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## Legal Protection of the Child from Violence and the Detention of Minor Foreigners in Poland

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Child protection from violence is one of fundamental principles of the contemporary legal system, rooted in numerous acts of domestic and international legal order.<sup>1</sup> This protection finds its fullest expression in the Convention on the Rights of the Child.<sup>2</sup> To date, this document is the greatest achievement of the international community as regards the protection of children's rights, since it provides an axiological and normative basis for acting for the benefit of children, both on the global and regional levels, as well as nationally and locally.

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<sup>1</sup> The international legal protection of children's rights includes not only documents explicitly concerning the rights of children, but also general documents containing provisions that directly or indirectly refer to children. They include, for example, the European Social Charter, which entered into force in 1965; the Convention of the International Labour Organization; Conventions, Recommendations and Guidelines of the Council of Europe. For more on this subject, see H. GÓRECKA, M. GÓRECKA: *Ochrona praw dziecka w prawie międzynarodowym i jego realizacja w Polsce*. Olsztyn—Kraków 2001.

<sup>2</sup> The Convention on the Rights of the Child was adopted by the United Nation General Assembly on November 20, 1989, and entered into force on September 2, 1990. Poland signed the Convention on January 26, 1990. The Sejm, by the Act of September 27, 1990 *on ratification of the Convention on the Rights of the Child adopted by the UN General Assembly of 20 November 1989* (Dz. U. of 27 February 1991, No. 16 item 71) granted consent for its ratification by the President. The Convention entered into force as of July 7, 1991 (Dz. U. 1991, No. 120, item 526). The Convention as a ratified international treaty constitutes an integral part of the internal Polish legal order.

The Convention on the Rights of the Child determines the universal legal norms for protection of children from neglect, mistreatment and exploitation, at the same time providing children with the guarantees of fundamental human rights. The catalogue of rights granted to a child in the Convention includes civil rights (personal rights and freedoms of a child, with the most important of them including: the right to life, citizenship, identity, the right to family, privacy, freedom of opinions, religion, the right to freedom from violence), social rights (the right to health protection and social security), cultural rights (the right to learning, to take advantage of cultural achievements, the right to information and knowledge of own rights) and political rights (the right to freedom of association and peaceful gatherings).

The principle of protecting the child from all forms of mistreatment is included *expressis verbis* in articles 19<sup>3</sup> and 36<sup>4</sup> of the Convention, while the states that have ratified the Convention also agree to protect children from all forms of exploitation and sexual abuse (Art. 34), as well as torture or cruel, inhuman or humiliating treatment or punishment (Art. 37). In the light of the Convention, it is unquestionable that the states that have ratified the document have obliged themselves to ensure protection to children — victims of military conflicts and children without families, as well as child-refugees. They also obliged themselves to protect children against non-legal decisions concerning their fate, as well as to enable children to express their own opinion in matters that concern them, also including the right to obtain and provide information.

Obligations of states to ensure protection to children are also ensured by Art. 24 of the International Covenant on Civil and Political Rights,<sup>5</sup>

<sup>3</sup> “1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

<sup>4</sup> “States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.” More about the relation between Art. 19 and Art. 36 of the Convention and the term “mistreatment” in: L. KOCIUCKI: “Ochrona dziecka przed złym traktowaniem.” In: *Konwencja o Prawach Dziecka — analiza i wykładnia*. T. SMYCZYŃSKI. Poznań 1999, pp. 375—381.

<sup>5</sup> The Covenant, adopted as a result of the UN conference in New York, under resolution of the General Assembly No. 2200A (XXI) of 16 December 1966, entered into force on March 23, 1976. Poland ratified this Covenant in 1977.

and Art. 9, par. 1 of this Covenant provides that everybody has the right to liberty and personal security. No one can be subjected to arbitrary arrest or detention. No one can be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Article 10 of the Covenant provides that each person deprived of liberty should be treated with humanity and with respect for the inherent dignity of the human person, and that juvenile persons should be separated from adults and treated appropriately to their age and legal status.

On the other hand, pursuant to Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>6</sup> inhuman or degrading treatment or punishment is forbidden, and under Art. 5 par. 1 and Art. 5 par. 4 of this Convention, deprivation of liberty can occur only in accordance with a procedure prescribed by law and in explicitly specified situations, while every person who has been deprived of liberty by arrest or detention should be entitled to appeal to the court to speedily obtain a decision on the lawfulness of his detention and a release order if the detention is against the law.

International standards do not exclude the possibility of applying detention in order to prevent illegal entry into the territory of a state or during deportation or extradition proceedings. However, it should be pointed out that the guidelines of the United Nations High Commissioner for Refugees<sup>7</sup> of February 1999 concerning criteria and standards concerning detention of asylum-seekers provide that an asylum-seeker, as a matter of principle, should not be placed in detention. Exceptions are permissible only when the application of detention is necessary to verify the identity of the foreigner, to establish grounds on which he/she applies for a refugee status, or if the asylum-seeker destroyed his/her travelling documents (or identity documents) or used a falsified documents in order to mislead the authorities of the state in which he/she is seeking asylum, as well as for protection of national security and public order.<sup>8</sup> According to

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<sup>6</sup> The international treaty concluded by states members of the Council of Europe became effective on September 3, 1953. Poland signed the Convention on November 26, 1991 and ratified it on January 19, 1993.

<sup>7</sup> The United Nations High Commissioner for Refugees (UNHCR) — a position created according to Resolution No. 319 (IV) adopted by United Nations General Assembly on December 3, 1949. The task of UNHCR is to ensure international protection to refugees and to search for a permanent solution to the problem of refugees by way of their voluntarily repatriation or assimilation in new national communities.

<sup>8</sup> In 2012, UNHCR guidelines concerning application of detention measures towards asylum seeking persons were adopted. Those guidelines provide that: (1) The right to seek asylum must be respected; (2) The rights to liberty and security of a person and to freedom of movement also apply to asylum seekers; (3) detention must be in accordance with and authorized by law; (4) detention must not be arbitrary and any decision

the above-mentioned guidelines, unattended asylum-seekers under the age of 18 should not be placed in detention. Guideline No. 6 provides that if it is possible, such persons should be entrusted to the care of members of family who already obtained the status of refugee in a given country, and if this solution is not possible, competent child care institutions should provide a minor foreigner with alternative care in the form of suitable accommodation and appropriate supervision.

With reference to children accompanying their parents, the High Commissioner recommends considering any appropriate alternatives for detention. Those alternatives include reporting or a permanent stay requirement, provision of a guarantor, release on bail, placing the family in an open centre, which they could leave only at specific hours. Children and their primary caregivers should not be detained, except for when it is the only possibility to preserve family unity.

The guidelines emphasize that application of detention towards families with children should comply with Art. 37 of the Convention on the Rights of the Child, which means it should be a measure of last resort, and should be applied for the shortest possible period. Foreign asylum seeking children may not be detained under prison-like conditions. If it is not possible to avoid application of detention, children and their families should be placed in especially designated departments in detention facilities.

Similarly, the recommendations of the Committee of Ministers issued on April 16, 2003 concerning detention of asylum seekers<sup>9</sup> emphasized that detention of minors should be the measure of the last resort and for the shortest possible time. Minors should not be separated against their will from their parents or any other legal or customary carers. In its recommendations, the Committee indicated that if minors have to be detained, they must not be held under prison-like conditions. A release

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to detain must be based on an assessment of the individual's particular circumstances; (5) detention must not be discriminatory; (6) indefinite detention is arbitrary and maximum limits on detention should be established in law; (7) a decision to detain or to extend detention must be subject to minimum procedural safeguards; (8) conditions of detention must be humane and dignified; (9) the special circumstances and needs of a particular asylum seeker must be taken into account; (10) detention should be subject to independent monitoring and inspection. See <http://www.unhcr.org/505b10ee9.html>, after: T. SIENIOW: "Detencja cudzoziemców a międzynarodowe standardy ochrony praw człowieka." *Stosowanie detencji wobec cudzoziemców. Raport z monitoringu i rekomendacje*. Ed. IDEM. Fundacja Instytut na rzecz Państwa Prawa, Lublin 2013 p. 16.

<sup>9</sup> Recommendations of the Committee of Ministers of the Council of Europe of April 16, 2003 on measures of detention of asylum seekers, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=2121>.

from detention should take place as fast as possible, and such a person should be provided with separate accommodation. The Committee also recommended introduction of special solutions in closed centres for families with children, as well as alternative measures ensuring execution of proceedings, not related to deprivation of liberty, such as residential facilities or foster homes for unaccompanied minor asylum seekers.

On the other hand, Reception Directive No. 2003/9/EC laying down minimum standards for the reception of asylum seekers<sup>10</sup> provides that the best interests of the child shall be a primary consideration for Member States when implementing the provision of the Directive that involve minors. The report on the implementation of the Reception Directive of February 5, 2009 emphasizes that all fundamental rights and principles expressed in the Charter of Fundamental Rights and in the European Convention on Human Rights, and in particular family life, access to health care and efficient appeal against application of detention must be respected regardless of the legal status of the third-country national. The report considers detention as a measure of last resort, which should be applied only for the shortest period possible and when detention alternatives cannot be applied. In each case, application of the detention measure should take place after individual assessment of a given case. Amendments to the directive proposed by the European Commission emphasize the importance of assuring legal protections to guarantee that detention will not be applied arbitrarily, and the children will not be placed in detention, except for situations when it is in their interest (with the provision that in general, unaccompanied minors should not be placed in detention).<sup>11</sup>

Protection of a child from violence, cruelty, exploitation and demoralization is a principle also accepted in the Polish legal order. In the Republic of Poland, this principle is a constitutional value. Pursuant to Art. 72 of the Constitution of the Republic of Poland of April 2, 1997<sup>12</sup>: “1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public author-

<sup>10</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, O. J. L31/18 of February 6, 2003.

<sup>11</sup> J. BURNETT, J. CARTER, J. EVERSLED, M. B. KHOLI, C. POWELL, G. DE WILDE: ‘*State Sponsored Cruelty*’. *Children in immigration detention*. Medical Justice, 2010. Retrieved from <http://www.statewatch.org/news/2010/sep/uk-medical-ustice-tate-ponsores-ruelty-report.pdf>. (accessed 19.2.2014).

<sup>12</sup> The Constitution of the Republic of Poland of April 2, 1997 adopted by the National Assembly on April 2, 1997, adopted by the Nation in the constitutional referendum on May 25, 1997, signed by the President of the Republic of Poland on July 16, 1997 (Dz.U. 1997, No. 78, item 483).

ity that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. 2. A child deprived of parental care shall have the right to care and assistance provided by public authorities. 3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child.” This protection is also implemented in various normative acts of lower levels.<sup>13</sup>

Therefore, in view of the multitude of regulations existing in the subject matter under analysis, the law in Poland protects the minor against violence in a multifaceted way and, it seems — universally. However, a question arises whether this law equally protects from violence minor foreigners staying in the territory of the Republic of Poland, particularly those who are subject to the procedure of being placed in guarded centres for foreigners<sup>14</sup> and whether standards of this protection are identical in case of the minors who are subject to detention together with the members of their family or carers and those unattended.

Principles concerning detention of foreigners in the territory of the Republic of Poland are governed (as to the merits) by the following acts: the Act on Foreigners of December 12, 2013<sup>15</sup> and the Act on Granting the Foreigners Protection in the Territory of the Republic of Poland of June 13, 2003.<sup>16</sup> Pursuant to Art. 398 par. 1 of the Act of Foreigners, a foreigner shall be placed in a guarded facility if: (1) there is a probability that a decision on imposing the return obligation on a foreigner will be issued without a specified period for voluntary return; (2) a decision on imposing the return obligation on a foreigner has been issued without a specified period for voluntary return; (3) a foreigner has not voluntar-

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<sup>13</sup> This protection is ensured, for instance, by the Act on Counteracting Domestic Violence of July 29, 2005 (Dz.U. 2005, No. 180, item 1493 as amended.); the Act on the Upbringing in Sobriety and Alcoholism Prevention of October 26, 1982 (Dz.U. of 2002, No. 147, item 1231, as amended), the Social Welfare Act of March 12, 2004 (consolidated text Dz.U. of 2008 No. 115, item 728), the Penal Code Act of June 6, 1997 (Dz.U. of 1997, No. 88 item 553 as amended), the Family and Guardianship Law Act of February 25, 1964 (Dz.U. of 1964, No. 9, item 59 as amended), The Medical Profession Act of December 5, 1996 (Dz.U. of 1998 No. 106, item 668) and others.

<sup>14</sup> Six guarded centres for foreigners operate in the territory of the Republic of Poland: Guarded Centre for Foreigners in Przemyśl, Guarded Centre for Foreigners in Biała Podlaska, Guarded Centre for Foreigners in Białystok, Guarded Centre for Foreigners in Kętrzyn, Guarded Centre for Foreigners in Lesznowola, Guarded Centre for Foreigners in Krosno Odrzańskie.

<sup>15</sup> Dz.U. 2013 item 1650; hereinafter the Act on Foreigners and AF.

<sup>16</sup> Dz.U. of 2009 No. 189, item 1472 as amended, hereinafter the Act on Granting Protection to Foreigners and AGPF.

ily left the territory of the Republic of Poland within the period specified in the decision on imposing the return obligation, and immediate forced execution of the decision is not possible; (4) a foreigner fails to meet the obligations set out in the ruling on use of the measures referred to in par. 3 of this regulation.<sup>17</sup> Detention for expulsion can be also applied towards a foreigner when any of the above circumstances occur and there is a risk that the foreigner will not comply with the rules applicable in a guarded centre (Art. 399, par. 1 of the Act on Foreigners). A foreigner is placed in a guarded centre or a detention centre for foreigners upon a court ruling (Art. 401, par. 1 of the Act of Foreigners).

The regime in guarded facilities for foreigners is modelled after the military or prison regime and, in combination with the external architecture or fittings inside those centres, is considered oppressive.<sup>18</sup>

A foreigner placed in a guarded centre is obliged — under pain of disciplinary liability (Art. 421, par. 1 FA) to comply with the organization and order regulations governing the stay of the foreigners in a guarded facility or a detention centre for expulsion (Art. 419, par. 1 FA), attached as a schedule to regulation of the Minister of Interior and Administration of August 26, 2004 on conditions for guarded facilities and detention centres for expulsion.<sup>19</sup> According to Art. 3 of this Regulation, a morning and an evening roll-call are carried out in a guarded facility, during which the number of foreigners staying in the centre is established, and according to Art. 4, a foreigner during his/her stay in the guarded facility or detention centre can be supervised with the use of technical devices, and in particular with TV monitoring. Foreigners walk under the supervision of an officer in a designated open-air area (Art. 29, par. 1). Male foreigners are entitled to get haircut at least once per two months, and a warm bath at least once a week (Art. 28, par. 1), and female foreigners — warm water at least once a day and a warm bath twice a week (Art. 28, par. 2). A visiting order is granted by the head of the facility or an officer responsible for operation of the detention centre in consultation with the head

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<sup>17</sup> Poland, as a member of the Schengen area, is obliged to protect EU borders against illegal immigration. Foreigners who reach other EU countries via Poland, under regulations of Dublin II (Regulation of the Council [EC] No. 343/2003 of February 18, 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national) are returned to Poland.

<sup>18</sup> J. BIAŁAS, D. CEGIEŁKA, A. CHRZANOWSKA, M. GÓRCZYŃSKA, W. KLAUS, K. RUSIŁOWICZ, K. SEUBIK, M. TOBIAS, HELSINSKA FUNDACJA PRAW CZŁOWIEKA: *Migracja to nie zbrodnia. Raport z monitoringu strzeżonych ośrodków dla cudzoziemców*. Warszawa 2012, <http://www.hfhr.pl/raport-migracja-to-nie-zbrodnia/#sthash.GkZc3DA1.dpuf> (accessed 1.3.2014).

<sup>19</sup> Dz.U. 2004, No. 190, item 1953.

of the facility, and the visit does not last longer than 60 minutes (Art. 20, par. 1, Art. 21, par. 1).

According to Art. 9 of the above-mentioned regulation on conditions for guarded facilities and detention centres for expulsion, the area of the guarded facility is secured by a protective fence. This fence is made of the external line performed from a full material, not lower than 3 m high, on a concrete foundation reaching at least 0.7 m inside the ground, and ended with inclined at 30°–45° offset arms inside of the centre, 1 to 1.5 m long, with stretched barbed wire, and an internal line made of metal mesh, of not less than 2 m high, ended with inclined at 30°–45° offset arms inside the centre, up to 0.5 m long, with stretched barbed wire. Between the external and the internal line there is a protective belt at least 3 m wide, illuminated with two independent sources of electricity.

Windows in rooms for foreigners are protected with bars, just like entries to individual blocks (Art. 4, par. 1, point 2).

The Act on Foreigners admits application of a measure in the form of placement in a guarded facility also towards minors detained in relation to their illegal stay in Poland. At the same time, detention can be applied both to minors under the care of adults, and to unattended minors.

The situation of minors in proceedings concerning granting a refugee status or auxiliary protection is slightly different. In accordance with Art. 88 par. 3 point 1 of the Act on Granting Protection to Foreigners, unattended minors in the refugee procedure are not placed in guarded facilities for foreigners. Pursuant to the agreement concluded between the Capital City of Warsaw and the Office for Foreigners, unattended minors subject to the refugee procedure are placed in the Children's Home in Warsaw.<sup>20</sup> On the other hand, minors staying under the care of their parents or legal guardians can be, on the basis of a court decision, placed in a guarded centre for foreigners together with other family members. While issuing a decision on placement in a guarded facility for foreigners under Art. 88 of the Act on Granting Protection to Foreigners, the court specifies the term of stay for the period between 30 to 60 days. However, this period may be extended by a decision of the court, for a period not exceeding 6 months (Art. 89, par. 5 AGPF).

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<sup>20</sup> A. GORLACH, M. PRYCYŃSKA, K. PRZYBYŚLAWSKA: *Detencja dzieci cudzoziemskich w Polsce. Raport na temat realizacji międzynarodowych i krajowych standardów dotyczących detencji dzieci cudzoziemskich*. Centrum Pomocy Prawnej im. Haliny Nieć, March 25, 2011, <http://www.pah.org.pl/m/1915/Detencja%20dzieci%20cudzoziemskich%20w%20Polsce.pdf> (accessed 1.3.2014).

Current<sup>21</sup> regulations governing detention of foreigners were introduced after protests that took place in guarded facilities for foreigners in October 2012, during which foreigners questioned the conditions in the facilities, and the relations between them and Border Guard officers and after a wave of criticism which then emerged in media concerning the operating principles of guarded facilities for foreigners.<sup>22</sup> One of the most important changes introduced in the context of those events and related to the detention of foreigners is that a court rules on placing a foreigner in a guarded centre after a hearing with the foreigner (Art. 401, par. 1 FA). Additionally, measures alternative to detention have been introduced (also in case of persons applying for international protection), such as reporting to a competent authority, payment of a security deposit, depositing a travel documents or the need to stay in the place designated (Art. 398, par. 3 FA). It has been forbidden to place unattended minors under 15 staying in Poland in the centre for foreigners, while the court examining the request to place an unattended minor foreigner above the age of 15 is obliged in each case to take into account, in particular, the degree of the minor's physical and mental development, personality traits, the circumstances of the detention and personal conditions in favour of placing a minor foreigner in a guarded centre (Art. 397, par. 2 and 3 FA). A foreigner should be placed in a guarded centre for the shortest possible period — not longer than 3 months, with a possibility of extension only in strictly defined cases to maximum one year (Art. 403, par. 1, 3, 6 FA). Border Guards authorities have been entitled to issue a decision on a return obligation, which facilitates implementation of procedures carried out towards foreigners, and thus shortens the time of stay in a guarded centre needed to carry out expulsion procedure. An obligation has been introduced to provide a common room for a foreigner staying in a guarded centre with a minor under his/her care (414 par. 3 FA) while the court, examining a request to place a foreigner along with a minor

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<sup>21</sup> The Act on Foreigners of December 12, 2013 replaced the Act on Foreigners of June 13, 2003 (Dz. U. of 2011 No. 264, item 1573 as amended). The new act entered into force on May 1, 2014. The Act on Granting Protection to Foreigners was amended for instance by Art. 484 of the Act on Foreigners of 12 December 2013 (Dz.U. 2013 item 1650) and the Act of June 26, 2014 amending the Act on Granting Protection to Foreigners in the Territory of the Republic of Poland and Certain Other Acts (Dz.U. 2014 item 100).

<sup>22</sup> See e.g.: STOWARZYSZENIE NOMADA: "Jesteśmy ludźmi. Strajk głodowy cudzoziemców w ośrodkach strzeżonych w Polsce. Dlaczego nie możemy być obojętni." See: <http://nomada.info.pl/jestesmy-ludzmi-dlaczego-nie-mozemy-byc-obojetni-na-protest-cudzoziemcow-w-osrodkach-strzezonych-w-polsce/> (accessed 1.3.2014); cf. *Protest głodowy w ośrodkach dla uchodźców, a los nielegalnych imigrantów nikogo nie obchodzi*, <http://natemat.pl/36515,protest-glodowy-w-osrodkach-dla-uchodzcow-a-los-nielegalnych-imigrantow-nikogo-nie-obchodzi> (accessed 2.3.2014).

foreigner under his/her custody in a guarded centre shall be guided by the wellbeing of this minor (Art. 401, par. 4 FA). The possibility of free movement of foreigners within the premises of a centre has been introduced, with the exception of the places to which the administration has denied access; access to the Internet in guarded centres has been provided (Art. 415, par. 11 FA); minors staying in a guarded centre were granted the right to participate in teaching and educational activities and in recreational and sports activities (Art. 416, par. 2 FA); and the legality and regularity of placing the foreigners in the detention centres and their stay in those centres was subject to the full supervision of the penitentiary judge (Art. 426, par. 1 FA). The possibility to issue a decision on releasing a foreigner from a guarded centre by the Border Guard authority to which a given centre is subordinated has also been introduced (Art. 406 FA, previously in such situation a decision on release could be issued only by the court upon a motion of the Border Guard authority, which extended the stay of a foreigner in the centre). An additional premise, previously absent in the Act on Foreigners for issuing a decision on release is now the physical and psychological condition of a foreigner that could justify the presumption that a foreigner has experienced violence (Art. 400, point 2 FA).

All of the above changes are unquestionably a shift in a right direction. Nevertheless, it is difficult to state that the legal solutions existing in the territory of the Republic of Poland as regards the detention of minor foreigners comply with the above-mentioned normative standards concerning protection of children's rights, particularly protection from violence. Forcing children whose only "fault" is their illegal stay in Poland to be placed in rooms with bars in windows, behind barbed wire, under constant supervision under conditions resembling prison isolation, constitutes a clear violation of those standards.

Regardless of the foregoing, objections are also raised due to the fact that regulations concerning placement of minors in guarded centres for foreigners and norms governing their stay in those centres are not only unclear and imprecise, but even raise doubts as to their compliance to the legal order applicable in the Republic of Poland.

The currently effective act on foreigners, just like the previous one, does not clearly specify whether in relation to minor foreigners under 17 years of age provisions of the Code of Criminal Procedure<sup>23</sup> should be applied, or — as in case of Polish citizens — the Act on Juvenile Delinquency Proceedings,<sup>24</sup> and therefore whether in cases of minor foreign-

<sup>23</sup> The Code of Criminal Procedure Act of June 6, 1997 (Dz.U. of 1997, No. 89, item 555 as amended), hereinafter CCP.

<sup>24</sup> The Act on juvenile delinquency proceedings of June 26, 1982 (Dz.U. of 1982, No. 35, item 228 as amended), hereinafter JDP.

ers, decision concerning placing, extending the stay or release from the guarded centre should be made in the criminal division or in the family and minors division of the district court. As the practice shows, in most courts, in case of placing minor foreigners staying in the territory of the Republic of Poland together with parents, the decisions concerning placement, extending the stay or release of both adults and children are taken by criminal divisions,<sup>25</sup> although sometimes decisions in the matter are also taken by the family court.<sup>26</sup> Under the Act on Foreigners of 2003, it was observed in the literature<sup>27</sup> that in such a case it is more appropriate for the criminal courts to issue a decision on the basis of regulations of the Code of Criminal Procedure, since the Act on Foreigners does not refer in any place to regulations on juvenile delinquency proceedings, while with reference to detention, it directly states that in the matters not regulated by the act, the provisions of the Code of Criminal Procedure should be applied. This argumentation can be also referred to the Act on Foreigners in the currently effective form, since this act does not refer to regulations of the juvenile delinquency proceedings either, while in Art. 404 it directly states that “The provisions of the Code of Criminal Procedure shall apply to the proceedings on placing a foreigner in a guarded centre, to the detention of foreigners in detention centres, to the extension of the foreigner’s stay in a guarded centre or in a detention centre for foreigners and to the release of a foreigner from a guarded centre or a detention centre for foreigners [...]”

However, the above question is not the only doubt that exists in the matter under analysis. Significant doubts are also raised as to whether in each case, detention of a minor can be appealed against and therefore whether it is subject to control by a court of higher instance. It may seem that a question formulated in this way should be answered positively, since the right to appeal against the decision to place a foreigner in a guarded centre is provided in Art. 401, par. 6 of the Act of Foreigners. However, the point is that although in case of an attended minor foreigner the right to appeal can be exercised on his/her behalf by his/her guardians, in case

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<sup>25</sup> Thus, for instance: decision of the District Court for Kraków Krowdrza in Kraków, IX Criminal Division of April 14, 2010, file ref. No. IX Ko 41/10/K; decision of the District Court in Kętrzyn, II Criminal Division, of April 30, 2012, file ref. No. II Ko 427/12; decision of the District Court Gdańsk-Północ in Gdańsk, XI Criminal Division of December 2, 2010, file ref. No. XI Ko 163/10. All the above data are quoted after: T.A. DĘBOWCZYK, J. OLESZKOWICZ: “Praktyka sądowa stosowania detencji cudzoziemców w Polsce.” In: *Stosowanie detencji wobec cudzoziemców...*, p. 26, footnote 57.

<sup>26</sup> And so, for instance, a decision of the District Court in Chełm, III Family and Minor Division, dated 14 January 2011, file ref. No. III Nsm 8/11. Quoted after: T.A. DĘBOWCZYK, J. OLESZKOWICZ: *Praktyka sądowa...*, see above, p. 26, footnote 57.

<sup>27</sup> *Ibidem*, p. 26.

of an unattended minor, it is difficult to establish who could do it. The Act on Foreigners does not regulate this issue. The rights of an unattended minor foreigner to appeal against a decision concerning placement in a guarded centre for foreigners are not provided *expressis verbis* in the provisions of the Code of Criminal Procedure Although Art. 459 § 3 CCP provides that parties, as well as the person whom the decision directly concerns, are entitled to appeal against it, considering the general rules of the criminal procedure it should be claimed that it refers to persons over 17. Pursuant to Art. 10 § 1 of the Penal Code, whoever commits a prohibited act after having attained the age of 17 years (except juveniles, who after attaining the age of 15 committed acts specified in Art. 10 § 2 of the Penal Code) shall be liable under the provision of the Penal Code, while under Art. 52 § 2 of the Code of Criminal Procedure if the aggrieved person is a minor, his/her rights shall be exercised by his/her statutory representative or a person who has custody of the aggrieved person. Therefore, although an unattended minor foreigner who has attained the age of 17 may appeal against the decision concerning detention on his/her, a minor foreigner who has not attained this age is not entitled to this right. At the same time, it should be mentioned that this principle concerns not only an appeal against the decision of the district court for placement in the guarded centre for foreigners, but it should also be referred to the decision on application other measures alternative to detention, including decision of the Border Guard authority issued in this matter (Art. 398 § 4 FA).

In the light of the above remarks, it is impossible not to have doubts whether the principle expressed in Art. 72 of the Constitution, stating that a child deprived of parental care shall have the right to care and assistance provided by public authorities, is actually applied towards minor foreigners staying in the territory of the Republic of Poland and whether the normative solutions adopted in the Act on Foreigners with reference to unattended minor foreigners guarantee maintenance of one of the most fundamental rights, that is, the right to a trial. In this context, it should be recalled that Art 45, par. 1 of the Constitution explicitly states that “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.” This principle is supplemented by Art. 77, par. 2 of the Constitution providing the prohibition to bar any person the recourse to the courts in pursuit of claims alleging infringement of freedoms or rights and Art. 78, under which each party has the right to appeal against judgments and decisions made in the first instance. The right to a trial expresses the idea of ensuring every person the right to present their case before state authorities — courts — providing a guarantee of making just,

impartial and correct decisions. This is a universal principle of an international character. Pursuant to Art. 6, par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” At the same time it should be emphasized that in case *Enea vs. the Republic of Italy*<sup>28</sup> ECHR clearly stated that in any case when individual civil rights are restricted, there should be a possibility to challenge in judicial proceedings, and the court should issue a decision taking into account the nature of the restriction and its potential consequences.

It is difficult to axiologically assess the differences concerning the actual possibility to appeal against a decision concerning personal rights of minors staying under the custody of a family or guardians in comparison to unattended minors. It is also difficult to find the compatibility with the principle of equality before the law expressed in Art. 32 of the Constitution.

Apart from doubts indicated above, the Act on Foreigners does not either provide an answer to the question whether minor foreigners staying in guarded centres (attended or unattended) are subject to the obligation to comply with the rules of stay under pain of disciplinary liability specified in Art. 421 of this Act. Therefore, if the provisions of the Executive Penal Code are applied in proceedings for measuring out a disciplinary penalty — as provided in Art. 423 of the Act on Foreigners — which, as a matter of principle, does not apply to person under 17 years of age, then the above regulation seems to indicate that even if minor foreigners are obliged to comply with the rules of staying in the centres, as specified in Art. 419 AF and 420 AF, it is without disciplinary consequences referred to in Art. 421 AF.

Finally, when analysing the situation of minor foreigners, it should be pointed out that pursuant to Art. 397, par. 1, point 2 FA in case of detention of an unattended minor foreigner staying within the territory of the Republic of Poland, the Border Guard requests a court to place it in a care and education centre or in a guarded centre. The Act on Foreigners does not provide any criteria which would specify in which cases the Border Guard should request the court to place a minor in a care and education centre and in which criteria for a guarded centre. Although

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<sup>28</sup> Application No. 74912/01, decision of the Grand Chamber of September 17, 2009. Review of the decisions of the European Court of Human Rights <http://ms.gov.pl/pl/orzeczenia-etpcz/download,503.0.html> (accessed 15.3.2014). More on this subject in: M.A. Nowicki: *Wokół Konwencji Europejskiej: Komentarz do Europejskiej Konwencji Praw Człowieka*. Warszawa 2013, pp. 518—527.

Art. 397, par. 3 AF provides that an unattended minor foreigner may be placed in a guarded facility if he/she has reached the age of 15, it does not follow from this provision that each unattended minor foreigner who has reached the age of 15 has to be placed in a guarded facility. This, in turn, means that the decision concerning requesting a competent court to place a minor (above 15 years of age) in a specific facility is exclusively vested in the authority that has detained the minor.

The above remarks therefore lead to the conclusion that although the law in Poland nominally protects all children from violence, in case of minor foreigners staying in the territory of the Republic of Poland and subject to detention, this protection is highly unsatisfactory. The Polish legal order still lacks appropriate normative solutions which could, on one hand secure migration procedures, and on the other, ensure actual compliance with national and international standards concerning protection from maltreatment of all children, including children who are illegally staying in Poland.

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MAŁGORZATA TOMKIEWICZ

## Legal Protection of the Child from Violence and the Detention of Minor Foreigners in Poland

### Summary

Legal protection of the child in its normative dimension, including the protection of minors against violence, is one of the fundamental principles of contemporary legal systems, which is rooted in numerous acts of Polish and international jurisprudence. The abundance of regulations in this scope indicates that legal system in Poland shields minors against violence comprehensively and — as it seems — universally. However, there arises a question whether the law protects to the same extent minor foreigner residing in the territory of the Republic of Poland, particularly those who are subjected to the procedure of placing them in guarded camps for foreigners; which is followed by the question: Are the standards of the said protection identical in the case of minors who are subjected to detention along with their family members, and in the case of minors who are unattended?

By means of the analysis of the legal solutions currently in force, the present article tries to answer the above questions.

MAŁGORZATA TOMKIEWICZ

## La protection juridique de l'enfant contre la violence face à la détention des étrangers mineurs en Pologne

### Résumé

La protection des droits de l'enfant dans la dimension normative, y inclus la protection des mineurs contre la violence, est l'un des principes fondamentaux des systèmes juridiques contemporains, enraciné dans de nombreux actes de l'ordre juridique national et international. La multitude des réglementations concernant le thème analysé montre que le droit en Pologne protège les mineurs contre la violence d'une façon qui se caractérise par de multiples aspects et qui semble être universelle. Cependant, on peut se poser la question si ce droit protège contre la violence au même degré les étrangers mineurs séjournant sur le territoire de la République de Pologne, surtout ceux qui — conformément à la procédure — sont placés dans des centres d'accueil pour demandeurs d'asile. Les standards de cette protection sont-ils les mêmes pour les mineurs placés en détention avec les membres de leurs familles ou avec des tuteurs et pour ceux qui sont seuls ?

L'auteur de l'article essaie de répondre à ces questions tout en analysant des mesures juridiques en vigueur.

**Mots clés :** mineurs, violence, protection juridique, étranger, détention

MAŁGORZATA TOMKIEWICZ

## La tutela giuridica del bambino dalla violenza e la reclusione degli stranieri minorenni in Polonia

### Sommario

La tutela dei diritti del bambino nella dimensione normativa, tra cui la tutela delle persone minorenni dalla violenza, è uno dei principi fondamentali dei sistemi giuridici contemporanei, radicato nei numerosi atti dell'ordine giuridico nazionale e internazionale. La molteplicità delle regolamentazioni che esistono nella materia analizzata indica che il diritto in Polonia tutela i minorenni dalla violenza sotto vari aspetti e — a quanto pare — in modo generale. Tuttavia nasce la domanda: il diritto tutela in grado uguale dalla violenza gli stranieri minorenni che soggiornano sul territorio della Repubblica Polacca, in particolare quelli che sono soggetti alla procedura di sistemazione nei centri sorvegliati per gli stranieri? Gli standard di tale tutela sono uguali nel caso dei minorenni che sono soggetti a reclusione insieme ai membri della famiglia o ai tutori come pure nei confronti di quelli che sono privi di assistenza?

L'articolo, attraverso l'analisi delle soluzioni giuridiche vigenti, intraprende un tentativo di risposta a tali quesiti.

**Parole chiave:** minorenni, violenza, tutela giuridica, straniero, detenzione