

# DETENTION OF ASYLUM SEEKERS IN POLAND - CURRENT TRENDS

HNLAC FOCUS REPORT - FEBRUARY 2018



This brief Focus Report is aimed at providing key statistics and explaining the relevant background concerning the application of administrative detention in relation to asylum seekers.

## GENERAL BACKGROUND

### Legal grounds for applying detention

According to the Polish **2013 Act on Foreigners**, **administrative detention can only be ordered by a District Court** (art. 401 sec. 2) following an application from the Border Guard.

A foreigner applying for refugee status or other forms of protection in Poland may be placed in detention (in the guarded centre or in an arrest for foreigners) only in exceptional situations, stipulated exhaustively by the **2003 Act on Protection**.

### According to article 87 sec. 1 detention is therefore permissible only if:

- ▶ when it is necessary to establish his identity;
- ▶ in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when **there is a high risk of absconding**;
- ▶ if he is in pre-removal detention in accordance with the EU Returns Directive and had previously the opportunity to apply for asylum and it can be substantiated that he is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;
- ▶ for state security or public order reasons; or
- ▶ according to the Dublin Regulation, in case where there is a serious risk of absconding and an immediate transfer is not feasible.

### The risk of absconding is determined to exist inter alia if:

- ▶ the applicant for international protection does not have his identity documents during the making of the asylum/protection application;
- ▶ in case of an unlawful crossing or attempted crossing of the state's border, unless the applicant arrived directly from a territory where his life or freedom was threatened and provided viable reasons for his irregular entry and applied immediately for asylum;
- ▶ in case of entry into Poland in breach of a previously issued entry ban

Moreover, **generally applicable grounds for migration detention are specified in the Act on Foreigners**. According to article 398 (1), a foreigner can be detained if:

- ▶ it is probable that a return decision without a possibility of voluntary departure period will be issued;
- ▶ a return decision without a setting a deadline for voluntary departure has been issued;
- ▶ the non-citizen has not left Poland within the voluntary departure period and his immediate deportation is not feasible;
- ▶ it is necessary to secure the carrying out of a Dublin III transfer to another EU member state and there is a high risk of absconding and an immediate transfer is not feasible;
- ▶ the foreigner is not complying with the previously ordered alternative measures.

### Alternative measures

Detention is to be applied only a measure of last resort. When deciding on a detention order, the court is obliged to consider the application of alternative measures first. The 2013 Act on Foreigners lists four such measures (article 398):

- 1) Regular reporting to the Border Guard
- 2) Bail
- 3) Residing in a specified place of residence
- 4) Surrendering of travel documents

The 2003 Act on Protection (article 88) provides for the same forms of non-custodial measures in relation to persons in asylum/protection procedure, except for the last option which is not mentioned (surrendering of travel documents).

## Detention facilities

There are two types of immigration detention facilities in Poland:

- ▶ **Guarded centers for foreigners** (currently there are 6 in operation with a total capacity of 575): Biala Podlaska (Nadbuzanski Border Guard Division), Białystok (Podlaski Border Guard Division), Ketrzyn (Warminsko-Mazurski Border Guard Division), Krosno Odrzanskie (Nadodrzenski Border Guard Division), Lesznowola (Nadwislanski Border Guard Division) and Przemysl (Bieszczadzki Border Guard Division)
- ▶ **Arrests for foreigners** (currently there are 2 in operation with a total capacity of 48. They are in fact separated parts of the guarder center with a stricter regime): Przemysł and Białystok.

## Length of detention

Pursuant to the Act on Foreigners the overall length of detention may not exceed 12 months but should the foreigner ask for asylum, the 6 months period of the duration of asylum proceedings is not counted against the maximum 12 month census. Moreover in case the foreigner lodges a claim for judicial review of his return order to the administrative court, his stay in detention may be extended up to 18 months.



## THE SCALE OF DETENTION IN NUMBERS

In 2013, a total of **1755 foreigners** were placed in guarded centers. After the new law came into force in 2014, the number decreased by one quarter (**1322 foreigners**). The year 2015 was another to witness a decrease in the number of foreigners placed in detention (**1051**). Simultaneously, the Border Guard has started to resort to alternatives to detention provided for in the Act on foreigners and the Act on granting protection since 1 May 2014. The two major measures safeguarding the course of the procedure include the foreigner's obligation to reside in the place designated in the decision and to report to the Border Guard authority. The alternative of placing the travel document in the deposit (used only with regard to foreigners not applying for refugee status) or paying a security deposit are used extremely rarely.

According to the statistics provided by the Border Guard a total of **1201 foreigners** were newly placed in detention throughout 2016, while in relation to further **432**, detention period was extended by the court. During the same period **988** persons were released from detention.

In the first half of 2017 **664 foreigners** were newly placed in detention, while in relation to further **426**, detention period was extended by the court. During the same period **656** persons were released from detention.

Interesting observations may be made upon a comparison of the status of foreigners who are in detention. The Border Guard data for the overall population of detainees in guarder centers and arrest for foreigners as of 31st December 2016 and 30 June 2017 indicate that a considerably high percentage of the detainees were asylum seekers.

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ON 31 DECEMBER 2016 **59% OF THOSE IN DETENTION HAD PENDING ASYLUM CASES** (196 OUT OF 333 PERSONS) AND ON 30 JUNE 2017 **ASYLUM SEEKERS ACCOUNTED FOR 64% OF ALL THOSE IN DETENTION** (179 OUT OF 280).

## ACCESS TO ASYLUM PROCEDURE WHILE IN DETENTION

Polish law does not impose any limitations concerning the possibility of filing an application for asylum/protection. **Foreigners placed in detention may therefore submit such applications at any time.**

A detained foreign national can express his will to apply for asylum either verbally or in writing in the presence of BG officers, such as social worker or officers on duty. These persons are obliged to notify to the Head of the Detention Center that a foreign national wishes to apply for asylum. In practice, a foreigner who wishes to apply for protection while in detention is asked to formulate his intention in writing and submit this **written statement into the internal mailing box.** Upon receipt of such a statement the BG make the necessary arrangements (including ensuring a proper interpreter) for the formal asylum application.

The law provides for a **48 hour time limit** in which the Office for Foreigners should receive an asylum application but, in reality, it is sometimes handled with delay. The average time period from the moment when a foreign national expresses his will to seek asylum until the application for asylum recorded is few days. This delay is usually associated with difficulties in providing the interpreter.

In all detention facilities, **regular legal assistance is provided by HNLAC and other Polish NGOs.** It is, however not sufficient, because majority of these organizations recently either **suspended or downscaled their legal aid** projects due to the indefinite suspension of the distribution of EU AMIF funds in Poland.



## ALTERNATIVE MEASURES

The introduction of alternative measures into Polish legal framework undoubtedly contributed to a decrease of the number of detention orders issued. Nevertheless practice shows that **their use is still rather restrained.**

In **2016** alternative measures were applied to a total of **1424 foreigners.** The most frequently used measure was the **obligation of restricted residence (1293) and reporting obligation (1208).**

During the **first half of 2017** alternative measures were applied to a total of **1322 foreigners,** the most frequently used measures being the **reporting obligation (1291) and the restricted residence (1110).**



## DETENTION ORDERS IN RELATION TO DUBLIN PROCEEDINGS

As a matter of general principle, a foreigner who requests granting the refugee status at the border, and who did not enter or did not try to enter illegally the territory of the European Union and did not present false documents and in case there is no Schengen ban against him, is not detained. The exhaustive list of grounds for applying detention in relation to asylum seekers is specified in law.

A heightened probability of ordering detention concerns Dublin returnees. Detention upon a Dublin transfer is not automatic, and there are no additional legal grounds for detention that would be specific to Dublin procedure. **Illegal crossing of the border during pending asylum process is however treated as a factor indicating the risk of absconding** and thus often served to justify detention.

In 2016, **603 foreigners** applying for granting international protection were apprehended and placed in **guarded centers or arrests for foreigners**, which is twofold as compared to 2015 (then **256 people** were apprehended and detained). Statistics for 2017 have not been received yet, but the numbers for previous years suggest a worrying general tendency of more frequent instances of detention in relation to asylum seekers. Court practice indicates a consistently restrained application of alternative measures instead of detention in such cases, especially vis-à-vis asylum seekers in relation to whom the Dublin III procedure has been enforced.



## VULNERABLE PERSONS IN DETENTION

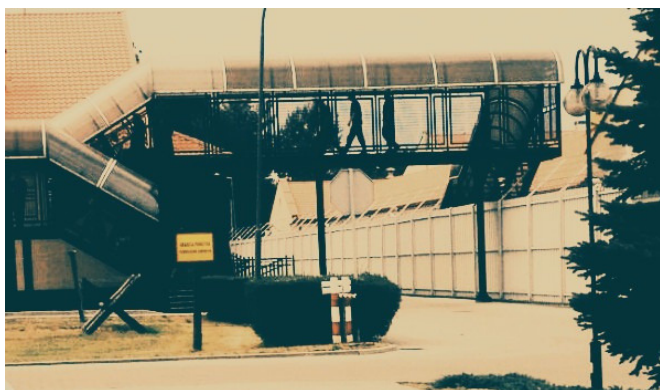
**The 2003 Act on Protection** does not regulate the methods of identifying vulnerable persons (the exception is determination of age of a minor in case of doubt). The Act only states that in order to assess whether a person is vulnerable the Head of the Office for Foreigners can carry out **medical or psychological tests** which are financed by the state (Article 68 sec. 3). Such tests can be also provided on applicant's request but then at his expense (Article 68 sec. 4). The main problem in this matter is that the law does not provide for any formalized procedure which would help to identify vulnerable persons among the foreigners applying for protection/refugee status in Poland.

A uniform, adequately detailed identification procedure, which would be employed by the staff of the Office for Foreigners, officers of the Border Guard as well as judges deciding in foreigner detention cases, should be specified by the law. Such a procedure should clearly state who should conduct the identification process and take into consideration the crucial role of all of the three aforementioned institutions. Without such a clear and formalized procedure vulnerable asylum seekers may still end up in detention despite the general statutory ban on placing victims of violence and trauma in guarded centers (Article 400 of the 2013 Act on Foreigners and Article 88 of the 2003 Act on Protection).

Currently, the Border Guard identifies vulnerable foreigners by using an internal document:

**Algorithm of Border Guard conduct in cases of vulnerable foreigners.** In line with the section 1 of the Algorithm, during the medical examination held after placing a foreigner in the guarded center an interview should be conducted in order to verify if he qualifies as a vulnerable person. This implies that at this stage, **the identification is performed primarily by the medical staff** in the guarded centers. Neither the medical doctors nor nurses receive a corresponding specialized training in this regard, however.

One also has to underline the key role of courts which decide upon the foreigner's detention and its extension. According to the research of court detention orders conducted by HNLAC within the project Reducing the scope of detention of vulnerable foreigners seeking protection in Poland (2012-2013), when rendering a decision on the use of detention, **courts rely almost exclusively on the information provided by Border Guards or the Office for Foreigners.** If the latter agencies did not qualify the foreigner as vulnerable, in most cases the court will not do so either. General and partially vague nature of the legal provisions currently in force as well as the lack of knowledge hinder the courts from a more detailed verification of the foreigner's personal situation with regard to his special needs and vulnerabilities. As a result, **the identification of vulnerable asylum seekers in detention is not full** and instances when such persons are not properly identified are recorded.



## MINORS IN DETENTION

According to the 2003 Act on Protection, **unaccompanied minor asylum seekers may not be detained** (article 88(a)(3)(3)). There is no such a general statutory guarantee against detention in relation to unaccompanied minors who are not in the process of seeking asylum. The only applicable limitation is the age census: only unaccompanied **minors who have turned 15 may be detained** (397 sec 3). The court decides whether the child shall be placed in a care-educational centre or a detention centre and unaccompanied **minors younger than 15 are always to be placed in a foster care facility or at a care-educational shelter.** Children accompanied by their parents (or other statutory guardians) may be detained according to general rules. Unaccompanied minors when placed in detention are to be separated from adults

At present most unaccompanied minors detained in Poland are placed in the guarded center in **Kętrzyn** which has a special section adjusted to housing children including recreational rooms and classrooms. Families with children are usually placed in **Biała Podlaska, Kętrzyn or in Przemyśl**. The guarded center in Przemyśl is taking in only children who are not yet in the schooling age, as the center does not offer a suitable schooling framework that would fulfill the general school curricula.

Polish law lays down an identification mechanism for unaccompanied children in a case when there are doubts concerning the declared minor age. In such situations medical examinations are carried out with a view of determining the biological age. In case of a lack of consent for carrying out the medical age assessment, the alleged minor is considered an adult.

## AVAILABILITY OF LEGAL AID IN DETENTION

A 2015 amendment to the Act on granting protection established a **state sponsored legal aid system** directed to asylum seekers. This system is formally operational since January 2016 but in practice it is still not full-fledged and it remains to be seen whether it can effectively ensure assistance to all those in need.

According to these new provisions **asylum seekers are entitled to legal assistance and advice** at the administrative level from NGO legal counsels and from lawyers hired by state. At the judiciary level the courts usually accept requests for free legal assistance and ex officio lawyers are appointed by the Bar Associations.



### SOURCES:

A. Kosińska, T. Sieniow, *Applying Alternatives to Detention of Foreigners in Poland (2014-2015)*

<https://udsc.gov.pl/en/statystyki/raporty-okresowe/raport-roczny-ochrona-miedzynarodowa/2016-2/>

The report *Vulnerable Foreigners in Poland: Identification, Detention and Judicial Practice. Analysis 2012-2013* is available on HNLAC's website:

[https://docs.wixstatic.com/ugd/1fb8cf\\_ced2d25ba62b47e1a665a5e42544f176.pdf](https://docs.wixstatic.com/ugd/1fb8cf_ced2d25ba62b47e1a665a5e42544f176.pdf)

As this system is limited to the appeal stage specialized Polish legal-providing NGOs are of the opinion that their services are still necessary. In practice a prevailing majority of asylum seekers prefers to turn to NGO lawyers rather than corporate lawyers who usually lack adequate training in the field of refugee law. Importantly, the state sponsored legal aid does not include legal assistance in challenging the detention orders or formulating motions for release.

### The overall accessibility of free legal assistance in Poland has noticeably decreased in the course of 2017.

The number of NGO-based lawyers rendering free legal assistance to asylum seekers has dropped, as has the number of visits to detention centers. These limitations are the direct effect of the indefinite suspension of distribution of the AMIF funds by the Polish government and the ensuing dire financial situation of many refugee-assisting NGOs in Poland.

### The Halina Nieć Legal Aid Center (HNLAC)

is a non-profit non-governmental organization established in 2002 in Kraków and UNHCR's implementing partner in Poland. HNLAC's main objective is to protect human rights by providing free legal aid to persons at risk of social exclusion and discrimination, including the poor, victims of domestic violence, foreigners, asylum seekers and refugees.

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