant hearing. The protection of migrants' procedural rights is seen through the prism of national law, which does not impose a direct obligation on courts to serve the migrant with an application for prolonging their stay in the detention center or to bring them to the hearing.

161. Replies from the President of the District Court in Kętrzyn, the President of the District Court in Przemyśl, the President of the District Court in Krosno Odrzańskie, the President of the District Court in Grójec, the President of the District Court in Białystok, the President of the District Court in Biała Podlaska, The President of the Regional Court in Olsztyn, the President of the Regional Court in Białystok, the President of the Regional Court in Radom, the President of the Regional Court in Przemyśl, the President of the Regional Court in Zielona Góra, the President of the Regional Court in Lublin at the request of the Association for access to public information.

This discourse omits practical aspects of the fulfillment of migrants' rights and the human rights aspect. In a situation where migrants are not informed about the date of the hearing or the information is provided in the day of the hearing, they have no practical possibility to successfully apply for an ex officio attorney. A motion put forth by them would not be delivered and reviewed by the court before the hearing. Moreover, due to their frequent lack of knowledge of the Polish language, they may not be able to formulate an appropriate written application on their own. Due to not being served the motion for prolongation of their stay in the detention center and not being brought to the hearing, before being delivered the decision of the first-instance court they do not know why their immigration detention is supposed to be prolonged. In the Association's assessment, such a situation does not match the fair trial guarantees included in Article 5(4) of the European Convention on Human Rights. In a case run by the Association in 2020, in the unilateral declaration of the Polish government before the European Court of Human Rights, the Polish government admitted to violating the procedural rights of a migrant in an analogous situation (application no. 47888/19). It seems that the current practice of the Polish courts is not up to the standards of the European Convention on Human Rights, which exposes Poland to further analogous cases brought against Poland before the Court.

It seems that the current practice of the Polish courts is not up to the standards of the European Convention on Human Rights, which exposes Poland to further analogous cases brought against Poland before the Court.

In 2020, The Association for Legal Intervention observed problems with the way the decisions to prolong the immigration detention were delivered to migrants. This resulted in the practical deprivation or limitation of their right to an appeal. The irregularity of delivering the said decisions concerned the date of their service and the language in which the decisions were served.

In 2020, the Association provided legal aid to migrants who received decisions to prolong their immigration detention only after their adjudicated detention ended or shortly before its end. The Association observed such situations in detention centers in Kętrzyn and Lesznowola. This does exclude the possibility of said situations happening in other immigration detetion centers as well, however, the Association does not provide regular legal aid there, and so does not have sufficient knowledge in this regard.

Such a situation makes it practically impossible for migrants to exercise their right to an appeal against the decision to place or prolong their stay in a detention center. The goal of such an appeal is to challenge the ground for detention and release of a migrant. When the decision on detention is being served after the deadline or shortly before, its instance control, looking from the perspective of protecting the migrant's right to personal freedom, remains illusory. In the Association's assessment, such a situation may lead to a violation of Article 5(4) of the European Convention on Human Rights.

When the decision on detention is being served after the deadline or shortly before, its instance control, looking from the perspective of protecting the migrant's right to personal freedom, remains illusory.

Another of the issues observed concerned the language in which the decisions on detention are delivered to migrants. According to current laws, court rulings should be delivered to a migrant in the Polish language together with their translation into a language understood by the migrant. The Association is aware of a situation in which migrants staying in Kętrzyn were served court rulings only in Polish, which they did not understand.[162] Translated decisions were delivered only a few months after they were issued. In turn, the decisions issued by the district court in Biała Podlaska were delivered to the migrants only in their language, without the Polish version. Such a migrant had a difficult time benefiting from the legal assistance of a Polish lawyer who was not necessarily fluent in the migrant's mother tongue. In the opinion of the Association, both of the abovementioned situations are incompliant with the Polish regulations and significantly limit the procedural guarantees of the detained migrants.

The violations of basic procedural guarantees that have been described here may be among the reasons for the worryingly high level of the acceptance of the Border Guard's motions for detaining or prolonging the detention of migrants. The information acquired from the district courts with jurisdiction over immigration detention centers indicates that 100% of the Border Guard's motions for detaining or prolonging the detention of migrants were accepted. Second-instance courts with jurisdiction over immigration detention centers repealed or changed the decisions of first-instance courts only in approx. 5.5%, in other words in 7 out of 132 cases.

The violations of basic procedural guarantees that have been described here may be among the reasons for the worryingly high level of the acceptance of the Border Guard's motions for detaining or prolonging the detention of migrants.

162. Article 72 §3 of the Code of Criminal Procedure in conjunction with Art. 404 u.c.

6. COVID-19

In the first half of 2020, in the light of the spreading COVID-19 pandemic, we requested the Border Guard to immediately release migrants from the detention centers, especially those belonging to vulnerable groups, such as children, pregnant women, the elderly, the sick, or those with weakened immunity. In the opinion of the Association for Legal Intervention, due to the way the immigration detention centers operate, they provide limited possibilities of abiding by the isolation rules, thus posing a threat to the personnel of the center as well as the migrants staying there.[163]

The Border Guard Headquarters indicated that it had taken several measures to limit the spread of COVID-19, such as mandatory examinations during detention, isolation of the migrant upon their admission to the detention center, and a ban on outside visits. However, it chose not to systemically release migrants or vulnerable groups from detention centers.[164] In 2020, despite isolated infections among migrants and employees of the immigration detention centers, there seems to have been no major spread of the virus there.

The immigration detention centers operate, they provide limited possibilities of abiding by the isolation rules, thus posing a threat to the personnel of the center as well as the migrants staying there.

In 2020, however, there has been a significant fall in the number of migrants placed in detention centers as compared to the previous year. In 2020, the number of detained was over two times less than what it used to be in 2019. In 2020, it was 739 persons, while in 2019 it was 1539 persons. However, there has been a 4 day increase in the average duration of stay in a detention center. In 2020, it was 87 days.[165] The Border Guard Headquarters did not indicate a reason for the decrease of detention centers population, but one may assume that COVID-19 was at least one of the factors. Only after the end of the epidemic will it be possible to assess whether the decrease is permanent or incidental in its character.

In 2020, due to the COVID-19 pandemic, migrants' access to legal aid was reduced. At certain times, NGOs providing free legal aid in these centers were not able to make personal visits to the centers. As a result, only migrants who were computer literate had a real possibility to obtain such aid through remote communication means. During the epidemic, the possibility to conduct the so called Virtual Visits in detention centers (Skype conversations with people in the detention center) increased considerably.

In 2020, however, there has been a significant fall in the number of migrants placed in detention centers as compared to the previous year.

163. SIP letter dated 27 March 2020, L.D. 3/3/2020/MJ.
164. Letter of the Border Guard Headquarters dated 3 April 2020, L.Dz. KG-CU.IV.072.3.2020.
165. The reply of the Border Guard's Headquarters of 12 February 2021, op.cit.

IV. Access to social and medical assistance

Aleksandra Chrzanowska

1. ACCESS TO MEDICAL TREATMENT FOR ASYLUM SEEKERS

Medical care is provided to asylum seekers in Poland.[166] Its scope is the same as for insured citizens (except for spa treatment or spa rehabilitation).[167] The Head of the Office for Foreigners is responsible for organizing medical assistance for asylum seekers.[168] From mid-2015, the operator providing medical services under the contract with the Head of the Office for Foreigners is Petra Medica LLC [hereinafter: PM].

The Association for Legal Intervention regularly receives complaints of asylum seekers related to the refusal to provide a health service or admission to a hospital, even though - when arriving for a previously appointed date of visit or going to the SOR in emergency cases - they have a temporary foreigner's identity certificate and a printed information about that the payer for services in their case is PM. According to their reports, they hear from employees of particular medical institutions that "PM did not confirm that their insurance is valid" or "refused to finance the treatment".

The Association for Legal Intervention regularly receives complaints of asylum seekers related to the refusal to provide a health service or admission to a hospital.

In the summer of 2020, among others a citizen of an African country suffering from cancer addressed the Association for Legal Intervention. He underwent all diagnostics and started specialist treatment. One day, in his words, the attending physician told him that he had to cancel another scheduled procedure, because PM received information that the treatment costs would not be covered any further. Importantly, the legal situation of the asylum seeker did not change at that time (i.e. he did not lose the right for benefits), and it was a health and life-saving therapy. It was therefore impossible to understand why PM refused further access to treatment. The SIP contacted the Office for Foreigners with a request for an urgent clarification of the PM case and soon received information from the asylum seeker that the attending physician contacted him again and invited him to continue the treatment.

The same happened to a young woman from Chechnya who, as a result of an acute upper respiratory infection, accompanied by fever and shortness of breath, was taken by relatives to the Emergency Room. She had not been admitted to several hospitals, all of which had questions about who would pay for her treatment. The situation has not changed despite the clarification that, as an asylum seeker, she is entitled to medical assistance paid by PM. Eventually, the asylum seeker was admitted to one of the hospitals, but for payment. During her stay at the hospital, the migrant's family contacted the Association for

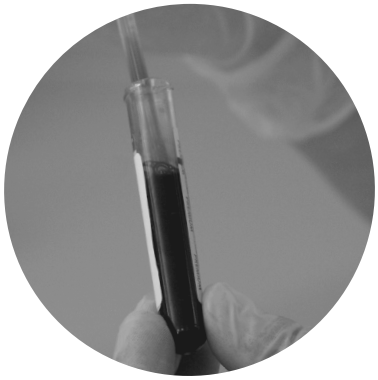
166. Article 70 of the Act on granting international protection to aliens.
167. Article 73 (1) of the Act on granting international protection to aliens.
168. Article 73 (2) of the Act on granting international protection to aliens.

Legal Intervention. As in the case described above, as a result of the intervention at the Office for Foreigners, the situation was resolved in favor of the migrant. The hospital reimbursed her on admission and PM covered all medical expenses.

The above cases are situations in which the health condition of asylum seekers indicated that the refusal of treatment could pose a serious threat to their lives. In many cases, when it comes to a routine treatment and there is no fear of an immediate life-threat in the event of failure to undergo immediate treatment or failure to perform the procedure, migrants often resign from applying for the enforcement of their rights. They ask the Association for Legal Intervention if they can obtain medical assistance outside the system organized by Petra Medica. They talk about the growing frustration and repeated humiliation in communication with the general practitioners employed by PM, who often accuse them of simulating ailments, refuse to refer them to specialists, or give out substitutes for drugs prescribed by specialists, which - according to patients - do not help with their specific ailments.

Another problem in accessing medical services provided by PM is the language barrier. While the help of interpreters is organized for specialist visits, in most general practitioner practices it is impossible to communicate in languages other than Russian and English. The language barrier is even more acute at a time of an epidemic, since the first contact with a general practitioner - similarly to the NHF system - is by phone.

In 2020, the SIP intervened many times when patients, for example French-speaking, needed referrals for specialist visits or the presenting prescriptions received during those visits. The interpreter service provided by PM applies only to a visit to a specialist. It does not accompany the patient during the next visit with the test results or medical recommendations from the general practitioner. When, after one of the specialist visits of a French-speaking client, the Association informed the office at the medical point at ul. Taborowa 33 that during the visit to the referring doctor he would need the support of an interpreter in order to establish a detailed plan for further action, Petra Medica replied that they would definitely not organize it, and the migrant should either learn to speak Polish, since he is in Poland, or bring the interpreter on his own “let him take a friend with him; or let him take you with him".



Similarly, the PM hotline for patients – asylum seekers is only in Russian and English. French, Persian or Arabic speakers are unable to understand the consultants' announcement regarding the timing of their visits. Of course, messages received via SMS can be translated in the translator. However, they are completely helpless when consultants call them - they do not know whether the appointment has just been confirmed or moved.

The current system discriminates people who do not communicate in Polish, English or Russian. They have difficult, if not impossible, access to the medical assistance they are entitled to.

The Association for Legal Intervention also noticed a breach of the principle of the confidentiality of migrants' contact with a doctor during a visit to a general practitioner at the PM medical point at the headquarters of the Office for Foreigners at ul. Taborowa 33. During the COVID-19 epidemic, from mid-March 2020, the fence of the Office for Foreigners was closed, and a maximum of 5 people are allowed in at the same time. As a result, there

is a long queue every day at the gates of the Office. People wishing to seek medical advice must first call the telephone number posted on the gate. If the situation requires it, they are allowed into the office, and if not - the PM employee goes to them and through the fence handles matters such as giving a referral or prescription for medicines. If the patient has additional questions, the conversation takes place over the fence, in the presence of a whole line of people standing there, who, inevitably, find out about his health problems. The Association for Legal Intervention submitted a complaint to the Office for Foreigners against the indicated practice, but the Office did not find any improper conduct by the doctor.

"Let him take a friend with him; or let him take you with him".

Patrycja Mickiewicz

2. THE AMOUNT OF FINANCIAL AID DURING ASYLUM PROCEDURES

Asylum seekers in Poland are provided with social and medical assistance. Social assistance may consist either in providing accommodation and collective meals in the reception centers, or in the monthly payment of a specific amount of money to cover the living costs of a given migrant and his family.[169] In the opinion of the Association for Legal Intervention, the paid amount is too low and does not allow to meet the basic needs of asylum seekers.

In 2020, the Association for Legal Intervention filed a complaint with the European Commission, accusing Poland of incorrect implementation of Directive 2013/33/EU of the European Parliament and of the Council of June 26, 2013 on establishing standards for the reception of asylum seekers[170] (hereinafter: "Directive 2013/33/EU"), with regard to the standards of material aid granted by Member States to the applicants for international protection, established by the provisions of the aforementioned directive.

In accordance with Art. 17 (2) of the Directive 2013/33/EU "Member States shall provide financial support enabling applicants to have an adequate standard of living, maintaining them, and protecting their physical and mental health." The European legislator also requires that the value of financial support is determined based on the levels set by the law or practice of the Member State in order to ensure an adequate standard of living for its own nationals (first sentence of Article 17 (5) of Directive 2013/33/EU).

In the opinion of the Association for Legal Intervention, financial support granted to asylum seekers in the Republic of Poland not only does not allow to ensure an adequate standard of living, but is not sufficient to meet basic life needs, hence a decision was made to subject the regulations in force in Poland to the European Commission's control.

The Association explained in the complaint that despite the lack of a statutory definition of "adequate standard of living" in the Polish legal system, it can be assumed that this limit was set at PLN 701 per month for a single person and PLN 528 per month per person in a family for multi-person households, thus at the level of the financial criteria for entitlement to financial support from social assistance.[171] It was argued that although it is debatable whether such amounts of funds allow for a decent standard of living, it was assumed that these are the amounts that clearly define the limits of state support, and thus may constitute a reference point for considering the amount of benefits granted to asylum seekers in the Republic of Poland.

Financial support granted to asylum seekers in the Republic of Poland not only does not allow to ensure an adequate standard of living, but is not sufficient to meet basic life needs.

169. Article 70 (1) and art. 71 (1) of the Act on granting international protection to aliens within the territory of the Republic of Poland.
170. Dz.U. L 180/96 from 29 June 2013.
171. Article 8 (1) of the act of 12 March 2004 on social support (uniform text Journal of Laws 2019, item 1507 as amended).

In the context, it was noted that, while in case of a one-person and two-person household, the amount of financial support provided in the course of the asylum procedure is higher than the amounts indicated above and therefore does not raise doubts as to its compliance with the provisions of Directive 2013/33/EU, in the case of three-person or larger households, the amount of financial support granted to asylum seekers is lower than the social criteria. In the case of a three-person household, it is PLN 450 per month per person and is PLN 78 lower per person than the social criteria, and in the case of four-person households and more - it is PLN 375 per month per person, which is PLN 158 lower than the subsistence minimum.

In order to present the problem covered by the complaint to the European Commission as fully as possible, the Association for Legal Intervention analyzed the amount of benefits granted to asylum seekers also in terms of the minimum subsistence level, i.e. a measure of poverty that determines the level of needs below which there is a biological threat to human life and psychophysical development.[172] In this context, it was pointed out to the European Commission that in the case of three-person and larger households, the benefits granted by Poland are much lower than the subsistence minimum, i.e. by PLN 56.96 less per person in a three-person family and as much as PLN 158.67 less per person in a household of four.[173]

When carrying out the above analyzes, it was indicated that the funds granted by the Polish authorities not only do not allow for a proper standard of living, but also lead to extreme poverty, and without the support of non-governmental organizations and informal groups, asylum seekers in Poland would not be able to meet basic life needs. For this reason, the Association for Legal Intervention took the position that the implementation of Directive 2013/33/EU cannot be considered correct.

The fear of asylum seekers in Poland against complaining about decisions granting support in such a low amount, and thus the inability to subject them to judicial and administrative control, led the Association to make a decision to submit a complaint to the European Commission. The case is pending.

That in the case of three-person and larger households, the benefits granted by Poland are much lower than the subsistence minimum.

172. Definition of the Institute of Labor and Social Affairs, https://www.ipiss.com.pl/?zaklady=minimum-egzystencji-2/.
173. Information on the level and structure of the minimum subsistence level in 2019, Institute of Labor and Social Affairs, https://www.ipiss.com.pl/?zaklady=minimum-egzystencji-2/.

Magdalena Sadowska

3. GOOD START "300+" BENEFIT

The "Good Start" benefit is a one-time provision in the amount of PLN 300, granted at the request of a parent for a child studying at school, regardless of the family's income. Last year, there was no change in the regulations establishing the "Good Start" benefit in terms of changing the catalog of entities entitled to receive the benefit. Thus, remain valid the legal doubts indicated in the SIP in action. The rights of migrants in Poland in 2019 report[174], whether the regulation of the Council of Ministers of May 30, 2018 on the detailed conditions for the implementation of the government program "Good Start" (hereinafter: "Good Start Regulation") was not issued beyond the statutory delegation in the above scope.

In 2020, the practice of Warsaw administrative authorities, challenged by administrative courts, to refuse to grant the "Good Start" benefit to people who are just applying for asylum. The only reason for the refusal was that the applicant did not have a residence card with the annotation "access to the labor market", and thus does not meet the requirements set out in the Good Start Regulation.[175] The Local Government Appeal Court in Warsaw ruled on 12 February 2020 that the provisions of the Act on supporting the family and foster care, constituting the legal basis for granting "Good Start" benefits, should not apply to the "Good Start" benefits, because this act "Regulates the situation of families and their support as well as foster care in a comprehensive and very broad manner, and thus the group of entitled people to whom the Act can be applied may be wider than the group of people to whom the provisions of the Regulation regarding the granting the 'Good Start' benefit. Since the Council of Ministers in the Regulation (...) 'Good Start' established the catalog of people entitled to the benefits differently ". In the opinion of the authority, the benefit should be granted only to those people who were listed directly in the Good Start Regulation. In the opinion of the Local Government Appeals Court, "since it does not indicate migrants residing in the territory of the Republic of Poland, who have been issued with a provisional identity certificate of a foreigner, there are no grounds for granting a benefit to such people".[176]

In some decisions it was additionally indicated that asylum seekers already receive financial assistance in the form of social assistance granted in the course of the asylum procedure. Thus, within the meaning of the Local Government Appellate Court, granting them the "Good start" benefit would constitute double financing of the applicants. Such an applicant receives support in the form of social assistance including teaching aids for children under the Act on granting protection to migrants. In the event of granting the "Good start" benefit, the asylum seeker would allegedly receive a second financial support from the state dedicated to the purchase of the same teaching aids.[177] This opinion was not approved by the courts. By the judgment of the Voivodship Administrative Court in Warsaw of 12 January 2021,

174. P. 68

175. Decision of the President of the Capital City of Warsaw of 21 October 2020, No. UD-X-WSZ-SR.8250.499.6997.2020. MBU8; decision of the President of the Capital City of Warsaw of 1 October 2020, No. UD-III-WSZ-RA.8250.922.2539.2020. KPO; decision of the Local Government Appellate Court in Warsaw of 9 March 2020, No. KOC/74 /Op/20; decision of the Local Government Appellate Court in Warsaw of 23 January 2020, No.KOC/15/Op/20.

176. Decision of the Local Government Appellate Court in Warsaw of 12 February 2020, No. KOC/7850/Op/19.

177. Decision of the President of the Capital City of Warsaw of 21 October 2020, No. UD-III-WSZ-RA.8250.922.2539.2020.KPO.

No. I SA/Wa 870/20, the decision of the Local Government Appeal Court in Warsaw and the preceding decision have been repealed.

As a result of the defective provisions of the Good Start Regulation, some migrants applying for the "300+" benefit must always take legal action. While administrative authorities are bound by the provisions of a regulation inconsistent with the law, the courts are bound only by the provisions of the laws and the Constitution of the Republic of Poland. Only the initiation of the administrative court proceedings allows for the effective obtaining of the indicated benefits.

Only the initiation of the administrative court proceedings allows for the effective obtaining of the indicated benefits.

The Association for Legal Intervention appeared in several similar cases before administrative courts, which overturned the decisions of administrative authorities of both instances to refuse to grant the "Good Start" benefit. This position was additionally strengthened when the Supreme Administrative Court issued a judgment on 18 May 2020 (No. I OSK 2734/19). In this judgment, the Supreme Administrative Court dismissed the authorities' cassation complaint against the described in detail in the SIP in action. The rights of migrants in Poland in 2019 report[178] judgment of the Voivodship Administrative Court in Warsaw of 17 May 2019, No. I SAB/Wa 49/19, concerning the refusal to grant the "Good Start" benefit to asylum seekers. The Supreme Administrative Court confirmed that the Good Start Regulation exceeds the scope of the statutory delegation indicated in the act.[179] The Supreme Administrative Court disagreed with the argument concerning "double financing of the applicant". He pointed out that "both in the Act on supporting the family and foster care system and in the Act on granting protection to migrants within the territory of the Republic of Poland, there are no regulations that would exclude the possibility for a migrant to obtain support from various sources financed from public funds. Therefore, the fact that the migrant obtained assistance granted on the basis of the provisions of the Act on granting protection to migrants within the territory of the Republic of Poland does not exclude the possibility of using the funds provided by the "Good Start" program and cannot constitute an argument for refusing to grant such funds".

Despite the favorable decision of the Supreme Administrative Court, by the decision of 4 August 2020, the Mayor of the Capital City of Warsaw again refused to grant the "Good Start" benefit to the migrant, citing the same arguments - no residence card with the annotation "access to the labor market" and "double financing of the applicant".[180] This directly called into question the interpretation of the law of the Supreme Administrative Court to which the authority was bound. The Local Government Appeals Court in Warsaw has revoked the above-mentioned decision of the President of the Capital City of Warsaw, pointing out that: "the contested decision was issued in the gross violation of the law, i.e. art. 153 Law on Proceedings before Administrative Courts. According to which the legal assessment and indications as to the further proceedings expressed in the court decision are binding in the case by the authorities whose action, inactivity or excessive length of proceedings was the subject of the appeal (...). (...) it should be emphasized that in accordance with the above-mentioned by the aforementioned judgments, the authority has no right to refuse the complainant the requested benefits, referring to the content of §2 of the regula-

178. P. 68

179. The delegation from Art. 187 (2) of the Act on supporting the family and foster care. According to the court, § 2 of the Good Start Regulation is inconsistent with art. 5 (1)(5) of the Act on supporting the family "by regulating matters reserved to the statutory matter and excluding migrants staying in the territory of the Republic of Poland who have been issued with a temporary migrant's identity certificate - from the possibility of obtaining the 'Good start' benefit. In this respect (...) also violates Art. 92 (1) of the Polish Constitution."

180. Decision of the President of the Capital City of Warsaw of 4 August 2020, No. UD-III-WSZ-RA.8250.922.1633.JPO (19.2020.RCZ).

tion and the possibility of applying for the benefit provided in the Act on granting protection to migrants within the territory of the Republic of Poland".[181] After revoking the decision, the President of the Capital City of Warsaw granted the requested benefit to migrants.

It seems that the position of the Supreme Administrative Court has not yet been universally accepted by the administrative courts. The Voivodship Administrative Court in Warsaw, by a judgment of 23 June 2020, dismissed the complaint of the client of the Association for Legal Intervention against the decision of the Local Government Appeals Court in Warsaw to refuse to grant the "Good start" benefit, referring to the fact that: the ordinances do not mention (...) a migrant residing in the territory of the Republic of Poland who has only a temporary migrant identity certificate. Therefore, the authorities rightly considered that the applicant did not meet the requirements entitling her to apply for the benefit in question. (...) The possibilities of social assistance are not (...) unlimited and appropriate support is not provided to all Poles in need, and - obviously - to all migrants. Therefore, in the opinion of the Court, it is not possible to speak of a violation of the Constitution of the Republic of Poland due to the restriction of the group of migrants entitled to apply for the 'Good start' benefit"[182] in the executive regulation referred to. The Voivodship Administrative Court in Warsaw referred to the above-mentioned decision of the Supreme Administrative Court of 18 May 2020, No. I OSK 2734/19. However, this judgment was misread by the Voivodship Administrative Court in Warsaw. The Association for Legal Intervention filed a cassation appeal against the ruling.

181. Decision of the Local Government Appellate Court in Warsaw of 13 October 2020, No. KOC/4426/Op/20.
182. Judgment of the Voivodship Administrative Court in Warsaw of 23 June 2020, No. I SA/Wa 733/20.

Aleksandra Chrzanowska
Patrycja Mickiewicz

4. ACCESS TO HOUSING FROM THE HOUSING STOCK OF THE CAPITAL CITY OF WARSAW

Last year, the Association for Legal Intervention provided support to people applying for the rent of premises from the housing stock of the Capital City of Warsaw. As in 2019, mainly people who were granted international protection or residence permit for humanitarian reasons seek the help in the Association.

In March 2020, a new resolution came into force regulating the criteria for granting apartments from the housing stock in Warsaw.[183] From now on, a new application form and new annexes (according to the SIP) are in force. A lot of people whom we helped to fill in the applications in 2019 and at the beginning of 2020, contacted us with new forms received from district offices, which had to be filled in again so that their cases could be further processed. Two families, whom we helped in 2019 to prepare applications for housing under the so-called in the housing competition of the Warsaw Center for Family Assistance[184] received flats in 2020.

In 2020, two cases were resolved regarding the refusal to qualify migrants for the lease of premises from the city's housing resources, in which complaints to the Voivodship Administrative Court in Warsaw were drawn up by the Association's lawyers.

In one case, the refusal to grant the right to rent a flat from the city's housing stock concerned a situation where one flat was occupied by several households. When examining the size criteria, the authority took the position that it was entitled to take into account the total area of all rooms, regardless of the number of households inhabiting the premises and the size of the room occupied by the applicant's household. In the complaint to the administrative court, a defective interpretation of the provision of § 1 point 16 of the Resolution[185] was pointed out, explaining that the legal regulation constituting the basis for the refusal specifies only the type of premises that should be taken into account when determining the area of the premises, in no case does it provide grounds for taking into account the living area of the premises occupied by households other than the applicants living in the premises. In addition, violations of a procedural nature were raised, i.e. the lack of comprehensive consideration of the evidence regarding the applicant's housing conditions and the fact that the applicant lived with his mother in one room with an area of 7.61 m2, which means this meets the criteria of metric.

The first judgment in the case was issued on 5 June 2019.[186] The Voivodship Administrative Court in Warsaw annulled the challenged resolution. The court did not comment on the issue of the interpretation but found significant procedural violations. As a result of the judgment, the district board adopted a resolution with the same content - again refused our client to qualify for the lease of premises from the city's housing resources based on the size of the premises occupied by unrelated households. The Association for Legal Intervention made a complaint to the court once again, raising arguments like those presented in

183. Resolution No. XXIII/669/2019 of the Council of the Capital City of Warsaw of 5 December 2019 on the principles of renting premises included in the housing resource of the Capital City of Warsaw, https://bip.warszawa.pl/NR/rdonlyres/2447F0DB-EA3C- 4723-977E-C82A5B411AA4 / 1490196 / 669_uch.pdf (access 02/02/2021).
184. More in the report "SIP in Action. The rights of migrants in Poland in 2019", p. 71-75
185. Resolution No. LVIII/1751/2009 of the Council of the Capital City of Warsaw of 9 July 2009 on the principles of renting premises included in the housing resource of the Capital City of Warsaw, Journal Of Maz. No. 132, item 3937 as amended.
186. No. II SA/Wa 1932/18.

the first complaint to the court. By the judgment of 16 December 2020[187], the Voivodship Administrative Court in Warsaw found the complaint substantively justified and annulled the challenged resolution, indicating in the justification of the decision that "(...) when examining the size criteria (...) one should only refer to the applicant's housing situation and people reported in the application to live together, because these people form a separate household. This, on the other hand, means that in a situation where the premises are inhabited by people who form two (or more) households, it becomes necessary to determine whether they use a specific room(s) on an exclusive basis". The verdict is not final, and the Association will monitor the further course of the case.

The second case covered by the legal assistance of the Association for Legal Intervention concerned a family of many people who had been refused to qualify for a flat from the city's housing resources solely due to the fact that they had a rental agreement concluded on the private market. Taking the position that the fact of having a legal title to the premises does not automatically constitute grounds for rent of premises from the housing stock, because first of all the authorities should examine the individual housing conditions of the applicants, the Association prepared a complaint to the court on behalf of the client. By the judgment of 8 August 2019[188], sharing the arguments presented in the complaint and seeing the lack of a thorough analysis of the case, the Voivodship Administrative Court in Warsaw annulled the challenged resolution. The district authority issued a cassation appeal against the above judgment, accusing the court of first instance of defective recognition that the authority had examined the evidence improperly and unfairly in a situation where the possession of a legal title to the premises constituted sufficient grounds for adopting a negative resolution. By the judgment of 21 July 2020[189], the Supreme Administrative Court dismissed the cassation appeal, not finding any violations indicated by the district authority. In the justification of the appealed decision, the Supreme Administrative Court indicated that "(...) the fact that the complainants, while renting a flat on the market, have a currently regulated housing status, does not exclude them from the group of people who may apply for a flat from the commune's resources. The provision of § 4 sec. 1 of the resolution in question clearly explains this issue, indicating among the people entitled to such a flat, apart from the homeless, also people in difficult housing conditions. Thus, having a regulated housing status not only does not make it impossible to remain in difficult housing conditions as defined in the above provision, but in certain situations it seems to be a necessary condition for a party to live in such difficult conditions at all."

The fact that the complainants, while renting a flat on the market, have a currently regulated housing status, does not exclude them from the group of people who may apply for a flat from the commune's resources.

187. No. II SA/Wa 769/20.
188. No. II SA/Wa 2201/18.
189. No. I OSK 3264/19.

V. Hate crimes

Magdalena Sadowska

In 2020, the Association for Legal Intervention received numerous applications regarding hate crimes against migrants. Victims, however, are not always willing to protect their rights in courts. They are afraid of the contact with the police, the prolonged proceedings or they simply wish to forget about the harms experienced.

One of the cases in which the Association for Legal Intervention became involved regarded a migrant who was an owner of a food truck business in Poznań. He displayed the Swedish national flag on his truck and became attacked twice by a group of five people. During both of the attacks, perpetrators made punishable threats motivated by the migrant's Ukrainian nationality, shouted nationalistic slogans, insulted Sweden and Swedish nationals, beat up the man, as well as damaged the flag and the food truck. During the second attack, the migrant called the police, who after arrival refused to intervene despite of the presence of the perpetrators on the site. In effect, the migrant made the notification on suspicion of committing a criminal offence (an assault, punishable threats, property damage), as well as the notification to initiate a disciplinary proceeding against the police officers who refused to intervene.

During both of the attacks, perpetrators made punishable threats motivated by the migrant's Ukrainian nationality, shouted nationalistic slogans, insulted Sweden and Swedish nationals, beat up the man, as well as damaged the flag and the food truck.

In the decision of 2 July 2020 (No. 79/2020), the Chief of Police in Poznań refused to initiate a disciplinary proceeding against the police officers, explaining that it was not confirmed that the police officers did not intervene. It was only proven that they did not arrest the perpetrators, because in the opinion of the Chief of Police there was a lack of reasonable grounds for arrest.

On 24 August 2020, District Court Stare Miasto in Poznań issued an order No. III W 415/20, considering one of the perpetrators whose identity was recognised by the Police guilty of committing an offence against the Article 124 §1 Code of Offences, i.e. damaging, destroying or making a thing unusable if the damage does not exceed 500 PLN. The man was punished with a fine of 300 PLN.

The preliminary proceeding regarding the suspicion of committing a criminal offence against the Article 119 § 1 of the Penal Code, i.e. discrimination based on nationality, is pending.

VI. Procedure regarding the legalisation of stay in Poland

Patrycja Mickiewicz

1. PROCEDURAL GUARANTEES

In 2020 the Association for Legal Intervention carried out activities aimed at ensuring that the Governor of Mazowieckie complies with basic procedural guarantees of migrants applying for the right to stay in the territory of the Republic of Poland.

Migrants who faced problems with legalizing their stay in Poland continued to come to the Association. Most of that was due to the chronic infringement of the law by the Governor of Mazowieckie. As in the previous year, the most common issue reported was the lack of the personalized notice for a particular administrative case (on the day of the application for the right to stay migrants still receive voluminous requests to bring more documents which are not always required in their individual cases, or have already been submitted along with the application). Because of that situation migrants, have no clue what kind of documents they should submit, to obtain the decision in accordance with their request. In consequence, they receive negative decisions.

On 20 May 2020 the Association for Legal Intervention together with the Helsinki Foundation for Human Rights, the Other Space Foundation, the Foundation Center for Migration Research and the Foundation Our Choice submitted a formal letter to the Governor of Mazowieckie indicating noticed irregularities. It was argued that the lack of an individualised request to supplement evidence de facto shifts the burden of proof onto the party to the proceedings, which is not permissible in an administrative proceedings, as it is the authorities that have to establish the objective truth and to this end undertake all actions aimed at the precise clarification of the facts of a given case and, moreover, are obliged to exhaustively collect and consider all evidence. It was explained that it is not acceptable to require from migrants not only to have a perfect knowledge of the law in force in Poland, but also to apply it proficiently. It was noted that in the context of legalisation proceedings conducted by the Governor of Mazowieckie, a migrant shall not only independently assess which documents are required by the law, but shall also know which documents are actually required by the administrative body. It was emphasised that, in the opinion of the signatories of the letter, such a requirement of the administrative body is not legally justified and constitutes a breach of the basic guarantees of administrative proceedings and of the Constitution. The Governor of Mazowieckie has been requested to undertake control activities which will result in bringing the activities of the Department

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for Foreigners into the conformity with the law in force in Poland and to ensure that a party to the proceedings receives an individualised notice in his/her case, as required by the statutory and constitutional guarantees.

Until the publication date of this report, we have not received a response from the Governor of Mazowieckie, which necessitates the notion of further legal action.
Reservations concerning the work of the Department for Foreigners of the Mazovian Voivodship Office were also reported by the Association for Legal Intervention to the Ombudsperson, who has repeatedly demonstrated its interest in cases concerning the legalisation of residence in Poland.

Apart from the failure to serve individualised notices to migrants, the Ombudsperson's attention was drawn to:

- the inability to obtain personalised information on the progress of the case,
- the lengthy procedures followed by a refusal to grant the permit applied for on the grounds that the purpose of stay was unjustified beyond three months or that the document in the files was no longer valid (without a request to adduce up to date documents or information),
- the failure to inform the party about the commencement of the re-examination of the case and the automatic duplication of the refusal decision - with complete disregard for the indications of the second instance authority as to the manner of further proceedings in the case,
- the failure to provide basic procedural guarantees, including the failure to ensure active participation of the party in the proceedings and the complete failure to comply with the obligation laid down in Art. 79a of the Code of Administrative Procedure, i.e. the obligation to inform the party before the issuance of a negative decision as to which prerequisite - in the opinion of the authority - the party does not meet, which may result in the issuance of a decision inconsistent with the request.

The letter further indicates that the presented violations also significantly affect other rights and freedoms of migrants residing in Poland - inter alia the right to a private and family life. Moreover, the long-standing uncertainty about the migration status affects migrants' decisions on study, work and other life plans. While waiting for the residence permits, migrants do not leave Poland fearing that they will not receive a return visa and, as a consequence, they strain their relations with the loved ones in their country of origin, are unable to participate in important events in their lives, cannot say goodbye to the seriously ill relatives or attend their funerals. In presenting the problems reported, the Association recognised the need for an urgent intervention by the Ombudsperson.

Long-standing uncertainty about the migration status affects migrants' decisions on study, work and other life plans.

The statistical data obtained through the procedure of access to the public information concerning, inter alia, the number and the type of decisions issued in 2020 as a result of the Head of the Office for Foreigners' examination of the appeals against the first instance residence decisions made by the Governor of Mazowieckie suggest that out of 10,811 examined cases as many as 6,494 cases ended with the appeal body overturning the appealed decision. This implies that more than 60% of the decisions issued by the Governor of Mazowieckie were legally flawed, which - in the Association's opinion - unequivocally proves the scale of the irregularities in the interpretation and the application of the law by this body.

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Małgorzata Jaźwińska

2. INACTIVITY OF ADMINISTRATIVE BODIES

In 2020, there was a systemic and gross inaction of the Head of the Office for Foreigners and the Mazowieckie Voivodship Office in cases related to the legalization of migrants' stay in Poland. Such a situation has existed in the indicated offices for several years, and the remedial actions taken have not been effective. Problems with the excessive duration of the legalization proceedings in 2019 were indicated, inter alia, by the Supreme Audit Office.[190]

The Office for Foreigners has ceased work aimed at organizing a reading room for files in the office, which would allow for the streamlining of this process, and in the result would shorten at least one stage of the procedure.

In 2020, the average duration of proceedings before the Mazowieckie Voivode for a temporary residence permit was 6 months, and regarding the waiting period for just reading the files was up to two months. In 2020, 2099 requests for urgent consideration of the case concerning the temporary residence permits were lodged along with as many as 10,564 requests for urgent consideration of the case concerning work permits. The duration of proceedings before the Head of the Office for Foreigners was also significantly longer than the statutory one, and in addition longer than in 2019. In 2020, the average waiting period for a decision on a temporary residence permit was 259 days (approx. 8.5 months), while in the case of a temporary residence and work permit - 247 days (approx. 8 months). During this period, 862 requests for urgent consideration of the case were submitted due to the office's inaction. Difficulties in arranging a file review has remained the same. Despite this, it seems that the Office for Foreigners has ceased work aimed at organizing a reading room for files in the office, which would allow for the streamlining of this process, and in the result would shorten at least one stage of the procedure.[191]

In 2020, the Association for Legal Intervention run a considerable number of cases related to the inactivity or the lengthy conduct of legalization proceedings before Voivodeship Offices or the Head of the Office for Foreigners. In all closed cases, the administrative court stated that the office had been inactive when proceeding with the case. In most of these cases, inaction took place in a gross violation of the law. The authorities disagreed with the blatancy of the inaction, arguing that it resulted from a significant increase in the number of adjudicated cases concerning legalization of stay and disproportionate human resources. The Voivodship Administrative Court in Warsaw, in its judgment of 27 May 2020, No. IV SAB / Wa 248/20, indicated, however, that in the case of a gross violation of the provisions of the procedure, the fact of a significant increase in the number of cases adjudicated by the authority cannot be an excuse. Long periods of inactivity in a situation where the case is not compli-

A gross violation of the provisions of the procedure, the fact of a significant increase in the number of cases adjudicated by the authority cannot be an excuse. Long periods of inactivity in a situation where the case is not complicated, and the party tries to end it as soon as possible may be considered a gross inactivity of the authority.

190. https://www.nik.gov.pl/aktualnosci/panstwo-niegotowe-na-cudzoziemcow.html/.
191. The reply of the Office for Foreigners of 3 February 2021, op.cit; the reply of the Mazowieckie Voivodship Office of 3 February 2021, BKO-II.1331.9.2021, on the SIP's request to access public information.

cated, and the party tries to end it as soon as possible may be considered a gross inactivity of the authority.

Despite the common knowledge about the systemic gross inaction of the authorities in legalization cases, no effective remedial steps have been taken for years.

VII. The SIP's involvement in the legislative work

Patrycja Mickiewicz

Constantly, one of the Association's tasks is reviewing legal acts regarding migrants. Last year we also submitted our comments on the solutions adopted by the Polish authorities concerning the ongoing pandemic. In 2020 we submitted comments on the following legal acts proposals:

The Act on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases, and Crisis Situations Arising Therefrom

Despite the lack of official consultations with non-governmental organizations, the Association for Legal Intervention submitted to the Prime Minister proposals of legal solutions safeguarding the interests of the migrants staying in Poland during the pandemic.

In the letter dated 23 March 2020, the Association highlighted the necessity to extend the departure date of persons obliged to leave the Polish territory on the ground of having received a return decision or in the effect of having received the final refusal of the residence permit in Poland. That is because increasingly such persons cannot leave the territory of Poland on time, due to the reasons beyond their control, such as the existing restrictions on the movement of persons across borders and the cancellation of flights. Additionally, the Association pointed out that there is a need to introduce legal regulations ensuring the lawfulness of migrants' work during the time of the pandemic crisis. It was explained that the right to continue legal employment is dependent upon meeting additional legal requirements whose meeting during the pandemic is problematic or even impossible, for instance due to the restrictions related to the work of the public administration bodies. Thus, to secure the interests of employers and migrant workers, legal solutions were proposed which, similarly as in the case of the residence permit issue, would extend migrants' right to work on conditions not worse than those set out in the existing work permit documents up to 30 days after the cancellation of the state of emergency.

The right to continue legal employment is dependent upon meeting additional legal requirements whose meeting during the pandemic is problematic or even impossible, for instance due to the restrictions related to the work of the public administration bodies.

Other suggestions on the solutions required to secure migrants' rights in the pandemic were introduced on 29 April 2020. It was proposed that the migrants shall be allowed to take up a legal job while they are awaiting the issuance of the work permit documents, as due to the restrictions in the work of many public bodies, administrative proceedings regarding the legalization of work take longer than usual. This

delay negatively impacts migrants who are deprived of their right to work, as well as employers who cannot meet their staffing needs. It was also emphasized that migrants should be able to submit a declaration of the intention to apply for international protection electronically. This, despite the restrictions in the work of some public services, would allow the asylum seekers to apply for international protection in Poland, in line with their rights and Poland's international obligations. Moreover, it was pointed out that the 500+ benefit payments should not depend on the possession of a valid residence card as in numerous instances migrants are unable to attain such document due to the ongoing pandemic and related disruptions of public service delivery. The Association also recognised the necessity to enable the use of hotel services to those who do not have a place of permanent residence in Poland, which would limit the risk of temporary homelessness in relation to the vulnerable groups and would increase the earning opportunities and the ability to maintain employment by those providing hotel services.

A significant part of the comments submitted by the Association was accepted by the Polish authorities and became included in the official legal regulations.

The Draft Amendment to the Act on Entry, Stay and Departure from the Territory of the Republic of Poland of the EU Citizens and Members of Their Families, and other legal acts

After the analysis of the draft amendment proposed by the Ministry of Internal Affairs and Administration of the Republic of Poland and other acts, the Association raised doubts about the compatibility of the suggested regulations with the European Union law. Particularly, what was pointed out was the potential long-term (up to 18 months) detention of the EU citizens and the members of their families in immigration detention centers, and the ability to expel the EU citizens and the members of their families without examining the extent of their integration in Poland, as well as a potential violation of their right to a family life and private life in case of the expulsion. The Association highlighted the above-mentioned reservations and added that part of the proposed regulations puts the EU citizens and the members of their families in a disadvantaged position compared to other migrants in Poland. Pursuant to the protection which stems from the possession of the EU citizenship, the Treaty law on the free movement of persons within the EU, as well as the protection of the fundamental rights, the regulations proposed by the Polish authorities cannot be justified.

The proposed amendments to acts appeared worrying to us to the extent that we also decided to submit our comments to the European Commission Office in Poland and the Polish Members of the European Parliament.

The Draft Act Amending the Act on Social Assistance

The Association for Legal Intervention submitted its comments on the Draft Act Amending the Act on Social Assistance, regarding migrants' access to social assistance. We drew the Ministry of Labor and Social Policy's attention to the fact that it is necessary to extend the length of the migrants' integration programs, as well as make them suitable to the migrants' needs. This would improve the efficiency of the assistance given to migrants and ensure fuller fulfilment of the Republic of Poland's obligations stemming from the international law.

We explained that it is desired to introduce mechanisms that would link the assistance offered with a person's individual abilities and needs in regard to the integration, depending on the migrant's family structure and culture. Additionally, we highlighted the necessity of extending the integration assistance to persons who were granted a residence permit for humanitarian reasons, as similarly to migrants who were granted a refugee status and subsidiary protection – they are forced migrants and therefore their integration is particularly important for social and economic reasons.

We also criticized the solution which excludes from accessing integration assistance minor migrants, who obtained refugee status or subsidiary protection in Poland after their legal representative completed the individual integration program. We explained that such a solution unlawfully makes the right to assistance under the integration program conditional on the moment in which the child was born, which leads to the situation where children born while their parents are in the process of obtaining international protection in Poland will be in a diametrically different situation than children born after one of their parents has already obtained protection, although their capabilities and needs in regard to the integration are analogous, if not the same. We pointed out that the solution is problematic from the point of view of the principle of equality before the law enshrined in Article 32 of the Constitution and Article 2(2) of the Convention on the Rights of the Child.

What is more, we emphasized a need for legislative changes in relation to the deadline of the application for granting a right to integration assistance by members of families of persons who obtained refugee status or subsidiary protection in Poland and who possess a temporary residence permit granted in order to reunite with a family. According to the existing regulations, the application for granting a right to assistance must be submitted up to 60 days after obtaining the temporary residence permit granted in order to reunite with the family, regardless of whether the family members remain in Poland or abroad. In practice, persons staying abroad are often unable to submit an application within the statutory deadline for reasons beyond their control (problems related to booking a visit at the Consulate of Poland to apply for an entry visa to Poland, issues with crossing the border, related to the activity of the member of the family who was granted international protection in Poland), which deprives them of the right to the integration assistance. For this reason, we advocated for the introduction of the regulation, according to which in case of persons staying outside of Poland, 60 days period for applying for the integration assistance would start on the day of entering the territory of the Republic of Poland. Furthermore, we recognized that the ongoing legislative work marks an ideal moment to stimulate a discussion on the possibility of extending the circle of subjects entitled to the so-called intervention assistance, i.e. benefits in the form of crisis intervention, shelter, food, essential clothing and appropriated benefits, and expressed our views on this matter.

We highlighted the necessity of extending the integration assistance to persons who were granted a residence permit for humanitarian reasons, as similarly to migrants who were granted a refugee status and subsidiary protection – they are forced migrants and therefore their integration is particularly important for social and economic reasons.

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Stowarzyszenie
Interwencji
Prawnej

SIP in action. The rights of migrants in Poland in 2020

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