

# VULNERABLE ASYLUM SEEKERS IN POLAND

HNLAC FOCUS REPORT - NOVEMBER 2017

**This brief Focus Report is aimed at providing analysis of identification of vulnerable persons applying for refugee status in Poland in the context of detention.**



## GENERAL BACKGROUND

According to the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) *member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied persons such as minors,*

*unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological,*

physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive (Article 21). Special attention is paid to the victims of torture and violence, member states are obliged to ensure them necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care, as well as ensure that the persons working with them had received appropriate training (Article 25).

The Polish Act on Granting Protection to Foreigners on the Territory of the Republic of Poland of 13 June 2003 (Act on Protection) introduces a catalog of *persons in need of special treatment* (article 68), which is very similar to that from the Directive. It includes: minors, disabled people, elderly people, pregnant women, single parents, victims of human trafficking, persons with serious illness, persons with mental disorders, persons who have been subjected to torture and victims of psychological, physical and sexual violence, including violence based on gender, sexual orientation and gender identity. Additionally, the 2003 Act on Protection allows to consider other asylum seekers, not qualified as members as the explicitly enumerated categories as *persons in need of special treatment*, if their individual circumstances and their specific life situation justifies such a qualification.

**Under the Act, persons recognized as vulnerable undergo a special refugee procedure in which the activities are conducted:**

- ▶ in conditions that ensure freedom of speech, in a manner adjusted to the psychophysical state of the applicant,
- ▶ at term adjusted to his physical and psychological state, having regard to the schedule of medical care being provided to the applicant,
- ▶ at the applicant's place of residence when this is justified by his health condition,
- ▶ if necessary with the assistance of a psychologist, a doctor or an interpreter.



Moreover, upon the applicant's justified request these activities are performed by a person of the same sex and with the assistance of a psychologist, a doctor or an interpreter of the sex, as indicated by the applicant.

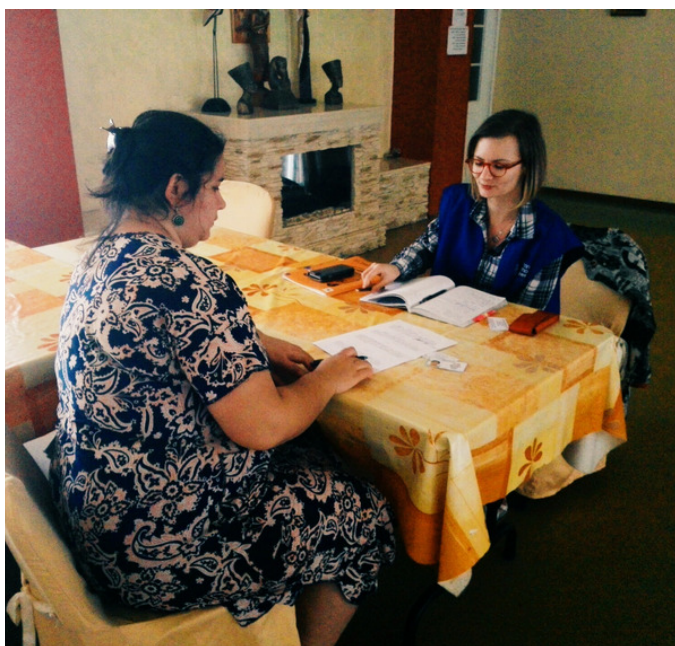
Special provisions regulate the situation of unaccompanied minors.

Whenever an unaccompanied minor submits an application for granting protection/refugee status, the agency receiving the application – **the Border Guard has a statutory obligation to immediately apply to the court for:**

- ▶ appointment of a legal guardian who shall represent a minor in refugee status proceedings and/or other proceedings (Dublin, voluntary return, social care),
- ▶ placement of a minor in a foster care. An unaccompanied minor is delivered to the foster care institution by the Border Guard.



The law lays down rules of a special procedure for interviewing unaccompanied minors. It states that the refugee status interview should be conducted in a language understood by the minor, in a manner appropriate for his age, maturity and mental development level and should take into consideration the fact that as a child the minor might have limited knowledge about the situation in the country of his origin. Before the interview, the Head of the Office for Foreigners instructs the minor on factual or legal circumstances which can impact the outcome of the proceedings and informs the minor about the possibility of requesting a presence of an adult of choice during the interview. The chosen person is present at the interview unless their presence hinders the proceedings. Other persons present at the interview are: minor's guardian, informed by the Head of the Office for Foreigners, who can ask questions and submit remarks, as well as a psychologist or an educational psychologist who prepares a report on the minor's psycho-physical state. The legislation also describes the qualifications of a person undertaking activities in refugee status proceedings involving unaccompanied minors.



## IDENTIFICATION OF VULNERABLE PERSONS IN THE CONTEXT OF 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. In 2017 there was an introductory training on the Istanbul Protocol provided to Border Guard representatives by UNHCR but further, regular training is called for.

According to the information provided by the Head of the Health Service in the guarded center in Krosno Odrzańskie, the medical staff were not trained nor they were acquainted with the *Istanbul Protocol - Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. What is more, when the Border Guard launched a tender for medical services, it did not include any prerequisite that the medical staff were trained in identification of victims of torture and violence because the law does not require it. The Head of the Health Service also mentioned that they do not use the *Algorithm of Border Guard conduct in cases of vulnerable foreigners*. Therefore, all the activities carried out by the medical staff towards foreigners result from their general medical knowledge, experience, medical ethics and treatment methods commonly used. In this context it should be pointed out that in recent years the doctors and psychologists have not identified any victims of tortures among foreigners placed in guarded center in Krosno Odrzańskie.

In the guarded center in Kętrzyn the resident doctor has been trained by the International Humanitarian Initiative Foundation in terms of identification of victims of tortures and violence as well as use of the *Istanbul Protocol*, but in practice he does not carry out the identification of victims of tortures and violence during the initial medical examination after placing the foreigner in detention. Moreover, it is not a required standard to study all the medical documentation of the

foreigners at the first examination in order to identify them as victims of torture or other vulnerable persons.

Section 2 of the *Algorithm* provides that the social worker in the guarded center is obliged to carry out an initial interview with the foreigner, especially in order to identify him as a vulnerable person. According to the information provided by the Border Guard during the monitoring visit held by the HNLAC in the Biała Podlaska guarder center if at the initial interview held upon the foreigner's placement in the guarded center, he declares that he is a victim of violence or suffering from trauma or if there is any suspicion that he is a victim of violence or suffers from trauma, the foreigner is put under observation of psychologists, including an external psychologist (who is not member of the center's staff). If the observation confirms that the foreigner is a victim of violence he is qualified as a vulnerable person and the staff of the guarder center proceeds to carry out a concrete diagnosis. However, the HNLAC's lawyers repeatedly assisted vulnerable asylum seekers who initially were not identified as vulnerable persons and they were identified and released from detention because of their special situation only after the intervention of the NGO lawyer.



Section 5 of the *Algorithm* sets forth that after the identification of circumstances against detention, **further observation and verification activities are carried out by the specialist: doctor or psychologist, which aim to ascertain that:**

- ▶ the foreigner is not a victim of violence, therefore further stay in detention will not constitute a threat to his/her life or health;
- ▶ the foreigner was subjected to violence, but his/her psychophysical state does not require implementation of the therapy, and further stay in detention will not constitute a threat to his/her life or health;
- ▶ the foreigner was subjected to violence and his/her psychophysical state requires a therapy which can be however implemented in detention conditions;
- ▶ the foreigner was subjected to violence and his/her psychophysical state requires a therapy which can be implemented in an institution outside the guarded center.



In the first 3 cases the foreigner is not released from detention. In line with the procedure applied by the Border Guard, a decision on release is issued not before the foreigner is provided with medical certificate setting forth that further stay in detention will constitute a threat to his life or health.

This section should be criticized in entirety. First of all, it is incomprehensible why after identification of circumstances against detention further activities are carried out instead of releasing a victim of violence from detention, as provided by the law. Furthermore, the vulnerable foreigners should be released from detention not only after their state of health requires the treatment in the hospital (point 4). If the foreigner was identified as a person subjected to violence, his further stay in detention, and thereby deprivation of liberty, may lead to deterioration of his physical and mental health. Moreover, a determination that detention may constitute a threat to the life or health of the foreigner is a process which requires time, qualifications and tools taking into account migration and cultural context. The *Algorithm* does not provide such tools nor does it require that specialists have adequate knowledge and were trained in terms of identification of victims of tortures.

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.

## AVAILABILITY OF LEGAL AID IN DETENTION

The availability of free of charge, specialized legal aid is especially important in case of vulnerable persons seeking protection in Poland.

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:

*Ombudsman's letter concerning situation of vulnerable foreigners in detention addressed to Commander in Chief of the Polish Border Guard (30 June 2017, sygn. KMP.572.4.2016.AI), available on:*  
<https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Komendanta%20G%C5%82%C3%B3wnego%20Stra%C5%BCy%20Granicznej%20w%20sprawie%20identyfikacji%20ofiar%20tortur.pdf>

*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.

For more information, please visit  
[www.pomocprawna.org](http://www.pomocprawna.org)



[facebook.com/pomocprawna.org](https://facebook.com/pomocprawna.org)



[twitter.com/CPPHN](https://twitter.com/CPPHN)