

Alternative report

Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej) is submitting this shadow report to the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) in advance of GREVIO's monitoring visit to Poland. The visit is part of the ongoing evaluation procedure regarding the country's legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

The Association for Legal Intervention (ALI) is a civil society organisation whose statutory objective is to take steps aimed at ensuring that human rights are respected and that no individual is treated unequally, disregard of their nationality, ethnicity, religion and migration status.

This alternative report outlines Association for Legal Intervention's concerns with reference to Poland's compliance with the Convention as regards protection of migrant women, asylum seekers and refugees residing in Poland.

The report covers Chapter VII of the Questionnaire on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. Additionally, it addresses the responses of the Polish government included in the Baseline Report submitted by Poland.

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VII. MIGRATION AND ASYLUM

A. AUTONOMOUS RESIDENCE PERMIT FOR MIGRANT WOMEN VICTIMS OF GENDER-BASED VIOLENCE

There is no regulation in the Polish legal system which provides women - victims of violence a full guarantee of obtaining an autonomous residence permit. Existing special legal solutions are not effective and, as a rule, are intended only for persons who have been granted a divorce or separation and therefore do not cover a group of women in informal relationships or women who have left the perpetrator of violence but have not regulated their situation within family law.

In the opinion of the Association the temporary residence permit mentioned by the Polish authorities in the report, due to circumstances requiring temporary residence¹, cannot be considered the fulfilment of the obligations arising from Art. 59.1 of the Convention.

The examination of rights and obligations arising from obtaining a temporary residence permit due to circumstances requiring the short-term stay leads to the conclusion that this is one of the less favourable residence grounds stipulated by Polish law.

Primarily, it should be noted that although obtaining the permit in question is not conditional upon meeting the general migration requirements, such as obtaining a reliable and regular source of income, health insurance and guaranteed accommodation, the decision in this matter is of a discretionary nature and therefore, even if a specific personal situation requiring the presence of a woman - a survivor of violence in Poland - is demonstrated, the authority investigating the case is not obliged to issue a decision in accordance with the party's request.

Acquiring this particular residence permit is a formal obstacle to further legalization of stay in Poland based on other types of residence permits. A woman - a victim of violence, who has been temporarily granted such a permit, may not then effectively apply for a temporary residence permit under the general rules, because her application will not be considered². Analogous obstacle exists in case of applying for permanent residence or residence of a long-term EU resident on the territory of the Republic of Poland³. Even assuming that the permit is a form of protection for women - victims of violence against the necessity to leave Poland, due to circumstances requiring a short-term stay, this protection is of a short-term nature as it prevents further legalization of the stay in Poland and entails the necessity to leave our country anyway.

¹ Art. 181 et seq. of the Act of 13 December 2013 on Foreigners (i.e. Journal of Laws of 2020, item 35)

² Pursuant to Art. 99(1)(3) of the Act on Foreigners, the proceedings for granting a temporary residence permit are refused if, on the day the application is submitted, the foreigner is residing in Poland on the basis of a temporary residence permit due to circumstances requiring a short-term stay.

³ Art. 196(1)(1)(c) and 213(1)(1)(g) of the Act on Foreigners.

Persons residing in Poland on the basis of a temporary residence permit due to circumstances requiring a short-term stay are deprived of the legal right to undertake employment, even in case of obtaining a work permit⁴. They also cannot expect financial assistance from the state, as their residence base excludes them from the group of persons entitled to social assistance benefits⁵.

Presented legal regulations demonstrate a lack of coherence in the system of protection of migrant women - victims of violence. On the one hand, Poland offers the possibility of obtaining a residence permit due to an exceptional personal situation, exempting from the necessity to meet the general legalization requirements, and on the other hand, it deprives the beneficiaries of the right to work and financial support from the state.

The Baseline Report indicates that the Polish legislation provides for the possibility of obtaining an autonomous residence basis for family members of a Polish citizen or a foreigner with a residence status which enables obtaining a temporary residence permit for the purpose of family reunion⁶. As already indicated, these permits are only for the spouses and therefore do not cover victims of violence in an informal relationship and can only be applied for in the case of divorce or separation. An additional requirement is having a residence permit for a family member on the date of submission of the next application, which also limits the number of persons who can effectively apply for this residence permit as it excludes e.g. women staying in Poland on the basis of a visa or a residence permit other than the permit for family members.

Women - victims of violence legally residing on the territory of Poland, who do not meet the conditions for obtaining a permit for family members, may apply for a temporary residence permit on general principles. The basic condition in this case is to prove the circumstances justifying the stay in Poland for more than 3 months. It must be assumed that invoking violence before the authorities may constitute the basis for granting a residence permit, however difficult and often impossible it is to meet the other requirements for issuing a decision in accordance with the party's request, i.e. demonstrating a sustainable and regular income, residence and health insurance⁷. These requirements are particularly burdensome for women victims of violence and single parents who have very limited opportunities to find and undertake employment and thus to demonstrate their source of income.

These regulations demonstrate the unequal treatment pursuant to the law on foreign women victims of violence, depending on whether the perpetrator of the violence is/were their spouse or an informal partner. Women in an informal relationship cannot count on privileged treatment for legalizing their stay, except for the right to apply for a temporary residence permit due to circumstances requiring a short-term stay, which, as indicated, provides them only temporary and strictly limited protection.

⁴ Art. 87 (1) (12) (c) of the Act of 20 April 2004 on Employment Promotion and Labor Market Institutions (i.e. Journal of Laws of 2019, item 1482)

⁵ Art.5 *a contrario* of the Act of 12 March 2004 on Social Assistance (i.e. Journal of Laws of 2019, item 1507)

⁶ The basis for residence is defined in art. 159 (1) of the Act on Foreigners

⁷ Art. 187 (8) in connection with Art. 188 (3) (1), (2) and (4) of the Act on Foreigners.

B. GENDER- BASED VIOLENCE AGAINST WOMEN AS A FORM OF PERSECUTION FOR ASYLUM CLAIMS

Polish regulations on granting international protection do not contain a direct reference to Art. 60(121) of the Convention. According to Art. 13(1) of the Act on granting protection to foreigners within the territory of the Republic of Poland, a foreigner is granted refugee status if, due to a well-founded concern about being persecuted in the country of origin for reasons of race, religion, nationality, political opinion or membership of a particular social group, he or she cannot or does not want to benefit from the protection of that country. This means that persecution or gender-based violence is not directly indicated in the Act as an independent prerequisite for granting international protection in Poland. However, victims of such violence may, in theory, invoke the premise of belonging to a persecuted social group

Polish asylum authorities generally refuse to recognize victims of gender-based violence such as women who have been raped in Muslim countries, victims of domestic violence, women at risk of so-called honour killings or separation with children after divorce as a social group within the meaning of the Geneva Convention. Furthermore, Polish administrative bodies of both instances often questioned the credibility of foreigners' testimonies as to the forms of violence they experienced or fear of experiencing it in the past⁸, or indicated that before coming to Poland, the applicants had not taken action to protect their rights in their country of origin, and thus did not demonstrate that they could not receive assistance from the authorities of their country of origin⁹.

The same argument is made by the authorities of both instances in cases of domestic violence as well as in cases where the perpetrators of sexual violence were state agents and the incident occurred during the performance of their official activities¹⁰. There are decisions in which the administrative authorities indicate that the gender-based violence experienced by a foreigner was of a purely criminal nature and as such does not qualify for international protection (e.g. in cases where the foreigners were victims of sexual violence committed by law enforcement officers as well as victims of long-term domestic violence). Moreover, the Polish administrative authorities and the Border Guard do not recognize, as a form of gender-based violence, the risk of the husband's family taking the child away after the divorce of the child's parents, which occurs against the will of the mother and actually means separating the child from her. ALL is familiar with the rulings which indicate that these are family cases and the authorities of another country (in this case Poland) do not have jurisdiction to decide on them.

It should be noted that in just a few cases, in which the Head of the Office for Foreigners expressed faith in the party's testimony as to the violence it had experienced and the risk of further serious harm or persecution after returning to the country of origin, the possibility of internal relocation of the applicant in the country of origin was nevertheless indicated¹¹.

⁸ E.g. The decision of the Head of the Office for Foreigners of 8 May 2018, No. DPU.420.83.2017.

⁹ The decision of the Head of the Office for Foreigners of 26 November 2018, No. DPU.420.745.2018.

¹⁰ The decision of the Head of the Office for Foreigners of 8 May 2018, No. DPU.420.83.2017.

¹¹ M. Jaźwińska (ed.), *SIP in action. The rights of migrants in Poland in 2019*, Association for Legal Intervention, Warsaw, 2020, p. 10-12.

Significantly, administrative authorities usually rely only on general Country of Origin Information (COI), e.g. in terms of human rights and security. When evaluating COI, the administrative authorities also do not take into consideration cultural circumstances, e.g. the fact that in some countries women usually cannot or are afraid to report to the law enforcement authorities with requests for help and criminal proceedings against perpetrators of violence experienced by their relatives or to withdraw it as a result of the influence of other family members¹².

With reference to the Polish government's statement that "The Border Guard ensures that the submission of an application for international protection and the interview is conducted without the participation of other persons on whose presence the applicant has not consented, under conditions ensuring an appropriate level of confidentiality and enabling the applicant to fully present the reasons for submitting an application for international protection. In this regard, the authority conducting the proceedings shall, at the request of the applicant, ensure that he or she is interviewed by a person of the same sex where the circumstances of the case indicate that this will enable the application for international protection to be fully justified", it should be emphasized that, according to the practice of ALI, foreigners have repeatedly applied for international protection in a facility with other unknown to them persons present. Applicants were required to provide all relevant information about past violence in their presence. Furthermore, women who were victims of violence by their husband (who is usually an applicant for international protection on behalf of all family members) indicated to their lawyers that they were unable to speak freely with a Border Guard officer. Although they were taken to a separate room to instruct them about the right to file a separate application for international protection from their husband and the consequences of filing a joint application, the room was, for example, next to the room where the husband was staying, the instructor was the man (to whom the foreign woman could not, for cultural reasons, tell her about the violence she had suffered) or the instructions were given in her husband's language, when she only spoke the language at a basic level (e.g. citizens of Tajikistan submitting an application for international protection, in Russian).

What is more, ALI is aware of situations when in the decision to refuse international protection addressed to all family members, the authorities cited excerpts from foreigners' testimonies describing the forms of gender-based violence suffered by them, despite their explicit request not to disclose to their husbands information about the forms of violence experienced so far (e.g. for cultural reasons). It should be mentioned that Polish legal regulations allow for issuing separate decisions to family members (despite submitting a joint application) in cases where issuing a single decision would lead to the disclosure of a particular situation of the applicant or the person on whose behalf the applicant is acting, which could endanger their interests, in particular in cases related to persecution based on sex, sexual orientation, gender identity or age¹³.

ALI does not have comprehensive data on the number of victims of gender-based violence, who have been granted refugee status or subsidiary protection or permit for

¹² *Ibidem*.

¹³ Art. 47(2) of the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland.

residence for humanitarian reasons in Poland, as this data is not collected. Nevertheless, according to the long-standing practice of ALI, in the majority of cases where victims of gender-based violence were supported by its lawyers, the Polish asylum authorities of both instances refused to grant these women a refugee status. Only in rare cases have foreigners who have been victims of gender violence been granted subsidiary protection or humanitarian residence¹⁴.

C. GENDER-SENSITIVE ASYLUM PROCEDURES AND RECEPTION CONDITIONS

Contrary to what was indicated in the Baseline Report, ALI does not provide legal support in criminal procedures in the reception centre for asylum-seekers in Warsaw. Association does provide legal assistance in the said centre, however the legal aid concerns issues related to receiving international protection in Poland. What is more, the Association does not cooperate with the state in providing legal assistance in the centre, nor does it receive any funding from the state for this purpose. There is no available information about any particular support in criminal procedures to women in the centres for foreigners in Poland. It should be noted that the staff in the reception centres, are employees of the Office for Foreigners, and not social workers specialized in reacting to crisis situations.

It should be emphasized that interrogation of persons placed in detention centers usually is conducted through an Internet communicator, regardless of the foreigner's psychophysical condition. Such interrogations are also conducted with vulnerable persons, including victims of gender-based violence. Asylum interviews conducted by means of distant communication do not allow to establish and maintain a sufficiently safe atmosphere of trust with an asylum seeker, especially a vulnerable one, necessary to allow her to freely present her asylum case. In consequence, it can negatively influence her credibility assessment¹⁵.

Furthermore, status interviews with asylum seekers are never recorded, even if the applicant requests it. It puts an undue hardship on, or in certain cases makes it impossible for an asylum seeker to challenge the accuracy of the protocol (written down in Polish) later. Inconsistencies in the protocol can have a far-reaching negative consequence for an asylum seeker. Despite the fact that legally the possibility to register asylum interviews was introduced in 2015, the Office for Foreigners states that they do not see the need to register those interviews. In 2019 no interview was registered¹⁶.

¹⁴ Residence for humanitarian reasons is a form of protection against deportation granted by the Border Guard or the Head of the Office for Foreigners in the return proceedings, Art. 348(1-3) of the Act on Foreigners.

¹⁵ O. Dobrowolska, M. Jaźwińska, A. Pulchny *Procedural guarantees [in]:* M. Jaźwińska (ed.). *SIP in action. The rights of migrants in Poland in 2019*, Association for Legal Intervention, Warsaw, 2020, p. 30, available online: <https://interwencjaprawna.pl/wp-content/uploads/2020/06/SIP-RAPORT-2019-ENG.pdf>.

¹⁶*ibidem*.

D. NON-REFOULEMENT OF VICTIMS OF GENDER-BASED VIOLENCE

According to the Act on Foreigners a migrant shall be granted a residence permit for humanitarian reasons, if his or her return to the country of origin would pose a threat to life, freedom or personal security, or he or she could be subjected to torture, inhuman or degrading treatment or punishment¹⁷ Such a person cannot be deported despite the deportation order¹⁸.

Gender-based violence is not specifically mentioned as a basis for granting a residence permit for humanitarian reasons. However, the vast majority of acts of gender-based violence will fall within one of the limbs of Article 348 of the Act on Foreigners.

One of the problems in terms of guaranteeing the respect for the non-refoulement principle in relation to women – failed asylum seekers, it's that in the return procedure the authorities fail to examine whether the return would violate the right to life nor the prohibition of torture, other inhuman and degrading treatment. Decision-makers claim that this issue has already been assessed during the asylum procedure and there is no need to re-assess it.

In the cases confronted by the Association, the most frequent reason for the negative decisions was the lack of faith in the women's testimonies concerning the violence they were subjected to and the recognition by the Polish authorities that there are means of legal protection against violence in the country from which the foreigners come from, and therefore they should seek protection there in the first place.

Furthermore, the risk of the forced separation from children or the risk of domestic violence is not always recognized as a legitimate reason to obtain a residence permit for humanitarian reasons. Usually either the credibility of women is questioned or the reality of the risk of gender-based violence in their countries of origin¹⁹. ALI is aware of cases when, after a forced deportation, women, survivors of domestic violence, were forcibly separated from their children²⁰.

E. OTHER MEASURES TAKEN IN RELATION TO THE PROTECTION OF MIGRANT WOMEN VICTIMS AND WOMEN ASYLUM SEEKERS

The Polish state does not provide special instruments for the protection of migrant women's rights, nor does it provide for integration measures that would take into consideration the specificity of their situation.

¹⁷ Article 348 (1) of the Act on Foreigners.

¹⁸ Article 330 (1) (2) of the Act on Foreigners.

¹⁹ M. Jaźwińska, M. Sadowska, *Survivors of violence*. [in:] M. Jaźwińska (ed.), *SIP in action. The rights of migrants in Poland in 2019*, pp.10-14, Association for Legal Intervention, Warsaw, 2020.

²⁰ M. Jaźwińska, *Procedural guarantees*. [in:] M. Jaźwińska (ed.), *SIP in action. The rights of migrants in Poland in 2019*, pp.45, Association for Legal Intervention, Warsaw, 2020.

Lack of access to crisis intervention

The system providing support for victims of domestic violence is twofold: one is based on the Act on Counteracting Domestic Violence, which comprises shelter and legal and psychological support - this support can be used by all women regardless of the type of legal residence of a migrant in Poland. The difficulty, however, is the low availability of this support - there are only 16 centers in Poland. In this context, the majority of victims of gender-based violence benefit from support in the form of crisis intervention and accommodation in social welfare institutions - crisis intervention centers (Ośrodki Interwencji Kryzysowej). Nevertheless, these facilities are not available to a large group of migrant women: asylum seekers, holders of visas, undocumented migrants, holders of humanitarian or tolerated stay permits. These categories of migrants remain unprotected.

Lack of recognition of special needs of migrant women

The majority of employees of Polish state institutions are not properly qualified to work with people with migration background. There are no educational anti-discrimination and intercultural programs in such institutions. Furthermore, there are problems at the language level, especially when foreigners speak other languages than Polish, English or Russian. For instance, the State Agency for Alcohol Related Problems - the main state agency that is currently responsible for combating gender-based violence - funds a 24-hour hotline which offers support in English and Russian only a few hours a week²¹.

Abuse in the labour market

Widespread violation of labour and social security law by employers or labour intermediaries is yet another problem. One of the reasons for the abuse of migrant workers is the fact that each of these legalization documents, which a foreigner is obliged to possess, is connected with a specific employing entity (employer, employment agency) and individual working conditions. Changing employer makes it necessary to start the procedure of work legalization from the beginning. Concerns about the loss of financial independence and documented residence force foreigners to continue working, even if they experience discrimination or violence, including sexual violence. Additionally, the authority appointed to inspect working conditions - the Labour Inspectorate - is at the same time the authority appointed to control the legality of the migrant's residence and cooperates strictly with the Border Guard in this respect.

Women, survivors of domestic violence, might have unduly restricted access to social assistance. In order to apply for parental benefits they had to provide an alimony decision. If they brought an action for alimony payments, their location would be revealed to their spouses – perpetrators of domestic violence, which would put them at a risk²².

²¹ PARPA website, available online: <http://www.parpa.pl/index.php/przeciwdzialanie-przemocy/pogotowie-niebieska-linia>.

²² A. Chrzanowska, P. Mickiewicz, M. Sadowska, *Parental benefits* [in:] M. Jaźwińska (ed.), *SIP in action. The rights of migrants in Poland in 2019*, pp.61-65, Association for Legal Intervention, Warsaw, 2020.

Unlawful detention of victims of violence

Polish regulations provide for an absolute prohibition of detention of migrants whose psychophysical condition may suggest that they were subjected to violence. However, non-governmental organizations are familiar with cases of detention of people who were most likely victims of torture or who were directly identified as victims of torture. This is due to the failure of a properly functioning mechanism for identifying particularly vulnerable people. An example of the above is the fact that even if foreigners, after being detained by the Border Guard, declare that they have been victims of violence, they are not subject to appropriate medical and psychological examinations which would enable them to be excluded from the detention centre²³. These observations were confirmed by the monitoring of the delegation of the National Mechanism for the Prevention of Torture, operating at the Ombudsman.²⁴ One of the few examples described was the case of a single woman with three children, reporting on torture and violence in her country of origin, being placed in a guarded facility.²⁵

One case when a survivor of rape was placed in immigration detention was communicated to the Polish Government by the European Court of Human Rights (case no. 47888/19, A.A. v. Poland). This shortcoming in terms of identification of survivors of violence, as well as lack proper training for decision-makers, is still not appropriately addressed.

Implemented by the Border Guard, the “Rules of conduct of the Border Guard with foreigners requiring special treatment” are questionable as to the real prevention of placing vulnerable groups in detention. This document does not allow for effective identification of the victims of violence and is contrary to the provisions of the Act, since it indicates that only a foreigner who has obvious symptoms indicating that he has been subjected to serious forms of violence cannot be detained.²⁶

²³ M. Jaźwińska, *Immigration detention [in]:* M. Jaźwińska (ed.), *SIP in action. The rights of migrants in Poland in 2019*, Association for Legal Intervention, Warsaw, 2020 p. 47.

²⁴ Address of the Ombudsman to the Head Commander of the Border Guard (KMP.572.4.2016.AI), 2017 <https://www.rpo.gov.pl/pl/content/ofiary-tortur-nie-powinny-przebywac-w-strzezonych-osrodkach-dla-cudzoziemcow-rpo-pisze-do-komendanta>.

²⁵ *Ibidem*

²⁶ M. Jaźwińska, *Immigration detention [in]:* M. Jaźwińska (ed.), *SIP in action. The rights of migrants in Poland in 2019*, Association for Legal Intervention, Warsaw, 2020 p. 47, available online: <https://interwencjaprawna.pl/wp-content/uploads/2020/06/SIP-RAPORT-2019-ENG.pdf>.