

IRREGULAR MIGRATION IN POLAND AND THE IMPORTANCE OF READMISSION AGREEMENTS IN THEORY AND PRACTICE

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ABSTRACT

Poland is a Member State of the European Union and a part of the Schengen area, which ensures free movement without controls at its internal borders while strengthening the security of its external borders. It plays a special role here, as its eastern border is simultaneously its external border. This importance has been further increased by recent events in the eastern part of Europe, particularly through the smuggling of migrants and refugees into the European Union from, inter alia, Iraq, Afghanistan, and other countries in the Middle East and Africa via the Belarusian-Lithuanian, Belarusian-Polish, and Belarusian-Latvian borders in 2021, and because of Russia's aggression against Ukraine on 24 February 2022 resulting in millions of people fleeing war and seeking protection, particularly in the eastern part of the European Union. The increased migratory movement along the eastern borders of the Republic of Poland observed in 2021, was a direct cause of the changes introduced in Polish legislation on foreigners. The possibility of returning migrants apprehended immediately after crossing the border in violation of the law was introduced. In such cases, the competent commanding officer of the Border Guard could draw up a report on crossing the border and issue an order to leave Poland. The appeal against this order may be presented to the Commander-in-Chief of the Border Guard, which, however, does not suspend it. The aim of these provisions was to protect the border from a mass influx of irregular migrants. However, it is questionable whether they simultaneously ensure the fundamental human right to be treated with dignity.

KEYWORDS

*irregular migration
refugee status and subsidiary protection
asylum and temporary protection
readmission
residence permit for humanitarian reasons
residence permit for tolerated stay*

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1. Introduction

The Schengen area allows free movement of persons between the Member States of the European Union (EU).² These rules abolish controls at internal borders while strengthening the security of external borders. Poland became bound by these rules with its accession to the EU in 2004, while it became a full member of the Schengen area in 2007 with respect to land and sea borders and in 2008 with respect to air borders. Since then, it has become part of an 'area without borders' between Member States and reinforced control with third countries. Poland plays a special role here as its eastern border is simultaneously the external border of the Union and the Schengen area. It can only be crossed at border-crossing points and during fixed opening hours. When crossing it, all persons, including both regular and irregular migrants, are subject to systematic border checks for entry into and exit from the EU.

Irregular migration covers people who cross a border unlawfully, visa overstayers, children born to undocumented parents, and migrants who lose their regular status because of non-compliance with certain requirements or rejected asylum seekers. The irregular migration has been at the forefront of political debate in the most of the EU's Member States and the Union as such since the outbreak of the 'migration crisis' of 2015.³ More than one million people arrived in the EU, most of whom were fleeing from war and terror in Syria but also from North Africa. Further, illegal migration in the EU was affected by the actions of the Belarusian government against the restrictive measures adopted by the EU. In June 2021, Belarus began to organise flights and internal travel to facilitate the transit of migrants to the EU, first to Lithuania, and then to Latvia and Poland. Consequently, several legislative measures have been adopted in these countries to protect their territories from a massive influx of irregular migrants. However, they have repeatedly violated international regulations, including the principle of non-refoulement. Moreover, on 24 February 2022 Russia launched military aggression against Ukraine. Since then, millions of people have fled the war, seeking protection in EU countries, primarily in the central-eastern part. Therefore, the EU intensified its work and activities to improve its control over external borders and migration flows. Therefore, migration issues are currently one of the most important challenges to maintaining security and simultaneously ensuring that the human right to dignity is respected. Irregular migration poses challenges to countries of origin, transit, and destination and the migrants themselves. They often face many difficulties in their migratory process, considering complicated procedures of obtaining refugee status.

One of the direct cause concerning the changes introduced in Polish legislation on foreigners was the increased migratory movement along the Polish eastern border taking place in 2021. Consequently, an important rule was amended: that

2 | Agreement on the Benelux Economic Union, 1985, Convention implementing the Schengen Agreement, 1990.

3 | Spencer and Triandafyllidou, 2022, p. 192.

any person who declares a willingness to apply for international protection should be allowed into Poland, and this application is to be accepted by the competent Border Guard post. For example, amendments in the form of leaving an application for international protection unprocessed by foreigners apprehended after illegally crossing the border have been met with negative assessment, including that of the Ombudsman,⁴ as not supported by the applicable international and EU law.

This study presents the legal basis for granting international protection to irregular migrants in the Polish legal order, along with its practical application. Therefore, it analyses the forms of international protection available to foreigners in Poland, including the procedures that apply here. Moreover, special attention has been paid to the procedure for the return of migrants who have crossed the border in violation of the law and with respect to whom there are no prerequisites justifying the initiation of proceedings for an obligation to return. The importance of readmission agreements is also highlighted, with an indication of how they are implemented in Poland.

2. Legal basis

The basic form of international protection granted in Poland is the refugee status stated in Article 56 of the Constitution of the Republic of Poland in 1997.⁵ It states that foreigners enjoy the right to asylum in Poland, and in situations where they seek protection from persecution, they may be granted refugee status. This status is granted considering the international agreements Poland is party to, such as the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950⁶ which although does not explicitly refer to either the right to asylum or the possibility of obtaining refugee status, is significant regarding foreigners' treatment in Poland. Examples include the prohibition of discrimination in the exercise of the rights guaranteed therein, provided for in Article 14 ECHR, or the protection against torture and inhuman or degrading treatment or punishment, provided for in Article 3 ECHR.⁷ Moreover, Article 4 of Protocol No. 4 of the ECHR, which prohibits the collective expulsion of aliens, is relevant.⁸ Other international agreements of significance are the Convention Relating to the Status of Refugees, drawn up in Geneva on 28 July 1951 together with the Protocol Relating to the Status of Refugees, drawn up in New York on 31 January 1967.⁹ These two acts of international law are directly referred to in EU primary law, specifically in Article 18 of the Charter of Fundamental Rights of the EU.¹⁰ Moreover, Article 78 of the Treaty on the Functioning of the EU provides a common policy on asylum,

4 | Opinion of the Ombudsman, 2021.

5 | Journal of Laws 1997 No. 78 item 483.

6 | Journal of Laws 1993 No. 61 item 284 as amended.

7 | Safjan and Bosek, 2016, issue 4.

8 | Journal of Laws 1995 No. 36 item 175.

9 | Journal of Laws 1991 No. 119 item 515 and Journal of Laws 1991 No. 119 item 517, accordingly.

10 | OJ C 326, 26.10.2012, pp. 391–407.

subsidiary and temporary protection in the EU.¹¹ It is, *inter alia*, based on respect for the principle of non-refoulement, which expresses the prohibition of returning an applicant for international protection to a country where his or her life or freedom is threatened. Specific issues related to foreigners' rights are also governed by the relevant provisions of EU secondary legislation. In particular, Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person¹² and a set of directives concerning temporary protection, returning illegally staying third-country nationals, status for refugees or subsidiary protection, and granting and withdrawing international protection should be mentioned here.¹³

The Polish legal order decided to separate the issue of entry and residence of foreigners from the issue of granting them protection.¹⁴ The rules and conditions for the entry of foreigners into the territory of Poland, their transit through its territory, and their stay in and departure from Poland are defined by provisions of the Act of 12 December 2013 on foreigners.¹⁵ The principles, conditions and procedure for granting protection to foreigners within the territory of Poland are set out in the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland.¹⁶ The procedure for granting refugee status was also based on the provisions of the Code of Administrative Proceedings which are applicable only to the extent that the Act on granting protection to foreigners within the territory of the Republic of Poland itself does not provide otherwise. Border traffic at crossing points with the Russian Federation, the Republic of Belarus, and Ukraine was suspended on 15 March 2020 based on the Ordinance of the Minister of Internal Affairs and Administration of 13 March 2020 on the temporary suspension or restriction of border traffic at certain crossing points.¹⁷ Its amendment on 21 August 2021 introduced the possibility of turning back to the state borderline those persons who were found at a border crossing point where border traffic had been suspended or restricted.¹⁸ The amendment was also introduced to the ordinance of the Minister of the Interior on 24 April 2015 on guarded centres and detention centres for foreigners. As of 13 August 2021, they had to increase their capacity to accommodate several foreign nationals. It has been possible to reduce the area per foreigner in a room for foreigners or in a residential cell from 4 m² to 2 m² for a period not exceeding 12 months. In response to the ongoing migratory pressure

11 | OJ C 326, 26.10.2012, pp. 47–390.

12 | OJ L180, 29.6.2013, pp. 31–59.

13 | Council Directive 2001/55/EC, Directive 2008/115/EC, Directive 2011/95/EU, Directive 2013/32/EU, Directive 2013/33/EU.

14 | Mikołajczyk, 2008, p. 34.

15 | Journal of Laws 2023, item 519, consolidated text, as amended.

16 | Journal of Laws 2022, item 1264, consolidated text, as amended.

17 | Journal of Laws 2020, item 435, as amended. Adopted on the basis Article 16.3, Point 2 of the Act of 12 October 1990 on the protection of the state border, Journal of Laws 2019, item 1776.

18 | Journal of Laws 2021, item 1536.

from mid-2021, it was decided to erect a special barrier on the border with Belarus.¹⁹ A similar response, through deterrence by building fences, was decided for the migration crisis by other EU Member States in 2015/2016 – erecting walls on Hungarian borders only as an example.²⁰

3. Forms and grounds of international protection

Pursuant to Article 3.2 of the Act on foreigners, a foreigner is any person who does not possess Polish citizenship, regardless of having the citizenship of another state or being stateless. Foreigners in Poland may apply for refugee status, subsidiary protection, asylum, or temporary protection. Before 1 May 2014, that is before the entry into force of the Act on Foreigners, which amended the Act on Granting Protection to Aliens on the Territory of the Republic of Poland, the refugee procedure also included – in the case of refusal to grant refugee status and refusal to grant subsidiary protection – the adjudication of the prerequisites for granting a permit for tolerated stay and, in the case of refusal to grant such a permit, led to a decision to expel the foreigner. The refugee procedure has been limited only to the adjudication of refugee status and subsidiary protection and the procedure for granting refugee status has been referred to as the procedure for granting international protection (an applications for refugee status have been referred to as applications for subsidiary protection). Additionally, foreigners may apply for a residence permit for humanitarian reasons and a permit for tolerated stay.²¹

Foreigners applying for international protection do not always have the full ability to communicate, which may negatively affect the effectiveness of granting protection. Polish legislation addresses this problem by providing that, when foreigners cannot write, a signature can be replaced by a fingerprint. The name of such a person is to be inserted into the application together with a statement affixed at the request of a person who cannot write. The provision of translations into Polish documents drawn up in a foreign language which are admissible as evidence can also be considered convenient for foreigners.²²

In accordance with Article 13 of the Act on granting protection to foreigners, refugee status is granted to foreigners. If it is a result of justified fear of persecution in the country of origin owing to race, religion, nationality, political opinion, or membership of a particular social group, he/she cannot or does not want to benefit from the protection of that country. Refugee status is also granted to a minor child of a foreigner who has been granted refugee status in Poland, born on that territory. The persecution indicated here constitutes a serious violation of human rights. Persecution may comprise, inter alia, the use of physical or mental violence, including sexual violence; the application of legal, administrative, police or

19 | Based on the provisions of the Act on the Construction of the State Border Security.

20 | Karageorgiou and Noll, 2022, p. 147; Menéndez, 2016, p. 400.

21 | Kowalski, 2016, p. 96.

22 | Articles 10 and 11 of the Act on granting protection to foreigners.

judicial measures in a discriminatory manner or of a discriminatory nature or the absence of a right of appeal to a court against a disproportionate or discriminatory punishment (an open catalogue provided for in Article 13.4 of the Act on granting protection to foreigners). It may occur, although it is not certain or likely, and the requirement to establish 'reasonable grounds' indicates the need to establish objective and realistic grounds for the risk of persecution.²³

Moreover, foreigners may benefit from subsidiary protection, provided for in Article 15 of the Act on granting protection to foreigners and is available to those who do not meet the conditions for being granted refugee status, and returning to their country of origin may expose them to the real risk of suffering serious harm. This may include the imposition of the death penalty or execution, torture, inhuman or degrading treatment or punishment, or a serious and individualised threat to life or health resulting from the widespread use of violence against the civilian population in situations of international or internal armed conflict. However, the mere existence of the risk of suffering serious harm through torture, inhumanity, degrading treatment, or punishment as one of the grounds for granting protection to foreigners is insufficient. Therefore, it is necessary to demonstrate that foreigners, owing to their individualised situation, may be exposed to such treatment.²⁴ Subsidiary protection can only be granted as a result of refugee status proceedings in a single procedure. Therefore, it is complementary to refugee status, which implies that foreigners cannot apply for it (as in the case of a permit for a tolerated stay).²⁵ However, the authority conducting the proceedings, when refusing a foreigner refugee status, must examine *ex officio* whether repatriation to the country of origin would not expose the person to a 'real risk of suffering serious harm'. If a foreigner cannot be granted subsidiary protection because there is no risk of 'serious harm' in his or her case, it should be checked whether he or she meets the criteria for a tolerated stay permit.²⁶ This solution provides a broad scope for international protection that may be granted to foreigners in Poland.

Asylum is another form of international protection. It is based on Article 56.1 of the Constitution of the Republic of Poland. Foreigners may exercise this right based on the principles set out in national legislation, Article 90 of the Act on granting protection to foreigners. It can be granted (on the basis of an administrative decision) when it is necessary to provide protection to a foreigner. Owing to the discretionary nature of asylum, it has minor practical significance as a form of international protection for foreigners.²⁷ The strict distinction between asylum and refugee status and the introduction of this separate legal institution into domestic law is a peculiarity of Polish law.²⁸

The Act on granting protection to foreigners contains provisions concerning temporary protection,²⁹ however, its application requires a decision by the Union

23 | Chlebny, 2006, p. 53; the CJEU in case C-391/16, C-77/17, C-78/17.

24 | Judgment of the Provincial Administrative Court, V SA/Wa 91/11.

25 | The CJEU of 8.05.2014 in case C-604/12.

26 | Mikołajczyk, 2008, pp. 38, 48.

27 | Judgment of the Provincial Administrative Court, V SA/Wa 2289/07.

28 | Kowalski, 2016.

29 | Articles 106–118a.

authorities.³⁰ Temporary protection may be granted to foreigners arriving in large numbers in the Republic of Poland who have left their country of origin or a specific geographical area because of invasion, civil war, ethnic conflict, or gross human rights violations. Temporary protection, for no longer than one year, is granted until it becomes possible for foreigners to return to their previous place of residence. Thereafter, it can be extended for a further six months, but not more than twice. The Head of the Office for Foreigners may refuse to grant temporary protection in case of specific behaviour of foreigners, such as the suspicion of committing a crime against peace, war crime, crime against humanity, or acts contrary to the purposes and principles of the United Nations. Such a refusal to grant temporary protection is resolved through a final decision.³¹

A permit for residence for humanitarian reasons³² can be granted in several situations: the threat to foreigners' right to life, liberty, and security when returning to their country of origin – it concerns a real threat to the freedoms and rights; the mere possibility is insufficient.³³ the risk of being subjected to torture, inhumanity, degrading treatment, or punishment – the rationale for exposing a foreigner to degrading treatment can be justified by the state of his or her health, but only on the condition that it is demonstrated that the foreigner will not be able to count on basic medical care in his or her country of origin;³⁴ the threat of forced work; the deprivation of the right to a fair trial or punishment without a legal basis; violation of the right to family, private life – the Polish courts have considered 'family life' to be a state that determines the intensity of ties (of an emotional, social, economic, biological nature),³⁵ and children's rights. It is noteworthy that the grounds for granting a residence permit for humanitarian reasons overlap significantly with the grounds for granting refugee status and subsidiary protection.³⁶ A residential permit on humanitarian grounds may be denied in the case of a crime committed against peace, war, or humanity, and in the case of crimes committed in Poland or outside when an act constitutes a crime under Polish law or constitutes a threat to state defence, security, or the protection of public security and order. As a result of the prerequisites set out above, refusal to grant a foreigner a residence permit for humanitarian reasons constitutes an obligation of an appropriate administrative authority.³⁷ In deciding whether to refuse residence on humanitarian grounds to persons who pose such a threat, the seriousness and frequency of the offences

30 | Chlebny, 2021.

31 | Chlebny, 2013, pp. 21–40.

32 | Articles 348–350 of the Act on foreigners.

33 | Judgment of the Supreme Administrative Court, II OSK 990/16, judgment of the Provincial Administrative Court, IV SA/Wa 2634/16, judgment of the Supreme Administrative Court, II OSK 889/17.

34 | Judgment of the Supreme Administrative Court, II OSK 257/18, and judgment of the Provincial Administrative Court, IV SA/Wa.

35 | Judgment of the Provincial Administrative Court, IV SA/Wa 3068/16; judgment of the Provincial Administrative Court, IV SA/Wa 3278/16; judgment of the Supreme Administrative Court, II OSK 1902/18.

36 | Kumela-Romańska, 2022.

37 | Judgment of the Supreme Administrative Court, II OSK 362/17.

committed by foreigners are considered.³⁸ Such a permit may be withdrawn if the circumstances under which it was granted have ceased or changed in such a way that the permit is no longer required. Moreover, it covers situations where foreigners have concealed information or documents, presented false information or documents, or have left Poland.

If there are circumstances to refuse a residence permit on humanitarian grounds, foreigners may also be granted a tolerated stay permit,³⁹ such as if a return is to a country where the right to life, liberty, and security would be threatened; or if there would be a threat of torture, inhuman, or degrading treatment or punishment; if foreigners could be forced to work, deprived of the right to a fair trial, or punished without legal grounds. However, it can be refused if it constitutes a threat to state defence, security, or the protection of public security and order, and may be withdrawn when the reason for granting the permit ceases to exist or when foreigners have left Poland.

Russia's armed attack on Ukraine on 24 February 2022 caused many Ukrainians to seek international protection from the war in Poland. The situation of Ukrainian nationals varies depending on the years in which the refugee procedure was conducted. In 2016, applications from Ukrainian nationals who were neither from Crimea, occupied by the Russian Federation, nor from the Donetsk or Lugansk regions met neither the conditions for refugee status nor subsidiary protection. There was no risk of persecution on any of the grounds required by the refugee definition. According to Article 18.1 of the Act on granting protection to foreigners: '[i]f there are no circumstances in a part of the territory of the country of origin which justify the fear of persecution or of suffering serious harm and there is a reasonable expectation that the foreigner will be able to move and reside safely and legally in that part of the territory, it shall be considered that there is no well-founded fear of persecution or an actual risk of suffering serious harm in the country of origin'. Applications of this type were often submitted by persons who were already illegally residing in Poland and sought to obtain a basis for residence through the refugee procedure. In doing so, they cited the precarious situation in Ukraine and the generally raised fear of war, including fear of being drafted into the army and possibly participating in the conflict in eastern Ukraine. Applications from persons from the eastern regions of Ukraine were considered to meet the prerequisite for granting subsidiary protection under Article 15.3 of the Act on granting protection to foreigners, because of the threat of serious harm from a serious and individualised threat to life or health resulting from the widespread use of violence against the civilian population in a situation of international or internal armed conflict. However, the applications of Ukrainian nationals originating from Crimea, as a rule, met the prerequisites for granting refugee status.⁴⁰ The same applies to Ukrainians fleeing hostility from February 2022 onwards.

38 | Judgment of the Supreme Administrative Court, II OSK 1902/18.

39 | Articles 351–353 of the Act on foreigners.

40 | Kowalski, 2016, p. 110.

4. Procedure for granting international protection

The decision to grant or refuse international protection (i.e. granting or refusing refugee status or subsidiary protection and revoking refugee status or subsidiary protection) is taken by the Head of the Office for Foreigners.⁴¹ The application for granting international protection is submitted by a foreigner to the Head of the Office for Foreigners through the commanding officer of the Border Guard division or the commanding officer of the Border Guard post. The same procedure is applied to foreigners staying in a guarded centre, detention centre for foreigners, detention centre, or penitentiary institution.⁴²

An application for international protection can be submitted directly by a foreigner or indirectly, on behalf of persons accompanying him or her and dependent on him or her for economic, health, or age reasons, that is, the spouse and minor children, provided they are not married (including a child born during the proceedings). This application is to be submitted in a special form containing the following data provided by Article 26 of the Act on granting protection to foreigners. The application form is contained in the Ordinance of the Minister of Interior and Administration of 27 May 2008 on the specimen form of the application for granting the refugee status:⁴³

1. name(s) and surname in the mother tongue, information about the last place of residence and place of work in the country of origin, military service in the country of origin and knowledge of languages;
2. indication of the language in which the applicant wishes the interview to be conducted during the procedure for granting international protection;
3. identification of the persons on behalf of whom the applicant is making the application;
4. name(s) and surname in the mother tongue of the spouse, information about the identity documents held by the spouse and knowledge of languages;
5. data of a minor child on behalf of whom the applicant is making the application, that is, the spouse's name, surname and surname in the applicant's mother tongue. Name (s) and surname, date of birth, gender, and parents' names;
6. spouse's declaration of consent to submit the application on his/her behalf or his/her minor child;
7. information on departure from the country of origin, including information on leaving the country of origin in the last 5 years and visas or residence permits in another country issued to the applicant and the person on behalf of whom the applicant is applying;
8. information on entry and stay in the territory of the Republic of Poland, including information on the place of residence and address for correspondence in the territory of the Republic of Poland, as well as on decisions issued

41 | Article 23 of the Act on granting protection to foreigners.

42 | Article 24 of the Act on granting protection to foreigners.

43 | Journal of Laws No. 92, item 579.

- against the applicant obliging him/her to return to the country of origin from the territory of the Republic of Poland or another Member State;
9. information on the state of health of the applicant and the person on behalf of whom the applicant is applying, as well as the violence they have suffered;
 10. outline the reasons for applying for international protection, including information on detention, arrest, ongoing criminal proceedings and court decisions rendered in relation to the applicant or a member of his/her family in a country other than the Republic of Poland;
 11. information on previous applications for granting international protection by the applicant or a member of his/her family in the Republic of Poland or another country;
 12. information on criminal proceedings conducted against the applicant and the person on behalf of whom the applicant is acting, in the Republic of Poland;
 13. data of the member of the applicant's family who resides in the territory of the Republic of Poland or another Member State, that is, forename(s) and surname, date and place of birth, address of residence, degree of relationship, and legal title to stay;
 14. specimen of the applicant's signature.

Any data on which the authority assesses factual findings concerning the applicant must be updated. Therefore, it is of the utmost importance to conduct supplementary evidence procedures. The evidence of the applicant's interview is crucial, without which the authority will not be able to assess whether the foreigner's return to the country of origin will pose a risk for the foreigner.⁴⁴ The Act on granting protection to foreigners introduces a model of a single, consolidated procedure in cases of granting refugee status. This means that the authority in a single procedure decides whether to grant protection to the foreigner and in what form, or whether to rule on his or her expulsion. If the foreigner does not meet the prerequisites for granting refugee status, the authority determines whether the applicant may benefit from subsidiary protection and subsequently from a permit for tolerated stay.⁴⁵ Among the most frequent reasons undermining the assessment of the credibility of the applicant for international protection were such factors as: lack of any knowledge about the organisation of which the applicant was alleged to be an active member and in which membership was supposed to be the reason for his or her persecution, inconsistency in the explanations provided, application for refugee status in connection with the threat of expulsion only after an illegal stay in Poland, or confronted with information obtained through Polish diplomatic missions.⁴⁶

According to Article 28 of the Act on granting protection to foreigners, the acceptance of the application for international protection and its registration

44 | Chlebny, 2010, pp. 42–58.

45 | Chlebny, 2010, pp. 42–58.

46 | Judgments of the Supreme Administrative Court: II OSK 908/09, II OSK 908/09, II OSK 941/07 or II OSK 1325/07.

should occur immediately, but no later than three working days from the date of acceptance of the declaration of the intention to file such an application. In the case of a mass influx of foreigners, this period is extended to ten working days. The declaration of intention to submit an application for international protection is registered by the Border Guard authority in a special register referred to in Article 119.1 Point 1 of the Act. The Head of the Office for Foreigners may leave an application for international protection unprocessed under the following situations: when it does not contain the name of the applicant or the country of origin, and these deficiencies could not be remedied, and when the application was submitted by a foreigner apprehended immediately after illegally crossing the external border of the EU.⁴⁷ An exception is made for foreigners who have come directly from a territory where their life or freedom was threatened by the danger of persecution or the risk of serious harm and who have presented credible reasons for illegal entry into the territory of the Republic of Poland and have applied for international protection immediately after crossing the border.⁴⁸ The last case is presented in more detail later in section five of the article.

By the Act of 9 March 2023 amending the Act on foreigners and certain other acts,⁴⁹ changes have been made to the competences previously conferred on the Head of the Office for Foreigners. Some of them, that is, with regard to decisions concerning residence, return, expulsion, and transfer, were transferred to the Commander-in-Chief of the Border Guard as a higher-ranking authority in relation to commanders of Border Guard divisions and posts. Simultaneously, the performance of tasks related to granting and organising assistance to foreigners in voluntary return and assistance in transferring a foreigner to another country responsible for examining an application for international protection has been concentrated in the hands of the Commander-in-Chief of the Border Guard. The amendment also brings national law in accordance with EU changes to the Schengen Information System (SIS), which aimed to streamline the process of returning illegally staying third-country nationals to their home countries and improve border checks.

5. Decisions on turning back to the state border line

From the moment international protection is applied, the foreigner is entitled to remain in Poland. However, if it is assumed that the applicant did not declare to the Border Guard officers his or her intention to apply for such protection, their obligation is to conduct a control of the legality of the applicant's stay in Poland. The scope of the procedure for the formal and immediate return of migrants who have crossed or attempted to cross the border in violation of the law was extended based

47 | Article 33 of the Act on granting protection to foreigners.

48 | Act on granting protection to foreigners, Article 33.1a.

49 | Journal of Laws 2023, item 547.

on an amendment to the Act on Foreigners adopted on 14 October 2021.⁵⁰ On this basis, a case in which a foreigner has been apprehended immediately after illegally crossing the external border of the EU is an additional exception to the principle of conducting proceedings to oblige a foreigner to return.⁵¹ In such a situation, the commanding officer of the Border Guard post with jurisdiction over the place where the border was crossed draws up a report on crossing the border and issues an order to leave Poland. An appeal against such a decision may be presented to the Commander-in-Chief of the Border Guard, however, it does not suspend the execution of the decision. In the previous legal order, a specific return procedure was in force, which made it possible to remove a foreigner from Poland only based on a decision obliging the foreigner to return, issued by the Commander of the Border Guard post. Such a decision could be appealed against by presenting the appeal to the Head of the Office for Foreigners. This legal order has changed in a specific factual situation related to the massive influx of foreigners into the territory of the EU in 2015 and 2016.⁵²

Submitting an application for international protection will be a challenge for foreigners in the conditions of crossing the state border in the aforementioned situation. This issue has been addressed by the ECtHR in its various judgments. This is because they explicitly protect the rights of foreigners who wish to apply for refugee status. In all cases of expulsion, there is a risk that they will be deprived of access to an adequate asylum procedure, and that compliance with the principle of non-refoulement will be undermined.⁵³ Applicants for international protection should be allowed to remain in the country pending examination of their applications.⁵⁴ Moreover, such a declaration may be lodged in the territory of a given state, at the border, or in a transit zone, and may not be subject to additional administrative formalities.⁵⁵ In its case law, the ECtHR also refers to the use of detention for migrants. Therefore, it should not be applied to children or families with children. Unfortunately, neglecting the best interests of the child continues to be a practical problem of human rights violations along Poland's eastern border.⁵⁶ These conclusions could also be applied to pushbacks because they are more severe for both the physical and mental health of children, not to mention respect for their dignity.

Before the aforementioned novelisation, the practice of pushbacks was sanctioned by the ordinance of the Minister of the Interior and Administration on 21 August 2021. The ordinance granted the Border Guard the competence to return persons who crossed the border irregularly to the state border. According to the Polish courts, the Minister of Internal Affairs and Administration could limit or suspend border traffic at border crossing points by means of an ordinance. However, this should not apply to foreigners who crossed the border outside any

50 | Journal of Laws 2021, item 352.

51 | Article 303.1 Point 9a of the Act on foreigners.

52 | Kumela-Romańska, 2022, p. 128.

53 | Judgment of the ECtHR, *D.A. and Others v. Poland*.

54 | Judgment of the ECtHR of 23.07.2020, *M.K. and Others v. Poland*.

55 | Judgment of the CJEU in Case C-808/18.

56 | Judgment of the ECtHR *Bistieva and others v. Poland*, Kosińska; 2019, pp. 129–139; Kosińska, 2021, p. 75.

border crossing point.⁵⁷ A new form of administrative act has been introduced – an order to leave Poland, issued by the commanding officer of the Border Guard post to a foreigner ‘apprehended immediately after crossing the border in violation of the law’. A ban on re-entry to Poland and other countries in the Schengen area for six months to three years can also be applied to such foreigners. What deserves criticism is that the Border Guard does not collect any data on foreign nationals’ situations, including personal data, country of origin, reasons for leaving the country, or foreigners’ intentions to apply for international protection in Poland.⁵⁸ This may raise doubts regarding the correct application of the principle of non-refoulement. Its application should aim to strike the right balance between the need to protect state borders and respect the rights of foreigners under international and EU law binding on Poland. Furthermore, it requires an examination of the facts in each individual case and prohibits the denial of protection in the absence of such a review. Under no circumstances may this activity be waived in the event of a mass influx of migrants requiring protection.⁵⁹ Furthermore, all applicants should be provided with food, water, clothing, adequate medical care, and, if possible, temporary shelter by the appropriate national authorities.⁶⁰ Such necessary assistance may also be provided by international organisations and civil society actors; however, in Poland, it was hampered by the state of emergency imposed in the border area on the basis of Ordinance of the President of the Republic of Poland of 2.08.2021 on the imposition of a state of emergency in the area of a part of the Podlaskie province and a part of the Lubelskie province.⁶¹

The commanding officer of the Border Guard post with jurisdiction over the place where the border was illegally crossed draws up a record of its crossing and issues a decision to leave Poland. An appeal against such a decision may be presented to the Commander-in-Chief of the Border Guard, however, does not suspend the execution of the decision. This does not appear to be a suitable solution, considering the verification of such decision correctness and the possibility of violating the conditions of international protection.⁶² According to § 3.2b of the aforementioned Border Ordinance, if persons referred to in Paragraph 2a (i.e. persons not belonging to those listed in Paragraph 2 are detected at a border crossing point where border traffic has been suspended or restricted and outside the territorial scope of the border crossing point, they are to be turned back to the state border line. The catalogue contained in Paragraph 2a includes the following persons: 1) citizens of the Republic of Poland; 2) foreigners who are the spouses or children of citizens of the Republic of Poland or are under the permanent guardianship of citizens of the Republic of Poland; 3) foreigners who hold the Card

57 | Order of the District Court in Bielsk Podlaski, VII Kp 203/21.

58 | *Opinion of the Polish Ombudsman*, 2023.

59 | Lauterpacht and Bethlehem, 2004, pp. 118–119; Goodwin-Gill, McAdam and Dunlop, 2021, pp. 241–345; Łubiński, 2022, p. 50.

60 | Judgment of the ECtHR, *Amiri and Others v. Poland*.

61 | Journal of Laws of 2021, item 1612; Zdanowicz, 2023, pp. 109–112, ‘Poland’s border with Belarus: Commissioner calls for immediate access of international and national human rights actors and media, 2021.

62 | Grześkowiak, 2023, p. 20; Rogala, 2021, p. 16.

of the Pole and their spouses; 4) members of diplomatic missions, consular posts and representatives of international organisations and members of their families and other persons crossing the border of the Republic of Poland on the basis of a diplomatic passport; 5) foreigners possessing the right of permanent or temporary residence in the territory of the Republic of Poland; 6) foreigners possessing the right to work in the territory of the Republic of Poland; 7) foreigners who drive a means of transport for the carriage of persons or goods, and their journey occurs within the framework of professional activities involving the transport of goods or the carriage of persons; 8) drivers performing road transport as part of international road transport or international combined transport; 9) school pupils studying in the Republic of Poland, after documenting to a Border Guard officer that they are studying in the Republic of Poland, and their guardians who cross the border together with the pupils to participate in such studies; 10) citizens of the Member States of the EU, the Member States of the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area or the Swiss Confederation, and their spouses and their children; 11) foreigners holding a permanent or temporary residence permit or a residence permit for a long-term resident of the EU; 12) students, participants of postgraduate studies, specialist training and other forms of education, as well as doctoral students studying in the Republic of Poland; 13) scientists conducting research or development work in the Republic of Poland; 14) persons crossing the border of the Republic of Poland based on a national visa for the purpose of repatriation or a visa for the purpose of arrival in the territory of the Republic of Poland as a member of the repatriate's closest family; 15) foreigners whose arrival occurs in connection with participation, as a competitor, a member of the training staff, a doctor, a physiotherapist or a referee, in international sports competitions organised on the territory of the Republic of Poland; 16) foreigners crossing the border of the Republic of Poland based on a visa issued for humanitarian reasons; 17) citizens of the Republic of Belarus; 18) citizens of Ukraine; 19) fishermen; 20) foreigners who have obtained a visa to participate in the Poland programme, Business Harbour programme; 21) foreigners arriving to the Republic of Poland for business purposes upon a written invitation stating the business purpose, issued by a competent entity; 22) citizens of the United Kingdom of Great Britain and Northern Ireland and their spouses and children; 23) persons whose arrival occurs in connection with their participation in an international competition or music festival organised on the territory of the Republic of Poland by a state or local government cultural institution; 24) participants of Erasmus+ and European Solidarity Corps projects. This provision was the subject of several judgments before provincial administrative courts on the issue of pushbacks made to the eastern border of Poland. Courts generally refused to prioritise the ordinance provisions of the Act on granting protection to foreigners – where the applicant declares seeking international protection and the Act on foreigners – in the event that there is no such declaration.⁶³ Once the Border Guard officers discovered that the complainant had illegally crossed the Polish border, they either

63 | The Provincial Administrative Court in Białystok, II SA/Bk 244/23, II SA/Bk 145/23, II SA/Bk 493/22, II SA/Bk 494/22, II SA/Bk 492/22.

enable the complainant to formally submit an application for international protection as soon as possible, initiate proceedings obliging the complainant to return, or apply the procedure under Article 303b of the Act on foreigners. The automaticity resulting from Article 303b of the Act on foreigners in issuing and executing decisions on leaving Poland, together with the withdrawal from the assessment of the foreigner's individual situation violates the prohibition of collective expulsion of foreigners.⁶⁴ In this case foreigners were forced to leave Poland and cross to the Belarus side of the border. The authority did not provide them any opportunity to present their arguments against turning back to Belarus. Nor did it examine the factual and legal situation of these persons. It did not even establish whether the foreigners had any legal title to stay in Belarus, to which they were turned back. In situations where foreigners have not been apprehended immediately after crossing the border, the procedure under Article 302.1 Point 10 of the Act on foreigners should be applied, which excludes the application of the procedure under Article 303b, Point 1, in conjunction with Article 303.1 Point 9a.⁶⁵

To sum up, the aforementioned provision of § 3.2b of the Border Ordinance allows for arbitrary and forced return of a foreigner to the state border line what in practice results in 'automatic' removal from Poland. It excludes prior implementation of the appropriate procedures provided by the Act on foreigners or the Act on granting protection to foreigners, and thus violates the principle of non-refoulement; therefore, it should not be applied. It remains in conflict with the norms of statutory rank as well as with Article 56.1, of the Constitution of the Republic of Poland, which guarantees foreigners the exercise of their right to asylum in Poland. Applicants' removal from Poland has the practical effect of preventing applications for international protection and, ultimately, potentially exposing them to danger.⁶⁶

6. Readmission agreements and its importance in migration crisis

Readmission means the transfer by the Requesting State and admission by the Requested State of persons (own nationals of the Requested State, third-country nationals or stateless persons) who have been proven to have entered, stayed or resided illegally in the territory of the Requesting State. Thus, the primary purpose of readmission is to facilitate the return or admission of persons residing in the territory of a particular state without the required documents.⁶⁷ It was used as one of the EU's answers to the mass influx of irregular migrants in 2015/2016 – apart from deterrence response through building of fences at external EU borders,

64 | Judgment of the Provincial Administrative Court in Białystok, II SA/Bk.

65 | Judgment of the Provincial Administrative Court in Białystok, II SA/Bk 492/22.

66 | Judgment of the Provincial Administrative Court in Białystok, II SA/Bk 145/23.

67 | Zdanowicz, 2011, p. 140.

a responsibility shifting to external partners – Turkey, in this case, has also been applied. The EU-Turkey statement of 18 March 2016 should be mentioned here to stop the flow of irregular migration from Turkey to Europe.⁶⁸ Turkey pledged to accept the return of all Syrian nationals who were able to enter Greece without a visa or permit. However, the EU has committed to resettle as many Syrians as will be sent back to Turkey. However, the broad personal scope of this agreement has proven controversial, because it includes Syrian nationals who sought asylum in Greece.⁶⁹

Readmission procedures in Poland are determined by Polish migration laws and international readmission agreements to which Poland is a party. The stages of the procedure are as follows. The first step involves identifying the concerned person. When a person suspected of illegally crossing a border is apprehended by border services or law enforcement authorities, an identification process is conducted to establish his or her identity and country of origin. After this identification, Polish authorities may contact the country to which the person is obliged to return in accordance with the readmission agreements. In the next step, an application for readmission containing information about the person and evidence of illegal border crossing is submitted. If the readmission application is accepted, the person is transferred. Throughout the process of transferring a person to the home country, relevant legal procedures are followed, including ensuring the right to appeal, protection from violence or inhuman treatment, and respect for human rights.

Poland has signed approximately 30 readmission agreements governing the return of foreigners who illegally crossed the border. These include the following countries (with the date of signing of the agreement): Austria (10 June 2002), Bulgaria (24 August 1993), Croatia (8 November 1994), the Czech Republic (10 May 1993), Greece (21 November 1994), Hungary (25 November 1994), Ireland (12 May 2001), Lithuania (13 July 1998), Latvia (29 March 2006), Macedonia (15 November 1994), Moldova (15 November 1994), Romania (24 July 1994), Slovakia (8 July 1993), Slovenia (28 August 1996), Spain (21 May 2002), Sweden (1 September 1998), Switzerland (19 September 2005), Ukraine (24 May 1993), Vietnam (22 April 2004). Poland is also a party to readmission agreements with third countries concluded at Union level. These include the following countries: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Cape Verde, Georgia, Hong Kong, the Macao Special Administrative Region of the People's Republic of China, Macedonia, Montenegro, Moldova, Pakistan, Russian Federation, Serbia, Sri Lanka, Turkey, Ukraine.

The third countries with which Poland cooperates most frequently in the implementation of readmission agreements include Ukraine, Russia, Moldova, Pakistan, and Georgia. The implementation of these agreements (based on the relevant implementation protocols) has generally been smooth, that is, the number of readmission applications has been matched by the number of readmission authorisations. Third countries with sporadic cooperation in the implementation of readmission agreements include Sri Lanka, Albania, Montenegro, Macedonia,

68 | European Council Press Release No. 144/16.

69 | Karageorgiou and Noll, 2022, p. 14; Menéndez, 2016, pp. 402, 409–412.

Serbia, Bosnia and Herzegovina, Hong Kong, and Macau (figures for 2000).⁷⁰ In 2016, almost 20,000 foreigners were transferred from Poland to other countries under readmission and other agreements and arrangements (more than 13,000 the year before). In turn, 1,583 people were transferred to Poland (1,074 the year before).

EU readmission agreements in facilitating effective returns are significant. They systemise the rules and deadlines for the confirmation of identity and transfer of third-country nationals to their country of origin, particularly with regard to third countries with which Poland has not cooperated or had problems in the past. Furthermore, the aforementioned agreements establish direct contact with the authorities responsible for implementing the agreements in question. Before the application of readmission agreements, such as in Georgia, Pakistan, and Sri Lanka, the efficiency of confirming identity and obtaining replacement travel documents was low. Cooperation in the aforementioned area occurred through diplomatic representation, which was not obliged by deadlines to respond to enquiries submitted by the Border Guard.⁷¹

In connection with the migration crisis in the Polish-Belarusian section of the state border, the Border Guard noted a change in the profile of illegal migration. So far, the largest number of foreigners to whom the Border Guard issued a return decision were foreigners coming primarily from the countries of the former USSR (Ukraine, Belarus, Russia, Georgia, Moldova) and Vietnam. In 2021, there was an increase in the number of return decisions concerning citizens of Iraq (2021 – 1357 persons, 2020 – 22 persons) and Afghanistan (2021 – 253 persons, 2020 – 44 persons). In 2021, cooperation with Iraq on identification and forced returns was among the most problematic because of the large-scale of the phenomenon and the lack of consent from Iraqi authorities for the implementation of involuntary returns. The Iraqi Embassy in Warsaw received 427 requests for identification of Iraqi citizens and issuance of a replacement travel document for return to their country of origin – 227 requests went unanswered. Only 20 travel documents on returning to the country of origin were issued. Approximately 70% of all foreigners detained in guarded centres are Iraqi nationals.⁷²

7. Latest statistics on irregular migration in Poland

From 1 August 2021 to 18 July 2022 officers of the State Border Guard in Białystok accepted 44 applications for international protection in Poland owing to illegal border crossings. Many foreigners who illegally entered Poland (exceptions are a minority of cases) travel to Western Europe and thus do not seek protection in Poland.⁷³ By 31 December 2021 almost 6,000 foreigners were under the care of the

70 | Practical aspects of reducing irregular migration in Poland, 2011.

71 | Entry bans and readmission, 2014.

72 | European Migration Network Annual Report, 2021.

73 | Judgment of the WSA in Białystok of 27.10.2022, II SA/Bk 558/22.

Head of the Office for Foreigners (2,800 more than a year earlier), and the largest number of applicants were Belarusians – 2,257, Afghans – 1,781 (991 evacuees), Iraqis – 1400, Russians – 987, and Ukrainians – 261. Of these, 18% lived in one of the centres for foreigners, and the remaining 82% received a cash benefit for independent functioning.⁷⁴

On 4 January 2022 the Polish Border Guard reported that 39,670 attempts to illegally cross the Polish-Belarusian border were recorded in 2021. By comparison, 129 such attempts were made in 2020, 20 in 2019 and only 4 in 2018.⁷⁵ In the first half of 2022, 5.1 thousand foreigners applied for refugee status in Poland (the largest number of applications for international protection were submitted by nationals of Belarus – 1.5 thousand, Ukraine – 1.2 thousand, Russia – 0.8 thousand, Iraq – 0.5 thousand, Afghanistan – 0.2 thousand persons). International protection was granted to 2.3 thousand persons (they were mostly citizens of Belarus – 2.1 thousand, Afghanistan – 50, Ukraine – 40), negative decisions were given to almost 0.8 thousand foreigners (the most numerous groups were citizens of Russia – 330, Iraq – 280, Tajikistan – 50 persons), and 2.4 thousand proceedings were discontinued (primarily concerning citizens of Iraq – 950, Afghanistan – 390, Ukraine – 320 people.⁷⁶

In February 2023, the number of irregular crossings of the Polish-Belarusian border decreased significantly compared with that in autumn of 2021. By 2022, 9.9 thousand foreigners applied for international protection in Poland. These were mostly citizens of Belarus – 3.1 thousand, Russia – 2.2 thousand, Ukraine – 1.8 thousand, Iraq – 0.6 thousand and Afghanistan – 0.4 thousand persons). The number of applications submitted was approximately 28% higher than that in 2021.⁷⁷ The Border Guard reported 29 attempts to illegally cross the border on 5 February 2023, 31 such attempts on 4 February 2023 and 55 attempts on 3 February 2023. The number of people who actually crossed the border and the percentage of those who avoided detention by Polish border guards remain unknown, although it is known that not all of these crossings are reflected in Border Guard statistics, and some migrants manage to reach Germany and further west through Poland.⁷⁸

In comparison with earlier years, one can observe changes in this respect. Based on statistical data concerning the number of foreigners detained in Poland in connection with their illegal stays, it may be inferred that between 2008 and 2010, the number decreased from 5,430 in 2008 to 4,005 in 2010. Simultaneously,

74 | European Migration Network Annual Report, 2021.

75 | Data available at: https://twitter.com/Straz_Graniczna/status/1478327785903038469?t=k2VdF_GmykZQBEunvENA9g8s=19 (Accessed: 24 June 2023).

76 | Data available at: https://twitter.com/Straz_Graniczna/status/1478327785903038469?t=k2VdF_GmykZQBEunvENA9g8s=19 (Accessed: 24 June 2023).

77 | Ochrona międzynarodowa w 2022 r. – ponad dwukrotny wzrost rozpatrzonych wniosków [Online]. Available at: <https://web.archive.org/web/20230604134047/https://udsc.prowly.com/224477-ochrona-miedzynarodowa-w-2022-r-ponad-dwukrotny-wzrost-rozpatrzonych-wnioskow> (Accessed: 24 June 2023).

78 | Ochrona międzynarodowa w 2022 r. – ponad dwukrotny wzrost rozpatrzonych wniosków [Online]. Available at: <https://udsc.prowly.com/224477-ochrona-miedzynarodowa-w-2022-r-ponad-dwukrotny-wzrost-rozpatrzonych-wnioskow> (Accessed: 24 June 2023).

the total number of foreigners actually expelled from the territory of the country remained at a similar level: 6,945 in 2009 (including 573 under forced return), and 6,768 in 2010)⁷⁹ The factors most responsible for the increase in the number of applicants for international protection in Poland in 2021 were political emigration from Belarus, the evacuation of nearly a thousand Afghans from Kabul because of the return to power of the Taliban, and the increase in illegal immigration, primarily from Iraq, as a result of Belarusian authorities creating an artificial migration route to Poland and other EU countries.⁸⁰

8. Conclusion

The migration crisis, which began in 2015 and continues to this day, poses a significant challenge for both the EU and its individual Member States. Those whose borders also form the external borders of the EU face a special situation, such as Poland, with its eastern border simultaneously being the external border of the Union. Foreigners in Poland may apply for different types of international protection, such as refugee status, subsidiary protection, asylum and temporary stay, permits for humanitarian reasons, and permits for tolerated stay.

The increased migratory movement at the eastern borders of the Republic of Poland, which began in 2021, was a direct cause of the changes introduced in Polish legislation concerning foreigners, with the primary aim of protecting the borders from a massive influx of illegal migrants. Unfortunately, a balance between simultaneously providing protection for foreigners has not been established. The possibility of returning migrants apprehended immediately after crossing the border in violation of the law is a notable example. The limited possibility for such foreigners to apply for international protection raises serious questions about its compatibility with international and EU legal orders; however, it remains applicable. Therefore, statutory procedures for the international protection of foreigners should be applied here instead of the regulations provided in the Border Ordinance. Collecting relevant data from foreigners applying for international protection in exchange for returning them to the border without such an activity would undoubtedly contribute to strengthening compliance with the principle of non-refoulement.

Considering the practice of returning irregular migrants to state borders, the importance of readmission agreements and effective implementation of their provisions appears to be significant. Readmission procedures in Poland are determined by Polish migration laws and international readmission agreements to which Poland is a party. These take form of bilateral agreements and those adopted within the EU framework. The added value of the latter is important, particularly because it systemises the rules and deadlines for the confirmation of the identity and transfer of third-country nationals to their country of origin. This

79 | Practical aspects, 2011.

80 | Raport Roczny ESM, 2021.

is particularly important with regard to third countries with which Poland has not cooperated or has problems connected with this cooperation. The one between the sending and receiving countries is of the most importance, considering that the readmission application must be accepted by the latter; for example, poor cooperation with the Iraqi authorities regarding the implementation of migrant returns in 2021.

The latest statistics on irregular migration remain high, which is unlikely to change in the coming years. The reason for migrants seeking protection may not be simply warfare, as in the case of Ukraine, but insufficient vital resources in the form of water or food shortages, which are gradually disappearing because of a constantly deteriorating environment. The international community's commitment to the principle of non-refoulement excludes the possibility of migrants being transferred to a dangerous country, which is also called a country that does not provide livelihoods. Therefore, it is necessary to strengthen international cooperation and develop mechanisms that will help reduce the causes of migration and assist those who have become victims. Therefore, the activity of developing new proposals for action currently being discussed in the framework of the EU migration policy is welcomed.

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