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FREE LEGAL ASSISTANCE AS AN INSTRUMENT IN PROTECTING THE RIGHTS OF FOREIGNERS IN THE REPUBLIC OF POLAND – A CONTRIBUTION TO THE DISCUSSION

NIEODPŁATNA POMOC PRAWNA JAKO INSTRUMENT W OCHRONIE PRAW CUDZOZIEMCÓW NA TERENIE RZECZYPOSPOLITEJ POLSKIEJ – PRZYCZYNEK DO DYSKUSJI

Summary: The article addresses the issue of free legal assistance as an instrument in the protection of the rights of foreigners in the Republic of Poland against the background of basic legal and international standards. In particular, the grounds for the protection of foreigners' rights arising from the Constitution of 2 April 1997, as well as the provisions of the Act of 10 September 2015 amending the Act on granting protection to foreigners on the territory of the Republic of Poland and some other acts, were taken into account. This Act introduces a number of solutions aimed at providing foreigners with free legal assistance. Its purpose was to implement into the Polish legal order the provisions of Directive 2013/32 / EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, as well as Directive 2013/33 / EU of the European Parliament and of the Council of 26 June 2013 on establishing standards for the reception of applicants for international protection. The purpose of this act was also to adapt national law to the provisions of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013. These acts are part of EU law creating the 2nd generation Common European Asylum System, i.e. „Asylum package”.

Keywords: protection of foreigners, free legal assistance for foreigners, the Constitution of the Republic of Poland of 2 April 1997. Head of the Office for Foreigners, officer, human rights

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Streszczenie: Artykuł podejmuje problematykę nieodpłatnej pomocy prawnej jako instrumentu w ochronie praw cudzoziemców na terenie Rzeczypospolitej Polskiej na tle podstawowych standardów prawno-międzynarodowych. Uwzględniono w szczególności wynikającą z Konstytucji z 2 kwietnia 1997 r. podstawy ochrony praw cudzoziemców, jak również unormowania z ustawy z dnia 10 września 2015 r. o zmianie ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw. W ustawie tej wprowadzono szereg rozwiązań mających na celu zapewnienie cudzoziemcom nieodpłatnej pomocy prawnej. Jej celem było wdrożenie do polskiego porządku prawnego przepisów dyrektywy Parlamentu Europejskiego i Rady 2013/32/UE z dnia 26 czerwca 2013 r. w sprawie wspólnych procedur udzielania i cofania ochrony międzynarodowej, a także dyrektywy Parlamentu Europejskiego i Rady 2013/33/UE z dnia 26 czerwca 2013 r. w sprawie ustanowienia norm dotyczących przyjmowania wnioskodawców ubiegających się o ochronę międzynarodową. Celem tej ustawy było też dostosowanie prawa krajowego do przepisów rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 604/2013 z dnia 26 czerwca 2013 r. Akty te stanowią część przepisów prawa unijnego tworzących Wspólny Europejski System Azylowy II generacji, czyli tzw. „pakiet azylowy”.

Słowa kluczowe: ochrona cudzoziemców, nieodpłatna pomoc prawna dla cudzoziemców, Konstytucja RP z 2 kwietnia 1997 r. Szef Urzędu ds. Cudzoziemców, funkcjonariusz, prawa człowieka

INTRODUCTION

For more than a dozen years, the phenomenon of migration growth has been gradually noticeable, which is a challenge for the communities of individual countries both in social, political and economic terms, as well as in the area of law and culture¹. The phenomenon of migration was fostered and favored by the policy pursued by many countries, focused on economic development. An efficiently functioning state must however, guarantee standards (arising from international and European regulation) for the protection of the rights of foreigners². In the implementation of these rights, it is important to provide foreigners with free legal assistance. Bearing this in mind, I would like to draw attention to the regulations regarding the provision of free legal assistance to foreigners in the Republic of Poland against the background of international and legal standards.

¹ See considerations of the Primate of Poland W. Polak, *Duszpasterstwo polonijne w poszerzonej Europie*, [in:] D. Cichy (ed.), *Misja Kościoła i migracje człowieka*, Warszawa 2014, p. 311; see also considerations: A.M. Kosińska, *Definicja pojęcia zagrożenia dla porządku publicznego, jakie może stanowić obywatel państwa trzeciego i okoliczności wyznaczania terminu dobrowolnego powrotu cudzoziemca – glosa do wyroku Trybunału Sprawiedliwości z 11.06.2015 r. w sprawie C- 554/13*, „Europejski Przegląd Sądowy”, February 2016, p. 40; see also further: A.M. Kosińska, *Prawa kulturalne obywateli państw trzecich w prawie Unii Europejskiej*, Lublin 2018; see also: D. Cichy, *Uchodźcy w Kościele*, Lublin 2016, p. 99-120.

² See K. Skotnicki, *Prawa i wolności osób nie posiadających obywatelstwa polskiego*, [in:] L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997, p. 145-147.

BASIC LEGAL AND INTERNATIONAL ISSUES

In retrospect, the system of solutions under international law regarding the protection of human rights is of fundamental importance, i.e. „all measures and activities aimed at ensuring and implementing human rights”. The special role of universal standards boils down to the catalog of minimum rights and freedoms to be provided in states³. Protection can be both internal (intra-state, national) and external (international, supranational)⁴.

In particular, the norms of the Universal Declaration of Human Rights of 1948, which is considered one of the greatest achievements of humanity, the foundation of human rights should be mentioned⁵. The Universal Declaration of Human Rights contains personal rights and freedoms, including the right to equal legal protection, judicial protection, free movement and choice of residence within the borders of each country⁶. In accordance with art. 13 of the Universal Declaration of Human Rights: „every person is entitled to freedom of movement and settlement within the boundaries of each State (sec. 1) and „every person is entitled to leave any country, including their own country, as well as to return to his country” (sec. 2)⁷. In addition, in the light of art. 14 of this legal act „in the event of persecution, any person shall be entitled to seek and use asylum in other countries”. The Universal Declaration of Human Rights was a signpost in the process of shaping regulations in the area of human rights and for the activities of international organizations⁸. In particular one should mention the creation of universal and regional human rights protection systems, as well as the introduction of basic human rights standards into the constitution⁹. The Council of Europe had an important influence as an international organization, to a large extent creating and influencing the implementation of democratic standards¹⁰.

The reference should also be made to the International Covenant on Political and Civil Rights, opened for signature in New York on 19 December 1966¹¹. In the light of this act, „everyone residing legally in the territory of any State will have the

³ K. Spryszak, *Wpływ „miękkiego prawa” organizacji międzynarodowych na zmiany norm konstytucyjnych w wybranych państwach Europy*, Toruń 2019, p. 95.

⁴ J. Jaskiernia, *Rada Praw Człowieka Narodów Zjednoczonych*, „Państwo i Prawo” 2008, No. 1, p. 17.

⁵ See also: J. Zajadło, *Jaka aksjologia praw człowieka?*, „Państwo i Prawo” 2019, No. 1, p. 6.

⁶ J. Symonides, *Powszechna Deklaracja Praw Człowieka (po 60 latach od jej przyjęcia)*, „Państwo i Prawo” 2008, No. 12, p. 8.

⁷ <http://libr.sejm.gov.pl/tek01/txt/onz/1948.html> [access: 30.12.2019].

⁸ See also: K. Sękowska-Kozłowska, R. Wieruszewski, *Zaległości ratyfikacyjne Polski w dziedzinie praw człowieka*, „Europejski Przegląd Sądowy”, March 2013, p. 4; see also: R. Wieruszewski, *Komitet Praw Człowieka*, [in:] R. Wieruszewski (ed.), *Mechanizmy ochrony praw człowieka w ramach ONZ. Analiza systemowa*, Warszawa 2017, p. 4.

⁹ J. Symonides, *Powszechna Deklaracja Praw Człowieka...*, p. 3-4.

¹⁰ See J. Jaskiernia, *Rada Europy jako organizacja kreuująca i oddziaływująca na implementację standardów demokratycznych*, [in:] J. Jaskiernia (ed.), *Rada Europy a przemiany demokratyczne w państwach Europy Środkowej i Wschodniej w latach 1989-2009*, Warszawa 2010, p. 32-50.

¹¹ Journals of Laws of 1977 No. 38, item 167.

right, within that territory, to freedom of movement and freedom of choice of residence” [article 12 (1)] and „everyone has the right to leave any country” [article 12 (2)]. However, the indicated rights „may not be subject to any restrictions, except for those provided for by law” and which „are necessary to protect national security, public order, public health or morality or the rights and freedoms of others and are in accordance with other known rights in this Covenant” [article 12(3)]¹². It follows from the above that foreigners are all persons without citizenship of a given country, not only citizens of other countries but also stateless persons. Citizens of the European Union are also foreigners, however their status in Polish law is different from that of citizens of other countries. This is due to European Union law. The right to move freely and settle applies to the entire territory of the state, whether it is a unitary or federal state. At the same time, it should be noted that the exercise of this right cannot be dependent on the motives or intentions followed by the person intending to leave the place (or stay). It is the state’s duty not only to refrain from interfering with the realization of this freedom, but also to take action so that other people do not restrict freedom of movement¹³. By granting consent to accept a foreigner on its territory, the state may for example define conditions regarding e.g. freedom of movement, permanent residence, employment¹⁴. The Pact also states that „a foreigner legally residing in the territory of a State Party to the present Covenant may be expelled from it only in execution of a decision taken in accordance with the Act and will have the right, if important reasons of national security do not speak against it, to submit arguments against his expulsion and demand re-examine its case by the competent authorities or a person or persons specifically designated by those authorities and be represented before them for that purpose” (article 13).

From the point of view of this subject, one should also pay attention to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn in Rome on 4 November 1950¹⁵. Art. 3 of the Convention states that: „no one may be subject to torture or inhuman or degrading treatment or punishment” and the provisions of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms ensuring certain rights and freedoms other than those already contained in the Convention and Protocol No. 1 to the Convention, done at Strasbourg on 16 September 1963¹⁶.

In the light of art. 2 of this legal act: „Everyone who legally resides in the territory of the State has the right to move freely and to freely choose their place of residence

¹² See also: K. Motyka, *Międzynarodowy Pakt Praw Obywatelskich i Politycznych*, [in:] K. Motyka (ed.), *Prawa człowieka. Wprowadzenie. Wybór źródeł*, Lublin 2004, p. 145.

¹³ R. Wieruszewski, L. Wiśniewski, *Komentarz do art. 12*, [in:] R. Wieruszewski (ed.), *Międzynarodowy pakt praw obywatelskich (osobistych) i politycznych. Komentarz*, Warszawa 2012 (access, LEX 30.12.2019).

¹⁴ R. Wieruszewski, L. Wiśniewski, *Komentarz do art. 12*, op. cit.

¹⁵ *Journals of Law of 1993*, No. 61, item 284.

¹⁶ <http://libr.sejm.gov.pl/tek01/txt/re/1950e.html> [access: 30.12.2019].

in that territory” (sec. 1), „anyone may freely leave any country, including their own” (sec. 2), and „the exercise of these rights may not be subject to restrictions other than those specified by statute and which are necessary in a democratic society for reasons of national and public security, maintaining public order, preventing crime, protecting health or morality or protecting the rights and freedoms of others” (sec. 3). However, „the rights mentioned in sec. 1 may also be subject to statutory restrictions in certain areas justified by public interest in a democratic society” (paragraph 4). In addition, „no one may be expelled from the territory of the State of which they are citizens, either individually or as part of collective expulsion” (Article 3 (1)), or „deprived of the right to enter the territory of the State of which they are citizens” (Article 3 paragraph 2), and „collective expulsion of foreigners is prohibited” (Article 4).

Other international documents include the Protocol on the status of refugees, drawn in New York on 31 January 1967¹⁷ and the Convention relating to the Status of Refugees, drawn up at Geneva on 28 July 1951¹⁸.

The issues of asylum and refugee status are also subject to European Union law. Human rights have gained their due rank in the European Union in connection with the entry into force of the Lisbon Treaty¹⁹, of which the EU Charter of Fundamental Rights (hereinafter: the CFR) is an integral part²⁰. The right to asylum is guaranteed respecting the principles of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 regarding the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (article 18 CFR). Collective expulsions are also prohibited. No one may be removed from the territory of the state, expelled or extradited to a country where there is a serious risk that he may be subject to the death penalty, torture or other inhuman or degrading treatment or punishment (article 19 of the CFR). Any discrimination, in particular on grounds of sex, race, skin color, ethnic or social origin, genetic features, language, religion or beliefs, political or any other views, belonging to a national minority is prohibited (article 21 (1) of the CFR).

Everyone also has the right to good administration, i.e. an impartial and fair consideration of their case within a reasonable time by the institutions, bodies and organizational units of the Union (article 41 (1) of the CFR) and the right to an effective judicial remedy and access to an impartial court. Legal assistance is provided to persons who do not have sufficient resources to the extent necessary to guarantee effective access to justice (article 47 of the CFR).

¹⁷ Journals of Laws of 1991, No. 119, item 517.

¹⁸ Journals of Laws of 1991, No. 119, item 515.

¹⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13.12.2007. EU Journals of Laws C 306 of 17.12.2007, p.1).

²⁰ Charter of Fundamental Rights of the European Union of 7.12.2000. EU Journals of Law C 303 of 14.12.2007.

The basic act is also Directive 2013/32 / EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection²¹, as well as Directive 2013/33 / EU of the European Parliament and of the Council of 26 June 2013 on establishing standards for the reception of applicants for international protection²² and Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 on establishing 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 person²³.

PROTECTION OF FOREIGNERS IN THE LIGHT OF REGULATIONS IN THE CONSTITUTION OF THE REPUBLIC OF POLAND

Polish solutions provide for the protection of foreigners²⁴. The Preamble to the Polish Constitution of 2 April 1997 already emphasizes the importance of awareness of the „need to cooperate with all countries for the good of the Human Family”, and therefore – as R. Piotrowski rightly emphasizes – „a universal community that does not exclude anyone and embraces everyone on equal terms”²⁵. This is reflected in further regulations of the Polish Constitution.

First, „the Republic of Poland shall comply with international law binding on it, (article 9 of the Polish Constitution). Secondly, in the light of art. 37 of the Polish Constitution: „Whoever is under the authority of the Republic of Poland, enjoys the freedoms and rights guaranteed in the Constitution” (sec. 1), and exceptions to this rule regarding foreigners are specified by the Act (sec. 2). Therefore, the rule is for Polish citizens and foreigners to enjoy all rights and freedoms. However, the Constitution allows for exceptions to the principle of universality, provided that the abovementioned conditions are met²⁶. The jurisprudence of the Polish Constitutional Tribunal emphasizes that, although the Constitution of the Republic of Poland contains regulations „creating the possibility of statutory restrictions on the rights and freedoms contained therein by statutes, there are insufficient grounds to state that such a possibility is absolutely excluded in relation to this right”. This reasoning also applies to art. 37 section 2 of the Constitution. It constitutes a significant complement to its

²¹ EU Journal of Laws UE L 180 of 29.06.2013, p.60.

²² EU Journal of Laws UE L of 29.06.2013, p. 96.

²³ EU Journal of Laws UE 2013 L 180/31; see also: K. Sękowska-Kozłowska, R. Wieruszewski, *Zaległości ratyfikacyjne Polski...*, p. 4.

²⁴ Further see also: D. Pudzianowska (ed.), *Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych*, Warszawa 2016.

²⁵ R. Piotrowski, *Europa wobec uchodźców – wartości i praktyka*, [in:] J. Jaskiernia, K. Spryszak (ed.), *Ochrona praw człowieka w Europie. Aksjologia – instytucje – nowe wyzwania – praktyka*, Toruń 2017, p. 11.

²⁶ R. Piotrowski, *Europa wobec uchodźców...*, p. 12.

provisions – including art. 31 section 3 – which concern the scope of protection of human rights and freedoms. This is an important addition, in contrast to art. 31 section 3 does not contain a rigor that would indicate that restrictions on rights and freedoms cannot violate their essence, which would make it impossible to restrict such rights whose nature is of such nature that they can be implemented in full or in general. Such a solution would also make it impossible to limit or transform some of the rights of a protective nature, even if it would involve a more complete protection of other constitutionally protected rights, including fundamental rights derived directly from art. 30 constitutions²⁷. Thirdly, the concept of free legal aid implies legal protection. In the light of art. 80 of the Constitution of the Republic of Poland, everyone (citizen and foreigner) has the right to submit, pursuant to the principles set out in the Act, a request to the Ombudsman for help in protecting their freedoms or rights violated by public authorities²⁸. The request to the Ombudsman is a means of protecting the rights and freedoms of the individual, which everyone is entitled to on the terms set out in the Act of 15 July 1997 on the Ombudsman. It is worth emphasizing that art. 80 of the Constitution of the Republic of Poland guarantees this legal remedy in the event of violation of rights and freedoms by public authorities, while the Act on the Ombudsman extends its application in the event of acts or omissions of all organs, organizations and institutions obliged to observe and exercise the freedoms and rights of the individual, and also in the event of violations not only of the law but also of the principles of coexistence and social justice. It is rightly emphasized that the social justice guarded by the Ombudsman distinguishes him from other legal protection bodies²⁹. The Ombudsman's help may be about informing the applicant (e.g. a foreigner) about his rights, starting proceedings before a court or other body in the interest of the applicant, joining the pending proceedings by the Ombudsman or bringing an appeal in favor of the applicant³⁰.

Fourth, the Constitution of the Republic of Poland guarantees everyone the right to a fair and public hearing without undue delay by a competent, impartial and independent court (article 45 (1)), and everyone against whom criminal proceedings are conducted has the right to defense in all stages of the proceedings. He may, in particular, choose a defender or, on the terms set out in the Act, use a public defender [article 42 (2)].

²⁷ The reasoning of the Constitutional Tribunal of 15 November 2000, file P 12/99, OTK ZU 7/2000, item 260.

²⁸ See e.g. M. Zubik, *Ustrój polskich ombudsmanów w perspektywie 15 lat obowiązywania Konstytucji RP*, [in:] M. Zubik (ed.), *XV lat obowiązywania Konstytucji z 1997 r. Księga jubileuszowa dedykowana Zdzisławowi Jaroszowi*, Warszawa 2012, p. 212; also: I. Lipowicz, *O mądre prawo i wrażliwe państwo. 25 lat RPO 1988-2013*, Warszawa 2013, 314.

²⁹ I. Lipowicz, *Stan ochrony praw człowieka z perspektywy Rzecznika Praw Obywatelskich*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2014, Year LXXVI – 2, p. 139.

³⁰ See M. Florczak-Wator, *Komentarz do art. 80*, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, p. 265-266; see also: B. Przywora, *Normatywny model przed sądowej nieodpłatnej pomocy prawnej w Polsce*, Warszawa 2019, p. 66.

Fifthly, the Polish Constitution uses the notion of asylum [article 56 (1)]' of the Polish Constitution). In the light of this regulation „foreigners may exercise the right of asylum in the Republic of Poland on the principles set out in the Act³¹. The right of asylum is the right of the state to provide shelter on its territory to a person prosecuted in his own country for political activities. Such a person may apply for asylum, already in Poland or through the Polish diplomatic service, staying in another country. The right of asylum serves only foreigners, not a Polish citizen, because a Polish citizen always uses the care of the state authorities, also when abroad. The rules for exercising this right have been set out in the Act³². The act regulating these issues is the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland³³, which sets out the principles, conditions and procedure for granting protection to foreigners within the territory of the Republic of Poland and the competent authorities in these matters (article 1), also provides right to legal assistance³⁴. The most common justification for asylum is persecution because of political views. In addition, pursuant to art. 56 (2) of the Constitution, „a foreigner who is seeking protection against persecution in the Republic of Poland may be granted refugee status in accordance with international agreements binding on the Republic of Poland”³⁵. Foreigners exercising the right of asylum or refugee status may exercise all rights and freedoms except those expressly reserved for Polish citizens. It should be emphasized that the right of asylum and the right to have refugee status are not protected by a constitutional complaint (pursuant to article 79 (2) of the Polish Constitution)³⁶.

RATIO OF THE GOVERNMENT BILL AMENDING THE ACT ON GRANTING PROTECTION TO FOREIGNERS WITHIN THE TERRITORY OF THE REPUBLIC OF POLAND

The purpose of the government bill amending the act on granting protection to foreigners within the territory of the Republic of Poland and some other acts (herein-

³¹ See comments, eg.: M. Florczak-Wątor, *Komentarz do art. 56*, [in:] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2019, p. 192-193; P. Sarnecki, *Komentarz do art. 56*, [in:] L. Garlicki, M. Zubik (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, tom II, wyd. II, Warszawa 2016, p. 305-307; see also: M. Bartoszewicz, *Komentarz do art. 56 Konstytucji Rzeczypospolitej Polskiej*, [in:] M. Haczkowska (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2014, p. 88-90.

³² See also: W. Skrzydło, *Komentarz do art. 56*, [in:] W. Skrzydło (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, VII edition, Warszawa 2013, p. 67.

³³ Journals of Laws of 2019, item 1666 as amended.

³⁴ For more information see: T. Barankiewicz, *Prawo do dobrej administracji w zakresie ochrony praw cudzoziemca*, [in:] D. Cichy (ed.), *Misja Kościoła i migracje człowieka*, Warszawa 2014, p. 63-64; see also: K. Wencel, *Prawo cudzoziemców w postępowaniu przed organami administracji publicznej*, [in:] W. Klaus (ed.), *Przyjazny urząd. Ewaluacja funkcjonowania Wydziału Spraw Cudzoziemców Mazowieckiego Urzędu Wojewódzkiego*, Warszawa 2009, p. 37-38.

³⁵ See B. Nita-Światłowska, *Komentarz do art. 56*, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja RP*, tom I: *Komentarz. Art. 1-86*, Warszawa 2016, p. 1352.

³⁶ *Ibidem*.

after: the draft)³⁷ was to implement into the Polish legal order the provisions of Directive 2013/32 / EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, as well as Directive 2013/33 / EU of the European Parliament and of the Council of 26 June 2013 on establishing standards for the reception of applicants for international protection. In addition, the purpose of the bill was to adapt national law to the provisions of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013. These acts form part of the provisions of EU law forming the 2nd generation Common European Asylum System, i.e. „Asylum package”³⁸.

According to the justification of the draft, the new solution introduced to the Act on granting protection is subject to the provisions regulating the provision of legal information and legal assistance to the applicant and to a foreigner deprived of such protection. The obligation to provide applicants for international protection with free legal information and free legal assistance results from the provisions of the so-called asylum package (namely Directive 2013/32 / EU, Directive 2013/33 / EU and Regulation 604/2013)³⁹.

In accordance with the art. 19 paragraph 1 of Directive 2013/32 / EU, at the stage of proceedings for granting international protection, conducted by a first instance authority, Member States shall ensure that legal and procedural information is provided to applicants free of charge upon request, including at least information on the procedure taking into account the particular situation of the applicant. In the case of a negative decision on an application at first instance, „Member States shall also provide applicants with information upon request (...) to explain the reasons for such decision and how to challenge it”⁴⁰.

However, according to art. 20 clause 1 of Directive 2013/32 / EU, Member States shall ensure upon request free legal assistance and representation in the appeal proceedings provided for in Chapter V (in cases for international protection). This includes at least the preparation of the required procedural documents and participation in the trial before the first instance court on behalf of the applicant.

The obligation to provide free legal assistance also arises from art. 25 (4) of Directive 2013/32 / EU in relation to unaccompanied minors and their legal representatives and art. 45 (4) in relation to persons deprived of refugee status or subsidiary protection. In addition, the obligation to provide free legal assistance as part of an appeal procedure before a court relates to proceedings regarding the transfer of the applicant to the Member State responsible for examining the application for international protection (article 27 (6) of Regulation 604/2013)⁴¹.

³⁷ Justification Parliamentary document 3433, 7th term, p. 1, <http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=3433> [access: 10.09.2017].

³⁸ Justification Parliamentary document 3433..., p. 1.

³⁹ Justification Parliamentary document 3433..., p. 25-26.

⁴⁰ Justification Parliamentary document 3433..., p. 26.

⁴¹ Justification Parliamentary document 3433..., p. 26.

In order to implement the provisions cited above in the Polish legal order, the draft regulation provides that a foreigner applying for international protection and deprived of refugee status or subsidiary protection will be entitled – at his request – free legal assistance. Whereas legal information, to the extent required by art. 19 of Directive 2013/32 / EU, consisting in providing legal and procedural information, will be provided by the Head of the Office for Foreigners, which at first instance conducts proceedings on granting international protection. This obligation will be implemented in accordance with art. 9 of the Code of Administrative Procedure, which stipulates that public administration bodies are required to inform the parties duly and exhaustively about factual and legal circumstances that may affect the determination of their rights and obligations that are the subject of administrative proceedings. The authorities ensure that the parties and other persons participating in the proceedings do not suffer damage due to ignorance of the law, and to this end provide them with the necessary explanations and instructions. In practice, this will require the development of an information brochure addressed to foreigners applying for international protection describing the procedure to be followed, as well as at individual meetings with foreigners. The decision on granting international protection contains elements arising from art. 107 of the Code of Administrative Procedure and is translated in a language understood by the foreigner. In the event of doubt as to the content of the decision, the foreigner may request an explanation which the authority provides by way of a decision. The described activities exhaust the requirements of art. 19 of Directive 2013/32 / EU. The provision of this information by an administrative body is also envisaged as one of the ways of implementing the directive by art. 21 (1) of the directive⁴².

STATUTORY REGULATIONS REGARDING GRANTING PROTECTION TO FOREIGNERS WITHIN THE TERRITORY OF THE REPUBLIC OF POLAND

The provisions of the Act of 12 December 2013 on foreigners⁴³, which defines the principles, conditions and procedure for granting protection to foreigners on the territory of the Republic of Poland and the authorities competent in these matters, are of fundamental importance. The legal definition of the concept of a foreigner results from art. 3 (2) of this Act, i.e. means „anyone who does not have Polish citizenship”, i.e. has the citizenship of another country and a person without any citizenship. A foreigner is not a Polish citizen who is also a citizen of another country⁴⁴.

⁴² Justification Parliamentary document 3433..., p. 26-27.

⁴³ Journals of Laws of 2018, item 2094 as amended.

⁴⁴ Further: B. Banaszak, *Komentarz do art. 56*, [in:] B. Banaszak (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 338; J. Chlebny, *Art. 1*, [in:] J. Chlebny (ed.), *Prawo o cudzoziemcach. Komentarz*, Warszawa 2019, p. 9; H. Zięba-Załużska, *Cudzoziemiec*, [in:] W. Skrzydło, S. Grabowska, R. Grabowski (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, Warszawa 2009, p. 119-120.

By the Act of 10 September 2015 amending the Act on granting protection to foreigners within the territory of the Republic of Poland and some other acts⁴⁵, a number of solutions were introduced to provide foreigners with free legal assistance. In the following, I will use the consolidated text of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (hereinafter: u.c.o.RP⁴⁶. The legislator introduces a separate chapter (Chapter 4a), entitled „Free legal information and free legal assistance”)

The right to free legal information in proceedings at first instance is vested in the applicant and a foreigner who is undergoing proceedings in the matter of depriving him of refugee status or subsidiary protection (article 69 c (1) of u.c.o.RP). The decision should include information on the right to free legal assistance⁴⁷.

The legislator also defines the subject matter. Free legal information consists in informing the applicant or a foreigner against whom the refugee status or subsidiary protection is pending, about the applicable legal provisions in the field of granting international protection, depriving him of refugee status or subsidiary protection and provisions regulating proceedings before public administration bodies in cases falling within the competence of these bodies, taking into account the specific situation of these persons (article 69c (2) u.c.o.RP).

Free legal information is provided by employees of the office servicing the Head of the Office for Foreigners and officers referred to in art. 21 (2) of the Act of 12 December 2013 on foreigners (Article 69c (3) of u.c.o.RP).

Free legal assistance is available to the applicant and a foreigner who has been issued with a decision to deprive him of refugee status or subsidiary protection, hereinafter referred to as „eligible foreigner” who acts without a lawyer or legal advisor (Article 69 d (1) of u.c.o.RP). A foreigner who has been issued with a decision on depriving him of refugee status or subsidiary protection is not entitled if he earns an income greater than 100% of the income criteria specified in art. 8 of the Act of 12 March 2004 on social assistance (Article 69 d (2) of u.c.o.RP). It is important that a foreigner entitled before obtaining free legal assistance submits a written statement containing a declaration that in granting international protection or depriving him of refugee status or subsidiary protection he has not appointed a lawyer or legal advisor (Article 69 d (4) of u.c.o.RP). The statement is made under pain of criminal liability for making false statements.

Free legal assistance includes:

- 1) making an appeal against the decision on:
 - a) refusal to grant refugee status or subsidiary protection,
 - b) discontinuation of proceedings on granting international protection,

⁴⁵ Journal of Law item 1607; see the literature on the subject of the Act, e.g.: A.Fermus-Bobowiec, E. Lis, *Udzielanie ochrony międzynarodowej cudzoziemcom na terytorium Rzeczypospolitej Polskiej*, „Studia Iuridica Lublinensia” 2016, Vol. XXV, 4, p. 26.

⁴⁶ Journal of Laws of 2019, item 1666 as amended.

⁴⁷ See A.Fermus-Bobowiec, E. Lis, *Udzielanie ochrony międzynarodowej cudzoziemcom...*, p. 50.

c) transferring the applicant to the Member State responsible for examining the application for international protection and discontinuing the proceedings,
d) declaring the application for international protection to be inadmissible,
e) refusal to accept the applicant's statement of intention to continue applying for international protection,

f) deprivation of refugee status or subsidiary protection;

2) legal representation in appeal proceedings regarding:

a) granting international protection,

b) refer the applicant to the Member State responsible for examining the application for international protection,

c) deprivation of refugee status or subsidiary protection (Article 69 e u.c.o.RP).

Free legal assistance is provided personally by:

1) lawyer, legal advisor or a person who is not an advocate or legal adviser, employed in a non-governmental organization conducting public benefit activity, entitled to provide free legal assistance, meeting all of the following conditions:

a) has a law diploma confirming the obtaining of a master's degree or a diploma confirming the completion of legal studies abroad, or a diploma of completing legal studies abroad recognized as equivalent to the Polish diploma confirming the achievement of the master's degree,

b) at least for a period of 3 years performing activities directly related to the provision of legal assistance in matters of granting international protection on the basis of an employment contract or civil law contract in a law office, law firm, civil law partnership, partnership, limited partnership or limited joint-stock partnership, referred to in the Act of May 26, 1982- Law on barristers, legal advisors' offices, civil law partnerships, general partnerships, limited partnerships and limited joint-stock partnerships, referred to in the Act of 6 July 1982 on legal advisors, in entities providing legal assistance in the Member States, Member States of the European Agreement on Free Trade (EFTA) - parties to the agreement on the European Economic Area or the Swiss Confederation or in a non-governmental organization conducting public benefit activities,

c) enjoys full public rights and has full legal capacity,

d) was not punished for an intentional offense prosecuted by public prosecution or tax offense (Article 69 e of u.c.o.RP).

The organization of free assistance is carried out through the Head of the Office for Foreigners, who concludes agreements with the district bar councils and councils of legal advisors for the provision of free legal assistance (Article 69 and paragraph 1 of u.c.o.RP.)

FINAL REMARKS

In the light of the findings, the following conclusions can be made. Modern reality brings on the one hand the opportunity to raise the standard of living, or economic and social development, and to increase the effectiveness of human rights, on the other it entails the risk of violation. A democratic rule of law cannot fail to see the threats. An efficiently functioning state must be able to make such changes that the protection of human rights follows the challenges and civilization changes⁴⁸. These include the progressive phenomenon of migration, which is increasingly felt. In these conditions, the issue of guaranteeing foreigners specific rights arising from international documents is of particular importance⁴⁹.

The adoption of the Act of 10 September 2015 amending the Act on granting protection to foreigners within the territory of the Republic of Poland, under which legal grounds for guaranteeing free legal assistance to foreigners should be assessed positively. This is an important step on the road to building a mechanism to implement European standards for the provision of free legal assistance to foreigners. The practice of applying these regulations will only allow to assess the extent to which they serve foreigners and in what directions changes should occur. The more so because the Ombudsman in Poland receives information about cases of non-admission to the territory of Poland of foreigners who do not have documents entitling them to cross the border, but declare their intention to apply for international protection in Poland. This is a special problem because, as a consequence, foreigners are refused entry and sent back to the territory of the country from which they tried to enter Poland⁵⁰. Polish authorities, and especially law enforcement authorities, face the challenge of monitoring similar cases and undertaking interventions for foreigners.

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⁴⁸ See also: M. Zubik, „Wolność a „prawo” (pięć hipotez o stosowaniu pojęć konstytucyjnych dotyczących praw człowieka)”, *Państwo i Prawo* 2015, No. 9, p. 18.

⁴⁹ Cf. A. Chodorowska, *Zagadnienie efektywności działania Urzędu ds. Cudzoziemców w zakresie procedury uchodźczej*, [in:] J. Jaskiernia(ed.), *Uwarunkowania efektywności struktur władzy publicznej*, Kielce 2017, p. 187-188.

⁵⁰ Information on the activities of the Ombudsman and on the state of compliance with human and civil rights and freedoms in 2018, p. 2014. <https://www.rpo.gov.pl/pl/content/informacja-o-dzialalnosci-rzeczniaka-praw-obywatelskich-oraz-o-stanie-przestrzegania-wolnosci-i-praw>[access: 4.01.2020].

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