S towarzyszenie Association I nterwencji For Legal P rawnej Intervention

LEGAL SITUATION OF THIRD COUNTRY NATIONALS FROM UKRAINE- DETENTION IN POLISH LAW

POSSIBILITIES FOR REGURALIZING STAY IN POLAND FOR TNC'S IN DETENTION

► INTERNATIONAL PROTECTION

HUMANITARIAN STAY – (art. 348 of Act on Foreigners/ Ustawa o cudzoziemcach z dnia 12 grudnia 2013 r.) granted in a course of return (deportation) procedure if:

I. In the destination country, a person would be at **risk of violation of a right to life, liberty and freedom, fair trial, or could be subjected to torture or inhumane and degrading treatment or punishment, or could be forced to labour-** as understood by The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)

POSSIBILITIES FOR REGURALIZING FOR TNC'S IN DETENTION

II. If the obligation to return would breach person's **right to family and private life;**

III. If the deportation would breach **children's rights** as understood by The Convention on the rights of the children;

Basis:

1. In return procedure- Act on Foreigners (Ustawa o cudzoziemcach z dnia 12 grudnia 2013 r.)

2. In international protection procedure- Act on granting protection to foreigners within the territory of the Republic of Poland (Ustawa o udzielaniu ochrony cudzoziemcom na terytorium RP z dnia 13 czerwca 2003 r.)

Art. 87 of the Act on granting protection to foreigners within the territory of the Republic of Poland is a transposition of the art. 8 of Directive 2013/33/UE of 26 June 2013 laying down standards for the reception of applicants for international protection.

Applicant can be placed in detention:

(a) to determine or verify person 's identity or nationality;

(b) 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 significant risk of absconding** of the applicant;

(c) **to secure issuance or execution of the return decision** when this procedure is pending or the decision has been issued, and there is a justified presumption that the application was launched with the sole purpose of delaying the issuance or preventing the execution of the decision;

(e) when protection of national security or public order so requires;

(f) in accordance with Article 28 of Regulation (EU) No 604/2013 (Dublin III) when there is a significant risk of absconding and immediate transfer is not possible.

Applicant can be released from detention based on decision of The Office for Foreigners when there is high possibility of granting international protection.

Art. 398a of The Act on Foreigners is a transposition of the art. 15 DIRECTIVE 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals.

A foreigner can be placed in detention:

- (a) If there is a **probability of issuance the deportation decision without a period of voluntary return** because it is required for reasons of state defence or security or the protection of public safety and order, or this kind of decision has be issued already, and;
- (b) there is a need to secure the transfer of a foreigner to a third country on the basis of an international agreement on the transfer and admission of persons, and its immediate transfer to that country is not possible;

Or if the circumstances described in art. 398 of The Act on Foreigners occurs and the alternative measures described there are not sufficient/cannot be applied. These circumstances are:

- (a) When it is probable that a decision obliging the foreigner to return will be issued without a period of voluntary return because of risk of absconding or this kind of decision has been issued;
- (b) Person concerned did not leave the country within a period of the voluntary return and the immediate deportation is not possible;
- (c) There is a need to secure the transfer of a foreigner in accordance with Article 28 of Regulation (EU) No 604/2013 (Dublin III Regulation) when there is a significant risk of absconding and immediate transfer is not possible
- (d) There is a need to secure the transfer to another Member State of the European Union, a member state of the European Free Trade Association (EFTA) - parties to the agreement on the European Economic Area or the Swiss Confederation on the basis of an international agreement on the transfer and reception of persons, and immediate transfer to that country is not possible.

Alternative measures:

- 1. Regular reporting in the Border Guard facility
- 2. Financial deposit (not less then twice the minimal amount of monthly wage)
- 3. Deposit of travel document
- 4. Leaving in a designated place

DETENTION IN THE POLISH LAW- RISK OF ABSCONDING

In the international protection procedure:

- **1.** The applicant does not posses identity confirmation document when applying for international protection;
- 2. Illegal border crossing- except for the situation when a person comes directly form the territory where his/her life or freedom where in danger or where he/she could face prosecution and the application was launched immediately after border crossing;
- 3. Person concerned entered Poland during the period of the **entry ban** enlisted in the record of foreigners whose stay in the territory of the Republic of Poland is undesirable, or the Schengen Information System for the purposes of refusing entry.

DETENTION IN THE POLISH LAW- RISK OF ABSCONDING

In the return procedure:

- 1. Declaration that the person concerned would not comply with the obligations resulting from return decision;
- 2. Lack of documents confirming identity;
- 3. Illegal border crossing or attempt of it;
- 4. Person concerned entered Poland during the period of the entry ban enlisted in the evidence of foreigners whose stay in the territory of the Republic of Poland is undesirable, or the Schengen Information System for the purposes of refusing entry.

DETENTION- when a person cannot be placed in detention

- 1. The psychophysical condition of a foreigner may justify the presumption that **the foreigner has been subjected to violence** (art. 400 p. 2 of The Foreigners Act, art. 88a par. 3 p. 2 of Act on granting protection to foreigners within the territory of the RP);
- 2. Detention could pose **a threat to the foreigner's life or health** (art. 400 p. 1 of the Act on Foreigners, art. 88a par. 3 p. 1 of the Act on granting protection);
- **3.** Unaccompanied minor or a disabled person (art. 88a par. 3 p. 3 of the Act on granting protection) unaccompanied minor over 15 can be detained in return procedure;
- 4. If the deadlines in the Dublin Procedure are not kept (art. 28 of The Dublin III Regulation).

Detention of children in general should be a measure of last sort and best interest of the child should be always considered as a priority! (jurisprudence).

DETENTION- when a person cannot be placed in detention

Person concerned should be released by the Border Guard decision if:

- 1. Reasons for detention cease to exist;
- 2. Circumstances that exclude detention occur;
- 3. A person is suspected to be a human trafficking victim (certificate confirming that status);
- 4. Execution of the return decision is not possible for legal of factual reasons (e.g. return to this countries has been suspended, country refused to accept foreigner).

The decision can be issued ex officio or upon request of the person concerned. Request should be made to the Commander of the Border Guard unit responsible for the detention centre.

DETENTION- maximum period

It should always be the shortest period necessary.

In the international protection procedure – maximum 6 months

- Single court decision should be issued for 60 days;
- ≻90 if person applied while already placed in the detention centre based on Act for Foreigner;

In the return procedure-

- maximum period of 3 months with possible extension to 6 if the procedure isn't finished,
- possible extension up to 12 if person concerned does not cooperate or there is a delay in the issuance of necessary documents by third country,
- possible further extension up to 18 months if a person launched an appeal to the administrative court (not in accordance with EU directive 2008/115/WE).

DETENTION- rights of a person in detention

1. A right to appeal detention decision- the court decision about placement in the detention/extension of its period can be appeal to the Regional Court (Sąd Okręgowy) via District Court (Sąd Rejonowy) that made the decision, within 7 days since delivery. However if the decision is delivered in Polish this period is counted since the day of delivery the translation. In the appeal procedure a person has a right to public attorney;

2. A right to appeal the return decision- within 14 days of the delivery If a person was not aware that they received it they can request to renew the deadline. The request have to be made within 7 days from the day that they realized their situation (however there is no guarantee that the deadline will be renewed.

DETENTION- rights of a person in detention

- 3. to medical and psychological care;
- 4. to contact their country representatives and embassies;
- 5. to contact non-governmental organizations providing legal help;
- 6. to contact your plenipotentiary in conditions assuring privcy;
- 7. to access internet on the available computer stations;

8. to receive packages with clothing, footwear and other personal items as well as with dressings and hygiene products, as well as with medicines that can be handed over with the consent of a doctor, after checking their contents in the presence of a foreigner;

9. submitting requests, complaints and motions to:

a) the manager of the guarded centre or the Border Guard body to which this centre is subject,

b) the officer responsible for the functioning of the detention facility for foreigners or the Border Guard authority responsible for the arrest

*full list in the article 415 of the Act on Foreigners

LEGAL AID- NGO'S VISITNG DETENTION CENTERS AND PROVIDING LEGAL HELP:

- 1. Stowarzyszenie Interwencji Prawnej (Association for Legal Intervention)- Kętrzyn, Lesznowola
- Helsińska Fundacja Praw Człowieka (Helsinki Human Rights Foundation)- Biała Podlaska, Białystok, Czerwony Bór (not restricted to)
- 3. Nomada- Krosno Odrzańskie
- 4. Homo Faber*- Przemyśl, due to current refugee situation in Eastern Poland and their involvement, they may have limited capacity
- 5. Fundacja Instytut na Rzecz Państwa Prawa (The Rule of Law Institute)
- Centrum Pomocy Prawnej im. Hali Nieć (Legal Aid Centre the Halina Nieć)

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Contact details for foreigners looking for legal aid:

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