

## SPECIAL PROCEEDINGS AND ALTERNATIVES TO DETENTION FOR MIGRANT AND REFUGEE CHILDREN

### POSTĘPOWANIE SPECJALNE I ALTERNATYWY DO DETENCJI DZIECI MIGRUJĄCYCH I UCHODŹCZYCH

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#### Abstract

The Author presented an analysis of the procedures and alternatives to the detention of migrating and refugee children in the Polish legal system, significantly influenced by European Union law. The Author pointed out legal solutions within the Polish legal system entangled with international law. It was emphasized that the continued use of child detention contradicts commitments made in international and regional legal instruments aimed at eliminating this practice. Detaining children can have serious negative consequences for their physical and mental health; therefore, alternatives to detention should be considered. Attention was drawn to the necessity of interpreting and applying Polish law in accordance with international human rights standards, including the principle of the best interests of the child to ensure the safety and protection of minor migrants and refugees.

**Keywords:** child, unaccompanied minor, detention, administrative proceedings, foster care

#### Abstrakt

Autor zaprezentował analizę postępowania i stosowane alternatywy do detencji dzieci migrujących i uchodźczych w polskim systemie prawnym, na który znaczący wpływ ma prawo unijne. Wskazał na rozwiązania prawne w systemie prawa polskiego w uwikłaniu prawa międzynarodowego. Podkreślił, że dalsze stosowanie detencji dzieci jest sprzeczne z zobowiązaniami podjętymi a zawartymi w aktach prawa międzynarodowego i regionalnego w celu wyeliminowania tej praktyki,

bowiem zatrzymywanie dzieci może mieć poważne negatywne skutki dla ich zdrowia fizycznego i psychicznego, dlatego należy rozważyć alternatywy dla zatrzymań. Zwrócono uwagę na konieczność interpretowania i stosowania polskiego prawa w sposób zgodny z międzynarodowymi standardami praw człowieka, w tym z zasadą ochrony najlepszego interesu dziecka, aby zapewnić bezpieczeństwo i ochronę małoletnich migrantów i uchodźców.

**Słowa kluczowe:** dziecko, małoletni bez opieki, detencja, postępowanie administracyjne, piecza zastępcza

## Introduction

The importance of discussed problem is reflected in the growing number of scientific studies addressing migration issues. Extensive references to the problem of the impact of migration on the situation of children can be found in publications published in recent years. The term “children in migration” is used, often indiscriminately, to refer to the various circumstances facing children increasingly – examples of such situations include refugee children, asylum seekers, unaccompanied minors, victims of human trafficking, disaster displaced persons, street children and children of economic migrants [Balahur and Budde 2007, 40]. Children undertaking migration unaccompanied by adults are exposed to a particularly wide range of problems especially during times of warfare or natural disasters (wars in different regions of the world, earthquakes). Alternative measures to place children in guarded centers for foreigners is to be a concern for the dignity, safety and proper development of children during migration and application for international protection in accordance with the children’s rights. This is an expression of the state’s implementation of the child’s welfare and proper development in accordance with the best interests of the child as stated in the Convention on the Rights of the Child.<sup>1</sup>

The term detention has been used to refer to a total restriction of movement, placing a person in a detention center for foreigners (detention from Latin *detentio* – *detention*, confinement) [Rysiewicz 1967, 151].

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<sup>1</sup> Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, Journal of Laws of 1991, No. 120, item 526 [hereinafter: Convention on the Rights of the Child].

The exact number of children undertaking various types of migration with their parents is currently unknown. Data indicate that the problem of social consequences resulting from migration affects both children changing residence with or without their parents, as well as children left behind as a result of the departure of one or both parents. Most available studies on the impact of migration on the situation of minors address only two aspects of the problem, i.e. situation of children undertaking migration with their parents as well as problems of children left behind as a result of their parents' migration. The problem of labor migration of children who undertake unaccompanied migration is also important (and perhaps even more important in the context of threats to the elementary rights of the child). This phenomenon is sometimes referred to in the literature as independent child migration. It should be emphasized that the phenomenon of independent migration observed in Africa or Asia raises the need to redefine traditional views of children as merely passive participants in population movements around the world.<sup>2</sup> Eurostat reports that in 2022, there were 239,500 asylum seekers under the age of 18, while one-sixth of them (39,500) were unaccompanied minors. Most of the unaccompanied children came from Afghanistan, Syria and Somalia.<sup>3</sup> Detention of children has an extremely negative impact on their health and well-being, and can also have a long-term and negative impact on their cognitive development.<sup>4</sup> At that point, children are at risk for depressive and anxiety conditions and symptoms of post-traumatic stress disorder, including insomnia, night terrors and even bedwetting. It has been found that there is a higher rate of suicide and self-injurious behavior among children placed in detention.<sup>5</sup>

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<sup>2</sup> "Child Migration." Development Research Centre on Migration a Globalization and Poverty, University of Essex 2003, [http://www.migrationdrc.org/research/typesofmigration/child\\_migration.html](http://www.migrationdrc.org/research/typesofmigration/child_migration.html) [accessed: 23.09.2022].

<sup>3</sup> Eurostat, *Asylum applicants by type of applicant, citizenship, age and sex - annual aggregated data*, [https://ec.europa.eu/eurostat/databrowser/view/MIGR\\_ASYAPPCTZA\\_\\_custom\\_5920187/bookmark/table?lang=en&bookmarkId=81ed49e7-f1a9-4c0b-82cc-583e54c8a9a8](https://ec.europa.eu/eurostat/databrowser/view/MIGR_ASYAPPCTZA__custom_5920187/bookmark/table?lang=en&bookmarkId=81ed49e7-f1a9-4c0b-82cc-583e54c8a9a8) [accessed: 29.10.2023].

<sup>4</sup> Inter-Agency Working Group to End Child Immigration Detention, *Ending Child Immigration Detention*, [https://endchilddetention.org/wp-content/uploads/2016/09/LAWG\\_Advocacy-Brochure\\_Aug-2016\\_FINAL-web.pdf](https://endchilddetention.org/wp-content/uploads/2016/09/LAWG_Advocacy-Brochure_Aug-2016_FINAL-web.pdf) [accessed: 26.10.2023].

<sup>5</sup> Ibid.

Migrant children are placed in detention centers for foreigners, i.e. placed in detention in at least 27 countries, despite a high level of involvement in efforts to end child detention in Europe, and despite existing standards of international law. Placing a child in a guarded center for foreigners (detention center) intensifies psychological suffering, especially for children who have been victims of violence before, during or after their journey.

### **1. Migrant children in the doctrine**

In the practice of Polish state bodies in the field of international legal protection of children, including unaccompanied minors in refugee status and subsidiary protection cases, the minimum standards of treatment are derived from international law and standards [Zdanowicz 2007, 224]. In Poland, issues concerning foreigners and proceedings for granting international legal protection are defined by acts<sup>6</sup> and, as in most democratic countries, are dealt with under the regime of administrative law [Białocerkiewicz 1999, 358; Idem 2001, 177; Idem 2003, 121; Chlebny 2011, 11; Muzyczka 2013, 65]. Foreigner and refugee matters were separated and regulated in separate legal acts. Act on granting protection specifies the principles, conditions and procedure for granting protection on the territory of the Republic of Poland and the authorities competent in these matters. Act on foreigners aligned Polish law with EU regulations. The greatest impact on the rights of a party in proceedings for international legal protection of children, including unaccompanied children, is contained in the Act on granting protection. This includes assistance at border crossings, guarded centers and detention centers for foreigners, where it is ensured that the foreigner has access to information in a language he or she understands about the possibility of submitting an application for international protection and using an interpreter for this purpose (Article 29 (1) of the Act on granting protection). In addition, the authority receiving an application for international protection pursuant to Article 30 (1)(5) of the Act shall provide information to the applicant in writing

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<sup>6</sup> Act of 13 June 2003 on granting protection to foreigners on the territory of the Republic of Poland, Journal of Law of 2023, item 1504 [hereinafter: Act on granting protection]; Act of 12 December 2013 on foreigners, Journal of Law of 2013, item 1650 as amended [hereinafter: Act on foreigners].

in a language he or she understands. The public administration is obliged to duly and fully inform the parties of the factual and legal circumstances that may affect the determination of their rights and obligations that are the subject of administrative proceedings. The authorities shall ensure that the parties and other persons participating in the proceedings do not suffer harm due to ignorance of the law, and for this purpose shall provide them with the necessary explanations and guidance.

The issues under discussion are an integral part of the development agenda in the areas of governance, migration and human rights protection.<sup>7</sup> The people least adapted to a dynamically changing world, its conditions and migration are children [Stadniczeńko 2019, 630]. They must be given due care, attention and support, including legal support. Refugee children, with the development of foreign and refugee law, are provided with certain guarantees in their difficult efforts to obtain refugee status. In the worst position are children without family or relatives when seeking refugee status in a culturally and linguistically foreign country.

In colloquial terms, a refugee is an individual who, forced by circumstances, leaves his or her place of permanent residence to settle permanently or temporarily in a foreign country or in another territory of his or her own country [Balicki 2012, 203-204; Gammeltoft-Hansen 2011, 12; Krawczyńska-Butrym 2009, 130]. In colloquial language, a refugee is called an emigrant, a refugee, an exile. The terms “migrant” and “refugee” are increasingly used both in public discourse and as synonyms, while there is a difference between them of a legal nature. Confusion between these terms can lead to problems for refugees and asylum-seekers, as well as confusion in debates on migration and asylum.

A content analysis of the Geneva Convention's definition of a refugee clearly shows that it has a subjective element – “fear”<sup>8</sup> [Goodwin-Gill

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<sup>7</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Asylum Policy Plan; with an EU-wide integrated protection strategy, 17 June 2008, COM 2008, No. 360, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008DC0360> [accessed: 23.09.2023].

<sup>8</sup> Judgment of the Court of Justice of 2 March 2010, ref. C-175/08, C-176/08, C-176/08, C-178/08ECLI;EU:C:2010;105; judgment of the Supreme Administrative Court of 6 April 2010, ref. V SA 2830/00. It is pointed out that fear is an individual feeling, the definition

and McAdam 2007, 201-67; Bem 2009; Kobes 2016; Gallagher 1989, 573; Chlebny 2006, 53], which is further defined by the valuable term “justified.” This means that this rationale must be based on objective grounds, which can be and are in practice evaluated in this manner. The definition also includes another term “persecution,” which is characterized by a lack of focus. Therefore, in order for a person to be considered a refugee under the Convention relating to the Status of Refugees,<sup>9</sup> he or she must meet the above conditions together, i.e. he or she must feel a fear that is objectively justified and relate to persecution on the grounds indicated in Article 1 of the Geneva Convention.

The Geneva Convention stipulates that a refugee is a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or unwilling, owing to such fear, to avail of the protection of his country, and, moreover, a person without any nationality who is outside the country of permanent residence, for similar reasons, to which is unable or unwilling to return owing to such fear [Phuong 2004, 22]. In the literature [Jagielski 1997, 84; Hryniewicz 2005, 19-30; Potyrała 2005, 59; Mikołajczyk 2004, 21; Wierzbicki 1993, 23], the development of definition of a refugee in the Geneva Convention was a novel approach to the refugee issue and the goal was to address the problem of refugees, stateless persons who appeared on a massive scale in the aftermath of the Second World War. These phenomena were treated as temporary occurrences influenced by international

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assumes the presence of a subjective element in the person seeking recognition as a refugee. Therefore, the determination of refugee status requires first and foremost an evaluation of the applicant’s statements, rather than an assessment of the situation prevailing in his/her country of origin, see Office of the United Nations High Commissioner for Refugees, *Principles and Procedures for Determining Refugee Status Pursuant to the 1951 Refugee Convention and its 1967 Additional Protocol*. Guidebook, Geneva 1992, 2nd edition of the Polish version, 2007, p. 18. The concept of “well-founded fear” combines a subjective and objective element, both of which must be taken into account in the procedure for determining whether there is a “well-founded fear” of persecution; judgment of the Supreme Administrative Court of 29 August 2007, ref. II OSK 1551/06.

<sup>9</sup> Convention relating to the Status of Refugees done at Geneva on 28 July 1951, Journal of Laws of 1991, No. 119, item 515 [hereinafter: Geneva Convention].

events [Gunning 1989, 44] and therefore included both temporal and geographical limitations.

Refugee status is one of the protection forms provided by international law, which is defined by the Geneva Convention, along with the Protocol relating to the status of refugees drawn up in New York on 31 January 1967.<sup>10</sup> The welfare of the child considered in the discourse of his rights should be regarded in terms of the right to various forms of assistance, including supporting in the development of the right to protection from harm and the right to participate in decisions concerning his affairs. In this view, the child's well-being should be considered through the perspective of the child's rights and freedoms, as well as needs and concerns.

## **2. Legal standards applied to migrant minors**

The current rights and obligations of foreigners with regard to the rules and conditions of their entry into, crossing, staying in and leaving the territory of the Republic of Poland, the course of action and the authorities competent in these matters in view of the significant changes in the law of the European Union and the obligation imposed on member states to implement adapting Polish law to EU regulations, among others, Council Regulation (EC) No. 539/2001 of 15 March 2001 listing the third countries the nationals of which must have visas when crossing the external borders and those the nationals of which are exempt from this requirement;<sup>11</sup> Council Regulation (EC) No. 1030/2002 of 13 June 2002 establishing a uniform format for residence permits for third-country nationals;<sup>12</sup> Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a common code of rules governing the movement of persons across borders (Schengen Borders Code);<sup>13</sup> Regulation (EC) No. 1931/2006 of the European Parliament and of the Council of 20 December 2006 establishing rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen

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<sup>10</sup> Journal of Laws of 1991, No. 119, item 517.

<sup>11</sup> Official Journal of the European Union L 81 of 21 March 2001, p. 1-7 as amended.

<sup>12</sup> Official Journal of the European Union L 157 of 15 June 2002, p. 1-7 as amended.

<sup>13</sup> Official Journal of the European Union L 105 of 13 April 2006 as amended.

Convention;<sup>14</sup> Regulation (EC) No. 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No. 311/76 on the compilation of statistics on foreign workers;<sup>15</sup> Regulation (EC) No. 767/2008 of the European Parliament and of the Council of 9 July 2008 on the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas;<sup>16</sup> Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).<sup>17</sup>

The Act on granting protection has the greatest impact on the rights of a party in the procedure for granting this protection. It regulates substantive, systemic and procedural issues concerning the granting of refugee status or subsidiary protection to a foreigner. The procedure for granting refugee status to an unaccompanied minor has the nature of a general administrative (jurisdictional) procedure. J. Borkowski [Borkowski 1999, 77] states that the standards of procedural standing of a person in an individual administrative case are established by the provisions of the Act of 14 June 1960 – Code of Administrative Procedure.<sup>18</sup> On the basis of jurisprudence<sup>19</sup> and doctrine [Adamiak 2007, 8], which advocated a broad understanding of the concept of “administrative case,” it was assumed that an administrative case is an opportunity, provided for in the provisions of substantive administrative law, to concretize the mutual powers and obligations of the parties to a substantive legal relationship, which are the administrative authority and an individual subject, not organizationally subordinated to the authority.

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<sup>14</sup> Official Journal of the European Union L.2006.405.1.

<sup>15</sup> Official Journal of the European Union L 199 of 31 July 2007, p. 23-29.

<sup>16</sup> Official Journal of the European Union L 218 of 13 August 2008, p. 60 as amended.

<sup>17</sup> Official Journal of the European Union L 243 of 15 September 2009, p. 1-58 as amended.

<sup>18</sup> Journal of Laws of 1960, No. 30, item 169 as amended [hereinafter: Code of Administrative Procedure].

<sup>19</sup> Resolution of 7 judges of the Supreme Administrative Court of 1 June 1998, OPS 3/98, ONSA 1998, no. 4, item 109; judgment of 7 judges of the Supreme Administrative Court of 17 May 1999, OSA 1/99, ONSA 1999, no. 4, item 109; resolution of 7 judges of the Supreme Administrative Court of 6 November 2000, OPS 11/2000, ONSA 2001, no. 2, item 48; judgment of 7 judges of the Supreme Administrative Court of 6 November 2000, OSA 2/2000, ONSA 2001, no. 2, item 52.



The code concept of an individual case under Article 1(1) of the Code of Administrative Procedure does not have an independent legal meaning. It means a case concerning an individually designated subject in a specifically defined administrative case. Therefore, the case can be the subject of both proceedings before administrative bodies and the subject of court proceedings. In order to consider that a specific case can be the subject of proceedings before administrative bodies, it must be assumed that the other two prerequisites listed in Articles 1 and 2 are also met. Such a case is within the jurisdiction of public administrative bodies and is resolved by decision or settled tacitly [Adamiak and Borkowski 2012, 11; Adamiak 2017, 45-56; Wróbel 2018, 35-88].

The rights of a party in foreigner status proceedings can also be found in the Code of Administrative Procedure. The legislator, partially deviating from these standards, in favor of regulating individual issues and procedural guarantees in the Act on granting protection, took into account the complex facts and the participation in these proceedings of foreigners, who should be ensured the benefit of additional procedural guarantees. This means that if a given matter is regulated in the Act on granting protection, the provisions of the Code of Administrative Procedure do not apply.<sup>20</sup> However, there may be situations in which, due to the lack of procedural regulations provided for in the Act on granting protection, the provisions of the Code of Administrative Procedure will apply, as well as cases of simultaneous application of both procedural regimes [Chlebny 2020, 900].

The general rules of administrative procedure are regulated by the Code of Administrative Procedure in Section I of Chapter 2. They apply to proceedings in refugee matters, unless otherwise provided by law (Article 4 of the Act on granting protection). The Provincial Administrative Court in Warsaw, in the justification for the judgment cited above, indicated that this means that administrative proceedings conducted in regard to refugee matters are subject to the general principles and standards of due process and, apart from exceptions in the strictly defined provisions of the act, there

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<sup>20</sup> Judgment of the Provincial Administrative Court in Warsaw of 8 December 2009, ref. V SA/Wa 831/09, Lex no. 648917.

are no exclusions in this regard as to the application of both the provisions on general principles and those regulating procedural matters in detail.

In the case where a foreigner has not been granted refugee status or subsidiary protection, the authority, when issuing a decision obliging him to return, shall grant a residence permit for humanitarian reasons, if the obligation to return: 1) can only be made to a country where, within the meaning of the ECHR: – the person's right to life, liberty and security of person would be threatened, or – the person could be subjected to torture or inhuman or degrading treatment or punishment, or – the person could be forced to work, or – the person could be deprived of the right to a fair trial or be punished without legal basis; or 2) the person's right to family or private life within the meaning of the ECHR would be violated; or 3) the rights of the child, as set forth in the Convention on the Rights of the Child, would be violated to the extent that their psychophysical development would be significantly threatened.

The Act on granting protection contains a number of provisions that introduce different regulations from those contained in the Code of Administrative Procedure with regard to evidence and the manner in which evidence is taken. The basic documents on the basis of which the authorities initiate proceedings for the granting of international legal protection are the declaration of the application for protection. This distinction is due to the fact that the act involves the moment of a foreigner's legal stay in the territory of the Republic of Poland from the submission of a declaration or application for legal international protection, and momentous legal consequences result from this fact, as the intention to submit an application for international protection excludes the issuance of a decision to refuse entry to a foreigner who does not meet the conditions for entry. Such a formation of the rules also follows from Article 3 of the Ordinance of the European Parliament and of the Council (EU)2016/399 of 9 March 2016 on the EU Code on the rules governing the movement of persons across borders,<sup>21</sup> which states that the provisions of this legislation shall

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<sup>21</sup> Ordinance of the European Parliament and of the Council (EU) 2016/399 of 9 March 2016 on the EU Code on the rules governing the movement of persons across borders (Schengen Borders Code), Official Journal of the European Union L 77 of 23 March 2016 as amended.

apply without prejudice to the rights of refugees and applicants for international legal protection, in particular the principle of non-refoulement.

The application form for international legal protection is detailed in Article 26 of the Act on granting protection and the act implementing the provision.<sup>22</sup> It introduces the formalism of proceedings and standardization of applications, as well as providing guarantees for the applicant in the proceedings by indicating the basic evidence required by the act, such as first name, surname; previous name, family name, gender, father's name, mother's name and family name, date of birth or age, place and country of birth, country of origin, citizenship, nationality, knowledge of languages, indication of the language to be used in administrative proceedings, and other that are indicated in Article 26 of the Act on granting protection, in addition to evidence arising from other laws. This refers to Article 8 of the Act on granting protection, among others, data on fingerprints, facial image, race or ethnicity, political, religious and philosophical beliefs, religious, party and trade union affiliation, membership in certain social groups, health status, information on sexual life, information on criminal record, relationship to military service, information on trips made abroad in the last 5 years.

The proceedings with respect to an unaccompanied minor as a vulnerable person under Article 68 of the Act on granting protection consist of the manner and conditions for carrying out activities of a certain type [Dańczak 2020, 1134]. This includes hearing of the child, which should be adapted to the child's age, maturity and mental development, taking into account the fact that the minor may have limited knowledge of the actual situation in the country of origin. This is important because the minor may not realize or his level of development may not allow him to understand the rationale for granting refugee status, and thus his explanation of why he was in a foreign country, what happened to him in his home country and other important facts affecting the evaluation of the validity of the refugee claim. In view of evidentiary difficulties as limited possibilities to collect and present evidence for the circumstances indicated in the applicant's interview, the legislator guaranteed in Article 42 of the Act on granting

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<sup>22</sup> Ordinance of the Minister of Internal Affairs of 4 November 2015 on the model form for application for international protection, *Journal of Laws* of 2015, item 1859.

protection exemptions from proving certain claims by including conditions such as: – the applicant has provided credible and consistent information necessary to establish the facts of the case; – the applicant has provided all the information and evidence in his possession to establish the facts of the case and has explained in detail the reasons for the lack of other information and evidence; – the applicant's explanations are consistent, credible and do not contradict the evidence and materials collected in the case; – the applicant has applied for international protection at the earliest possible date, unless he can show good reason for not doing so.

The vast majority of children and their guardians do not have knowledge of the Polish language, and they must testify by participating in the administrative procedure. The procedural guarantee of an unaccompanied minor in the procedure for granting international protection is the participation of persons from the authorities who meet one of the specified conditions (Article 66 of the Act on granting protection). The first condition is graduation from a university with a master's degree in law and two years of work experience in institutions the scope of which includes the care of children. The next condition is graduation from a university with a master's degree or higher professional degree and two years of work experience in public administration and training in conducting international protection proceedings involving minors. The prerequisite is a master's degree in pedagogy, psychology, sociology and two years of work experience in public administration. It is reported in the doctrine [ibid., 1131] that the drafting of Article 66 of the Act on granting protection does not adequately translate into Polish the regulation of Article 25(3) of Directive 2013/32/EU, which ensures that Member States are obliged to ensure that persons with knowledge of the special needs of minors participate in the hearing of an application for international protection of an unaccompanied minor and that decisions resolving such an application are prepared by an official with the necessary knowledge of the special children's needs.<sup>23</sup>

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<sup>23</sup> Report of the National Point of the European Migration Network in Poland entitled *Unaccompanied Minors*. Policy, practice and statistics on unaccompanied minors in Poland, Warsaw 2015, <http://www.emn.gov.pl/download/75/20854/MalolaciPL.pdf> [accessed: 28.04.2023] and European Union Agency for Fundamental Rights, *Child-friendly justice – thoughts, opinions and experiences of children and professionals. Summary*, 2017, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-child-friendly\\_justice-summary\\_pl.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-child-friendly_justice-summary_pl.pdf)

The existence of the possibility of recording the course of hearing by means of an image or sound recording device at the request of an unaccompanied minor or guardian is important. The recording of the course of hearing is an appendix to the record and is a legal guarantee that the activities of hearing, reproduced and analyzed after a certain period of time after their recording, will faithfully represent the course of such hearing, and thus the request of an unaccompanied minor will be duly considered.

Another procedural guarantee of an unaccompanied minor is the authorities' obligation to instruct and inform the child in accordance with Article 6 of the Act on granting protection, so that before the hearing the minor is instructed about the factual and legal circumstances that may affect the outcome of proceedings, and the possibility to request that it take place in the presence of an adult designated by the minor. In addition, the hearing shall be held in a language that the minor understands, with the participation of an interpreter of the language spoken by the minor and understood by the child. This ensures, the minor will be heard, and his testimony, any circumstances and facts provided during the hearing will be taken into account when considering his application for international protection. The omission of such an obligation, or its implementation incompletely or only during the hearing, can be the basis for a challenge to the conduct of the proceedings, and thus also for an appeal against a possible decision issued in the case [ibid., 1129].

In order to implement procedural guarantees on behalf of an unaccompanied minor, an application for international protection is submitted by a guardian or a representative of an international or non-governmental organization engaged in providing assistance to foreigners, including legal aid, if on the basis of an individual evaluation of the unaccompanied minor's situation, the organization determines that he may be in need of such protection. The provision in Article 26(6) of the Act on granting protection is extremely important in view of the validity of administrative proceedings under Article 30 of the Code of Administrative Procedure. This provision indicates that the legal capacity of the parties shall be assessed in accordance with the provisions of civil law, unless special provisions provide otherwise.

In order to avoid a drawback in administrative proceedings resulting in a defect in resumption, and to develop and transfer to Polish law the provisions of international acts regarding the correct procedure for processing an application for international legal protection for an unaccompanied minor, the Polish legislator in the Act on granting protection guaranteed the representation of the minor in administrative proceedings. This guarantee follows from Article 22(1) of the Convention on the Rights of the Child and Article 31 of Directive 2011/95/EU and Article 7(3) of Directive 2013/32/EU. The Act on granting protection in Article 61 (1) (3) guarantees an unaccompanied minor the appointment of a guardian to represent him in an international protection case.

It is argued in the doctrine that guardians are most often appointed from among NGO staff, students, probation officers and from among professional attorneys [Włodarczyk and Wójcik 2014, 169]. The legislation does not specify who can be appointed a guardian, nor does it indicate any specific qualities that a guardian of an unaccompanied minor should have. Nevertheless, guardians should have knowledge and competence in the rights and needs of children, including refugee children, and have communication skills. During the hearing of an unaccompanied minor, the guardian, a person designated by the child and a psychologist or educator participate. The guardian's participation is mandatory, as it is to ensure that the best interests of the minor are protected in the proceedings before the authority, and to exercise the powers of the guardian, in these proceedings, i.e., to ask questions, make comments on the course of action, behavior or treatment of the minor. Therefore, an educator or psychologist is an obligatory participant, and the establishment of a guardian for an unaccompanied minor is also a guarantee of a party's active participation in the proceedings under Article 10 of the Code of Administrative Procedure. The authorities are obliged to ensure active participation of the parties at every stage of the proceedings, and before issuing a decision allow them to comment on the evidence and materials gathered and the demands made [Świątkiewicz 2002, 25]. The active participation of a party in the proceedings is guaranteed by notifying the guardian of the place and date of the applicant's hearing to establish the facts and circumstances indicated in the application for international protection. This means that an unaccompanied minor is legally guaranteed not to be heard until

a guardian is appointed for him and he is informed of the time and place of the hearing.

An unaccompanied minor arriving at the border of the Republic of Poland for the purpose of filing an application for international protection in accordance with the Act on the granting protection, may not file such an application on his own. In the situation of an intention to file an application for international protection, the authority that received the verbal declaration shall make a record of this action and register the declaration of intention to file an application for international protection in the register. This guarantees that the child will not be treated as illegally residing in the territory of the Republic of Poland, and that the authorities can proceed to initiate the procedures necessary to ensure the best interests of the minor, including the appointment of a guardian and family search.

### **3. Procedure for dealing with a minor**

The authority immediately applies to the guardianship court having jurisdiction over the place of residence of the unaccompanied minor with a request for the appointment of a guardian to represent him in the proceedings for granting international protection and placing him in foster care. Simultaneously with the appointment of a guardian at the request of the Border Guard, the guardianship court (family court) places the child (unaccompanied minor) in foster care. After the court appoints a guardian for an unaccompanied minor, an application for international protection of the child (unaccompanied minor) is submitted by the guardian with the minor's participation, and the administrative procedure and proceedings for granting international legal protection are initiated. Such an application on behalf of an unaccompanied minor can be submitted by a representative of an international organization or non-governmental organization engaged in providing assistance, including legal assistance to foreigners. The legitimacy of the inclusion of a representative of an international organization in the case arises on the basis of an individual evaluation of the unaccompanied minor's situation and the recognition that the minor may be in need of such protection. The application must be submitted on an official form, which is established by the Regulation of the Minister of Internal Affairs of 4 November 2015 on the model

form for an application for international protection.<sup>24</sup> Due to the appointment of a guardian and, in certain circumstances, a professional attorney, the child receives due support, which guarantees the assurance of his rights in the administrative proceedings. The authority *ex officio* takes measures to locate relatives. The Act on granting protection in Article 61(1) lists examples of such actions as, among others, informing the unaccompanied minor of the possibility of searching for his relatives through international NGOs and assisting the unaccompanied minor in contacting international NGOs and initiating a search for his relatives. The authority may carry out other activities and take, in its evaluation, effective steps to locate the unaccompanied minor's relatives. An important action of the Border Guard authority is to determine the age of the unaccompanied minor child applying for international legal protection. When the authority, on the basis of statements made by the applicant claiming to be an unaccompanied minor, or on the basis of other circumstances, has become doubtful as to the age of the applicant, it is obliged to ensure that a medical examination is performed to determine the actual age of the applicant. Conducting a medical examination requires the consent of either the applicant claiming to be an unaccompanied minor or his legal representative. Therefore, the court-appointed guardian must cooperate with the applicant. After obtaining the consent, and prior to proceeding with the medical examination, the authority shall inform the applicant claiming to be an unaccompanied minor in a language he or she understands about the possibility of determining his or her age through medical examination. It shall explain the manner in which the medical examination will be carried out and the significance of such examination's result in the procedure for granting international protection to the minor. The applicant must be duly informed of the effect of refusing to undergo a medical examination. The result of these examinations is to indicate whether the examined applicant is an adult [Gimenez and Manzano-Agugliaro 2017, 299; Gilsanz and Ratib 2005, 2-17; Manzoor, Nuzhat, and Anwar 2014, 211-15]. In the case of impossibility of obtaining a clear result of the medical examination, the applicant is considered a minor, which should be regarded as an extension

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<sup>24</sup> Ordinance of the Minister of Internal Affairs of 4 November 2015 on the model form for application for international protection, Journal of Laws of 2015, item 1859.



of legal protection to unaccompanied minors. In the case of non-consent to a medical examination, an applicant claiming to be a minor is considered an adult, resulting in a lower level of legal protection than would be granted to an unaccompanied minor. One of the important alternatives to detention, an important practice of the authorities in the procedure for granting legal international protection to a child (unaccompanied minor) is to bring him to a professional foster family, acting as a family emergency shelter or an intervention-type foster care facility. This usually takes place immediately after accepting the unaccompanied minor's declaration of intent to apply for international protection or the minor's application for international protection. The purpose is to take care of the minor on an ad hoc basis by institutions which are prepared accordingly, until the common court appoints a guardian and decides on the placement of the minor in foster care. An unaccompanied minor shall be placed in a professional foster family, acting as a family emergency, or in an intervention-type foster care facility until a decision is made by the guardianship court. In this way, due to the specific factual and legal situation of an unaccompanied minor, the child is assured, safe and dignified living conditions during the processing of his application for international protection. Detailed procedures and the definition of basic living and care conditions are provided by the Ordinance of the Minister of Labor and Social Policy of 22 December 2011 on institutional foster care.<sup>25</sup> According to the ordinance, institutions are required, among others, to prepare a psychological diagnosis of the child performed by a psychologist or educator, which should take into account the child's strengths and needs in the care, developmental, emotional and social areas, the causes of family crisis and the impact of this crisis on the child's development, the child's relationship with its immediate environment and persons important to the child and the child's development. The diagnosis should include (in accordance with the age, development and experience of the child), indications for further pedagogical work with the child, the therapeutic program, work with the child's family and work preparing the child for placement in a foster family or family home, as well as preparing the child for independence.

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<sup>25</sup> Ordinance of the Minister of Labor and Social Policy of 22 December 2011 on institutional foster care, *Journal of Laws of 2011*, No. 192, item 1720.

The facility provides: – nutrition adapted to the child’s developmental, cultural, religious and health needs; – access to health care; – provision of medical products, and foodstuffs for special nutritional purposes, as well as medical devices, along with coverage of the child’s own contribution up to the limit provided for in the regulations on health care services financed from public funds; – access to educational, compensatory, as well as therapeutic and revalidation classes, if such are indicated for the child; – equipment of clothing, footwear, underwear and other items of personal use, according to age and individual needs; – toys appropriate to developmental age, personal hygiene products; – provision of textbooks, school aids and supplies; – a monetary amount for the child’s own disposal from the age of 5, the amount of which, not less than 1% and not more than 8% of the amount corresponding to the amount referred to in Article 80 (1)(2) of the Act of 9 June 2011 on family support and foster care system,<sup>26</sup> shall be determined monthly by the head of the care and educational institution or regional care and therapeutic institution; – 24-hour access to basic food and beverages; – access to education, which depending on the needs of the children, shall take place in schools outside the care and educational institution or regional care and therapeutic institution in the system of individual teaching; – assistance in learning, in particular with homework and, if necessary, through participation in remedial classes; – participation, as far as possible, in extracurricular activities and recreational and sports activities; – payment for a stay in a boarding school, if the child is studying outside the locality in which the care-educational institution or regional care-therapeutic institution is located; – payment of the cost of transportation to and from the place of legitimate stay outside the care-educational institution or regional care-therapeutic institution.

After consideration of the authority’s application by the general court for the appointment of a guardian and placement of a minor in foster care, which is provided in the case of inability of the parents to provide care and upbringing for the child, the minor is placed in foster care. According to Article 32 of the Act on foster care, the institution primarily provides work with the family to enable the child to return to the family or, when this is impossible, to seek adoption of the child, and in the case

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<sup>26</sup> Journal of Laws of 2023, item 1426 as amended [hereinafter: Act on foster care].

of impossibility of adoption, care and upbringing in a foster environment. The purpose of foster care is to meet the emotional needs of children, taking into account living, educational, cultural and recreational needs. Children remain under foster care until their application for international protection is considered, or until they reach the age of majority during the procedure for considering an application for international legal protection.

When a child (unaccompanied minor) travels with a member of the extended family to the border of the Republic of Poland and shows willingness to apply for international protection, the child's relatives who are related in the direct line of the second degree or in the lateral line of the second or third degree may be shown in the authority's application to the general court for assignment as a foster family, if the minor agrees. Such a solution provided for in Article 61(1a) of the Act on granting protection follows the principle of respect for family life under Article 8 of the Convention for the protection of human rights and fundamental freedoms.<sup>27</sup> As the European Court of Human Right case law indicates, placement of a child in a family institution is consistent with Article 8 of the ECHR only if it is lawful, pursues a compatible goal of the child's best interests, and is considered necessary in a democratic society, and the child must be heard in certain circumstances.<sup>28</sup> Each child experiences the world in his own way and determines for themselves which of their experiences are meaningful to them and why.

In terms of modern philosophy of the subject, goodness is "a value established and realized by man" [Sołtys 2015, 133]. Pointing to the different faces of goodness in the modern world, A. Sołtys states that those conceived as values are placed in the subjective sphere [ibid., 139-42]. Goodness as a value from the subjective perspective can be analyzed through the prism of cognitive-perceptual theory of the self [Epstein 1990, 11-32]. The author points to a two-system view of cognitive processes, which are the preconscious experiential system and the conscious rational system.

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<sup>27</sup> Journal of Laws of 1993, No. 61, item 284 [hereinafter: ECHR].

<sup>28</sup> Judgment of the European Court of Human Right of 19 February 2013, *B. v. Romania* (No. 2), case number 1285/03; judgment of the European Court of Human Right of 14 March 2013, *B.B. and F.B. v. Germany*, case numbers 18734/09 and 9424/11.

The former refers to emotions that guide behavior, while the latter is an analytical and abstract system. This is because it turns out that the viewpoints of the child and the adult most often diverge. Both subjects define what is important to them differently. Responding flexibly to what the child is currently experiencing, while “coping” with problems, has a positive impact on the quality of the child’s current and future life.

Detention of children takes place despite the fact that a range of non-custodial alternatives are available in the country where the child is located, even when detention is of relatively short duration, when children are detained with their families, and even when detention takes place in “child-friendly” detention centers<sup>29</sup> and various types of harm may occur.

Over the past 20 years, immigration detention of children has been increasingly used as a part of strategies to combat irregular migration [Flynn 2014, 15-19]. However, according to information provided by the International Organization for Migration (IOM), in practice, alternatives to detention that use case management based on the best interests of the child to promote commitment to the successful completion of international protection and immigration processes often achieve higher rates of case resolution while ensuring the well-being of children.<sup>30</sup> The IOM, the United Nations High Commissioner for Refugees (UNHCR) and United Nations Children’s Fund (UNICEF) conducted a joint review of detention practices for migrant children across the European region in 2021. It showed that of the 38 countries reviewed, in 26 countries children are placed in detention prior to their deportation from the country. In 18 countries, children are placed in detention upon arrival, in 8 countries during procedures for international protection, in 5 countries during age evaluation procedures, and in 16 countries while awaiting other procedures. In almost all

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<sup>29</sup> UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, [www.ohchr.org/Dokumente/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf](http://www.ohchr.org/Dokumente/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf) [accessed: 23.09.2023].

<sup>30</sup> IOM, *Child Immigration Detention Is Not Only Wrong, It Is Ineffective*, [www.iom.int/news/not-only-wrong-it-ineffective](http://www.iom.int/news/not-only-wrong-it-ineffective) [accessed: 23.09.2023]; UNHCR, *Options Paper 2: Options for governments on open reception and alternatives to detention*, [www.refworld.org/docid/5523e9024.html](http://www.refworld.org/docid/5523e9024.html) [accessed: 23.09.2023].

countries, children placed in detention are held in detention centers for foreigners rather than in criminal detention centers. In 9 countries, detention of migrant children was not permitted by the national legal framework.

Problems of independent child migration continue to be under-recognized within the activities of international organizations. The problems are not given due consideration in addressing the social determinants of migration movements in the subject literature. Researchers argue that the impact of parental migration on the situation of children is an extremely difficult, in an unambiguous evaluation, moral, psychological, pedagogical as well as legal problem [Jatrana, Toyota, and Yeoh 2005, 12; Naerssen, Spaan, and Zoomers 2008, 1-18].

## **Conclusion**

The phenomenon known as independent migration of children is certainly not new in recent years. The exact number of children undertaking various types of migration is currently unknown. Child migration constitutes a phenomenon that is quite common in many countries of the world. Undertaking emigration unaccompanied by adults, children are exposed to a particularly wide range of problems. As defined in Article 3(1) of the Convention on the Rights of the Child, described in detail by the Committee on the Rights of the Child in General Comment No. 14, and with regard to children with disabilities in Article 7 of the Convention on the Rights of Persons with Disabilities<sup>31</sup> and General Comment No. 6 of the Committee on the Rights of Persons with Disabilities.

Any decision regarding a child deprived of parental care must be based on the principle of the best interests of the child. The right of the child (unaccompanied minor) under Polish legislation is the timely processing of his application for international protection. Code regulations contained in the Code of Administrative Procedure on time limits for handling cases indicate that administrative authorities are obliged to handle the case without undue delay Article 35 § 1 and 2 of the Code of Administrative Procedure. Cases requiring investigation should be settled no later than within

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<sup>31</sup> Convention on the Rights of Persons with Disabilities, drawn up in New York on 13 December 2006, Journal of Laws of 2012, item 1169.

a month, and particularly complex cases no later than within 2 months from the date of initiation of the proceedings, and in appeal proceedings within a month from the date of receipt of the appeal (Article 35 § 3 of the Code of Administrative Procedure). The general deadlines and indications for handling an administrative case do not apply to refugee cases.

Unaccompanied children in proceedings for international legal protection are always represented by a guardian (Article 40 § 2(1) of the Code of Administrative Procedure and Article 129 § 2 of the Code of Administrative Procedure). Therefore, the authorities serve letters and rulings in accordance with the general rules on service under the Code of Administrative Procedure. In the procedure for granting international legal protection to an unaccompanied child, an appeal against any decision may be made to a higher authority, as according to Article 89 of the Act on granting protection, the Council for Refugees is a public administration body that considers appeals against decisions and complaints against decisions issued by the Head of the Office, which is regulated in Article 127 § 3 of the Code of Administrative Procedure. A decision issued in the first instance by the Minister (Article 5 § 2(5)) is not subject to appeal, but to a request for reconsideration. It is necessary to pay due attention to balancing the various elements of the best interests of the child, and therefore to take a holistic approach to the child's problems taking into account the determination of the best interests of the child in accordance with the procedural guarantees contained in Section V of General Comment No. 14 of the Committee on the Rights of the Child. It should be noted that in the 2017 Communication from the Commission to the European Parliament and the Council on the Protection of Migrant Children, the need for a range of care alternatives, including family foster care,<sup>32</sup> was included in key actions. The EU Directive on Reception Conditions for Migrant Children requires unaccompanied minors to be placed with adult relatives, with a foster family, or in a facility for foreigners suitable for children or with special facilities for them.<sup>33</sup>

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<sup>32</sup> European Commission, Communication from the Commission to the European Parliament and the Council, Protecting Migrant Children, COM/2017/0211, <https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:52017DC0211> [accessed: 23.09.2023].

<sup>33</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on the establishment of standards for the reception of applicants for international protection, Official Journal of the European Union L 180/96 of 29 June 2013 as amended.

Eurostat publications<sup>34</sup> disclose data on children migrating within the European Union, despite the absence of a country-by-country requirement to report data on child detention. This lack of data hinders monitoring of progress in the implementation of policies related to ending the practice of child detention.

In relation to the use of child detention during migration and the call for the development of further effective solutions, there are interesting proposals for solutions to the problem, i.e. alternatives to detention and appropriate care arrangements in the European context, which were presented on the example of Cyprus, Greece, Spain, Belgium, the Netherlands, Germany, Italy, Iceland, Ireland and Serbia, a document was developed by IOM UN Migration, UNHCR The Refugee Agency, UNICEF entitled *Concern for the safety and dignity of refugee and migrant children: Recommendations on alternatives to detention alternatives to placement of children in detention centers for foreigners and appropriate care arrangements in Europe*. It indicates that state institutions should be replaced by quality care, including family foster care and community-based care. With proper training and support for caregivers, and effective efficient supervisory control mechanisms. The current situation calls for deeper reflection on the social costs of migratory movements and in-depth analysis before forming a balanced opinion based on facts that are borne out by reality. The legal, social and psychological consequences of the independent migration of children is one of the most significant problems currently caused by population movements in the world, and requires special handling by appropriately prepared personnel.

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<sup>34</sup> Eurostat, *Migration and asylum*, <https://ec.europa.eu/eurostat/web/migration-asylum/children-migration/database> [accessed: 24.09.2023].

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