

# THE REPUBLIC OF POLAND

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## INTRODUCTION

The conversion of the Polish political system – from totalitarian to democratic – in 1989 led to substantial changes in the whole legal order obviously including migration and asylum law. In fact, the creation of a totally new system must have begun. Among other aspects, the obligations under international law deriving from newly adhered to international agreements such as the 1951 Refugee Convention had to be taken into account. Moreover, the future EU accession requirements gradually become a determinant in the process.

The first comprehensive regulation was adopted only in 1997 when the Alien Act covering both migration and asylum issues was adopted. However, the deficiencies which appeared in practice, as well as the accelerating process of adjusting Polish migration and asylum regulations to the EU standards which formally began in 1999 led to major amendment of the Aliens Act in April 2001. The evolution of the migration and asylum law within the EU led to further major changes. In 2003 the new Aliens Act was adopted jointly with the Act on granting protection to aliens within the territory of the Republic of Poland both of 13 June 2003 (*Journal of Laws 2003, No. 128, item 1175 and 1176 respectively*; hereafter referred to as the AA and the APA respectively). Both acts entered into force on 1 September 2003. Earlier the Act on principles and conditions of entry and residence of nationals of Member States of the European Union and their family members within the territory of the Republic of Poland of 27 July 2002 (*Journal of Laws 2002, No. 141, item 1180, as amended*), which will enter into force on the day of accession, was adopted. The two latter acts are of *lex specialis* character in relation to the AA. One should also mention the Act on Repatriation of 9 November 2000 (*Journal of Laws 2000, No. 106, item 1118, as amended*).

However, taking into account the EU developments, the process of establishing the Polish migration and asylum law system continues. New amendments aimed at further adjustment to the EU standards are

planned. Due to the dynamic evolution of the EU regulations the adjusting process must be assessed as especially difficult. It has been informally labelled as a “shooting at a moving target” activity. Nevertheless, it seems that a more critical approach by the Polish authorities towards the EU standards, which very often cause serious concerns as far as conformity with international law standards is concerned, would be much more desirable. Yet, a passive approach has definitely prevailed so far.

The creation process of Polish migration and asylum law as such has been strictly linked with EU developments. Thus, it is hardly possible to answer the question what Polish migration and asylum law would be like without the adjustment process and, in consequence, to credibly assess the influence of EU standards on the Polish regulations.

## PART I ENTRY, VISA REGIME AND BORDER CONTROL

**1.1 What national authorities are competent to deal with visa applications (Schengen visas and long-term visas)? Are there any procedures to avoid duplication or successive visa applications at different EU-consulates? On what substantive criteria, other than the Schengen minimum requirements, are visas granted or refused? How many visas have been issued or refused?**

Visa regulations of the 2003 AA which have significantly changed the previous ones were introduced in order to improve the effectiveness and coherence of the Polish visa system and to ensure its compatibility with the EU standards.

The AA identifies the following visa categories: airport visa, transit visa, entry visa, residence visa, diplomatic visa, service visa, courier visa, transit diplomatic visa.

Generally, a consul is the competent authority to deal with a visa application (Art. 46.1 AA). Additionally, in specified situations, other authorities are competent. They include: a voivod (*wojewoda*; a local representative of government; Poland is divided into 16 regions /*województwo*/), a commanding officer of the Border Guard checkpoint, the minister competent with respect to foreign affairs; a head of a Polish diplomatic mission and a person appointed by the minister competent with respect to foreign affairs to perform consular functions.

The extraordinary residence visa provided for in Art. 33 AA, may be issued even if the general conditions justifying visa refusal apply. It may be issued or refused, alternatively by a consul or by a voivod competent with respect to the place of the alien's residence. Issuing such a visa is

subject to the prior consent of the Head of the Repatriation and Aliens Office (Art. 46.3 AA).

The residence visa provided in Art. 34.1–2 AA for a minor alien born on the territory of Poland or, alternatively, for a person representing a minor whose travel document lists the minor concerned is issued or refused by a voivod competent with respect to the place of residence of the person representing the minor (Art. 46.4 AA).

Diplomatic visas, service visas, courier visas and transit diplomatic visas are issued or refused by the minister competent with respect to foreign affairs, a head of a Polish diplomatic mission or a person appointed by the minister competent with respect to foreign affairs to perform consular functions (Art. 46.5.1–2 AA). In particularly justified cases they may be also issued by a commanding officer of the Border Guard checkpoint (Art. 46.5.3 AA).

A commanding officer of the Border Guard checkpoint is also entitled to issue an extraordinary residence visa under Art. 47 AA. Such a visa may be issued to an alien proving exceptional and urgent grounds justifying his or her entry to, residence in or transit through Poland and that he or she was unable to be issued with a visa from a consul for unforeseeable and imperative reasons. The competence of a commanding officer of the Border Guard checkpoint to issue an extraordinary residence visa under Art. 47 AA will cease at the moment of accession to the EU (Art. 165.2 AA).

The AA, in comparison with previous regulations, limits the visa competences of authorities other than a consul and sets out these competences in a more detailed manner.

A visa refusal decision is final except for a visa issued by a voivod (Art. 46.8 AA).

## 1.2 Is there a visa tracking procedure in order to identify visa overstayers? What data are collected from visa-applicants (fingerprints)? Admissibility of visa data to alien and police authorities?

No special visa tracking procedure exists in order to find out visa overstayers. Generally, the legality of an alien's residence in Poland is controlled when an alien is justifiably believed to reside illegally or violates public order (Art. 85–87 AA and the Minister of Interior Regulation on the legality control procedures with respect to aliens residence within the territory of the Republic of Poland, *Journal of Laws 2003, No. 143, item 1426*). The pending reform of the Polish Border Guard including, *inter alia*, the

extension of competences to control aliens within the whole territory of Poland should be also mentioned in this context.

Data which may be collected from aliens in procedures covered by the AA are stipulated in Art. 12.1 AA. They include: first name(s); surname; former surname; surname at birth; sex; father's first name; mother's first name and surname at birth; date of birth or age; place and country of birth; description including height in centimetres, colour of the eyes and distinctive features; fingerprints; citizenship; ethnic origin; marital status; education; current occupation; place of employment; place of residence or stay; information on criminal record, judicial or administrative decisions and pending criminal proceedings. Additionally, data on an alien's state of health may be collected in visa, admission and residence procedures (Art. 12.2 AA).

However, under the AA fingerprints are only collected in the following situations: illegal entry, save in situations where an alien entered unintentionally and subsequently was immediately escorted to the border (Art. 14.2 AA); issuing an expulsion decision (Art. 93 AA); detaining an alien to whom the premises of expulsion apply or who does not comply with an expulsion decision (Art. 101 AA). Additionally, fingerprints are collected from aliens seeking protection under the APA.

Visa applications (visa prolongation application) must include: an alien's personal data, as well as the data of children whom the application covers, as well as data of other persons listed in an alien's travel document; data on an alien's travel document; information relating to travelling and residing abroad within the previous five years; the purpose of the residence planned. An alien is obliged to justify the application and to enclose documents confirming information stated in the application as well as photographs of persons covered by the application (Art. 45 AA).

Visa data including the above mentioned data on visa applicants, as well as detailed data on particular visa procedures (applications, administrative decisions, judgements) form the Visa Register which is a part of the general aliens data system under the AA, known as the Residence System (*System Pobytu*). All data from the Residence System, as well as from the separate Register of Aliens' Fingerprints are available under Art. 133 AA to the following authorities: the Commandant in Chief of the Police; the Commandant in Chief of the Border Guard; the Chief of the Internal Security Agency; the Chief of the Intelligence Agency; the Minister of National Defence; the minister competent with respect to public finances; the minister competent with respect to internal affairs; the Refugee Council;

a court; the Supreme Administrative Court; a prosecutor; a voivod; a consul. Data included in the Residence System may be transferred abroad under relevant international agreements (Art. 134 AA).

**1.3 Have courts ever decided on the refusal of a Schengen visa based upon Schengen blacklisting by other Member States?**

n/a

**1.4 What measures have been undertaken in the implementation of the action programme for administrative cooperation in the field of external borders, visa, asylum and immigration following the Council Decision of 13 June 2002?**

According to the information from the Repatriation and Aliens Office no special measures of administrative co-operation are in operation so far.

**1.5 What measures have been undertaken to implement the Directive 2001/51 EC supplementing the Schengen rules concerning carrier sanctions? How often have carrier sanctions been used?**

Carrier sanctions have been effectively used in practice since they were introduced to the Polish legal system by the 1997 Aliens Act. Currently, carrier sanctions are regulated in Chapter 12 of the 2003 AA (Art. 135–140). Regulations of the AA have significantly changed the previous regulations. New regulations were introduced in order to meet the EU standards.

The regulations of Chapter 12 of the AA cover all standards specified in the Directive of 28 June 2001 which supplement the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (2001/51/EC), including: carrier obligations on aliens in transit; the financial responsibility of a carrier which is unable to effect the return of an alien; the amount of penalties (according to Art. 138 AA the penalty amounts to the PLN equivalent of not less than EUR 3,000, – up to EUR 5,000, – for each person and not more than EUR 500,000, – in total; other penalties are not provided); as well as carriers' effective rights of defence and appeal with respect to penalties.

However, provisions on carrier sanctions apply only to air and sea carriers. According to Art. 165.1 AA they will also be applied to land carriers following the accession.

Moreover, the case-law of the Supreme Administrative Court (NSA), referring mainly to the scope of a carriers' control obligation, has been taken into account. Consequently new regulations precisely delimit the obligation of a carrier to control travel documents and visas.

1.6 In your judgement, does the visa law and policy of your country live up to EU standards or are adjustments needed? Do you consider that there is need for further EU-harmonization of visa policies concerning:

- common criteria for granting visas aiming at harmonizing visa obligations among states participating in the Budapest Process;
- establishment of a European visa identification system (VIS and SIS II)?

To what extent will the EU enlargement process present an opportunity or challenge for tackling issues of illegal entry and border control?

Polish migration law, including visa regulations, has been intensively adjusted to the EU standards. Definitely, the 2003 AA marked significant progress in this respect. However, the process is still on-going.

## PART II ADMISSION AND RESIDENCE OF THIRD COUNTRY NATIONALS

2.1 What are the basic principles in your country concerning:

- admission of third country nationals for labour purposes or self-employed activities;
- admission of third country nationals for study and vocational training;
- legal status of third country nationals in possession of a long-term residence permit of another Member State?

To what extent do these principles differ from the European Commission's proposals;

2.2 What are the legal requirements and procedures for obtaining a residence permit for third country nationals for the purpose of employment? Which procedures are used in maintaining the preferred access of EU-citizens and Turkish nationals (association agreement) to the labour market? Do special programmes exist for highly qualified professionals facilitating access to the labour market? To what extent are trade unions and employers involved in such programmes? Is there a procedure to calculate the demand for foreign labour? How is the EU-enlargement taken into consideration? To what extent has the recent economic recession and unemployment influenced the concepts on admission of third country nationals?

2.3 To what extent do existing national laws and practices differ substantially from the approach taken in the Commission's Proposal on admission for the purpose of paid employment and self-employed activities relating to:

- admission of third country nationals for study and vocational training;
- on legal status of third country nationals in possession of a long-term residence permit of another Member State?

To what extent do these principles differ from the European Commission's proposals?

2.4 What measures have been taken to implement the Directive of 29th June 2000, implementing the principle of equal treatment between persons irrespective

of racial or ethnic origin and Council Directive 2000/78 EC of 27th November 2000, establishing a general framework for equal treatment in employment and occupation? Have legislative changes been undertaken? To what extent is “affirmative action” considered as necessary to promote equal opportunities for migrant workers from third countries?

The residence visa is issued for the following purposes listed in Art. 26.1.4. However, the catalogue is not of *numerus clausus* character. The residence visa may be of short-term (for a maximum of three months) or long-term character (for a maximum of one year). Long-term residence visas may be issued for the listed purposes (tourism; visits, participation in sports events; self-employment; cultural activity or participation in international conferences; performing service obligations by representatives of foreign states or international organisations; asylum procedure – which is distinct from refugee status procedure; see Part III below – ; employment – pursuing economic activity – ; education, training, didactic – other than economic activity; enjoying temporary protection) in circumstances which require residence for a period longer than three months. The residence period is determined according to the relevant circumstances. Residence visas for the purpose of employment may be issued to an alien who provides a document certifying that an employment permit will be issued or – if such a permit is not required – a document issued by an employer certifying the intention to employ an alien. Residence visas may be prolonged once within the maximum validity period of one year only if each of the following conditions is met: the alien has important professional or personal interests for staying or humanitarian grounds occur; the reasons for visa prolongation are of unforeseeable and imperative character; the purpose of residence is not distinct from the declared one; established grounds for visa refusal (Art. 42.2–7) do not apply.

The AA provides two forms of residence permits: residence permits and settlement permits.

A residence permit is granted to an alien if circumstances justify his or her residence for a period exceeding three months and one of the following is met:

- a) an alien provides a document certifying that an employment permit will be issued or prolonged or – if such a permit is not required – a document issued by an employer certifying the intention to employ the alien concerned;

- b) an alien is self-employed and the activity pursued is in the interest of Poland and he or she possesses sufficient financial means for covering residence within Polish territory;
- c) an alien is an established artist intending to continue his or her activity in Poland;
- d) an alien participates in training and vocational training in the framework of the EU programmes;
- e) an alien intends to join a migrant worker in accordance with the provisions of the European Social Charter of 18 October 1961;
- f) an alien is a spouse of a Polish national;
- g) an alien intends to come or has come to Poland for family reunification;
- h) an alien is a minor born within Polish territory being a child of an alien with a residence permit (Art. 53.1 AA).

Moreover, a residence permit may be granted to an alien if: he or she proves that circumstances justifying his or her residence for a period exceeding three months other than those listed in Art. 53.1 AA occur and he or she possesses sufficient financial means to cover residence within Polish territory; or an alien intends to begin or to continue university education being able to provide a relevant document of confirmation, as well as possesses sufficient financial means to cover residence within Polish territory (Art. 53.3 AA). The residence permit is also granted to a person enjoying temporary protection (Art. 110.2 APA). Moreover, the premisses of residence permit refusal are provided in Art. 57.1 AA.

It is assumed that an alien possesses sufficient financial means to cover residence within Polish territory if they cover the costs of accommodation, living and health care of the alien concerned and his or her dependant family members without recourse to the social assistance system (Art. 53.4 AA).

The settlement permit is granted:

- a) to an alien who proves that: he or she has established family or economic links with Poland; and possesses accommodation and means of support in Poland; and was continuously residing within the territory of Poland directly before applying for a settlement permit for a period of minimum five years under visas, a residence permit or refugee status or for a minimum of three years under residence permits issued for the purpose of family reunification;
- b) to a minor born within the territory of Poland who is a child of an alien if at least one of his or her legal representatives has been issued a settlement permit;

- c) to an alien married to a Polish national for at least three years if he or she was residing within the territory of Poland directly before applying for a settlement permit for a continuous period of two years minimum;
- d) to an alien who is not covered by the situations listed above and who was residing within the territory of Poland directly before applying for a settlement permit for a continuous period of a minimum of ten years under visas, a residence permit, tolerated stay leave or of a minimum of eight years under refugee status;
- e) to a child of a Polish national if the latter enjoys parental authority.

The grounds for refusing a settlement permit are provided in Art. 66 AA and they are in line with the relevant regulations of the Directive of 25 November 2003 concerning the status of third country nationals who are long-term residents (2003/109/EC).

As a general rule, an alien may be employed (pursue economic activity) subject to the alien possessing an employment permit. However, aliens who have been granted a settlement permit, refugee status, tolerated residence leave or temporary protection are exempted from the requirement of possessing an employment permit. Following the day of accession the exemption will be extended to nationals of the EU Member States and their family members (Art. 50.1 of the Act on employment and preventing unemployment of 14 December 1994, *Journal of Laws 2003, No. 58, item 514, as amended* in conjunction with Art. 1.2 of the Act on amending the Act on employment and preventing unemployment of 26 April 2002, *Journal of Laws 2002, No. 74, item 675, as amended*). Some further categories of aliens pursuing determined economic activities are also exempted from the requirement of possessing an employment permit.

An employment permit is issued by a voivod. An application for an employment permit is preceded by the issuing of a document certifying the intention to employ an alien. Such a document is issued by a voivod on the request of an employer and is the basis for an alien to apply for a residence visa for the purpose of employment or for a residence permit. Issuing employment permits to aliens who have already been issued with a relevant visa or residence permit is not preceded by issuing a document certifying the intention to employ an alien.

There are no special programmes facilitating access to the labour market for highly qualified professionals.

## 2.5 Concerning the proposal for a directive on the right to family reunion agreed upon by the Council in February 2003:

- Do you consider the proposed standards below the principles of family reunification applicable in your country?
- Will the implementation of the Directive, once it is adopted, lead to changes in the national law on family reunification downgrading the standard of protection? If so, what changes are envisaged?

The principles of the AA on family reunification are generally in line with the Directive of 22 September 2003 on the right to family reunification (2003/86/EC) as they were modelled on the basis of the draft directive. Thus, it is hard to assess whether further implementation of the Directive standards – if needed – would lead to the downgrading of the family reunification standards under the AA. Nonetheless, this cannot be excluded. For instance, restrictions upon family members' access to employment and self-employment might be introduced in accordance with Art. 14.2–3 of the Directive. Yet, the AA requires the sponsor – save a person granted refugee status – to have stayed lawfully in the territory for a period of three years before becoming entitled to reunite with family members (Art. 54.1 AA). This is a standard lower than the one contained in the general rule set out in Art. 8 of the Directive which limits such a requirement to a maximum period of two years. Some of the family reunification standards of the AA based on the Directive model (e.g. the scope of family members entitled to reunite) cause serious concerns regarding their conformity with the established international law standards of family protection such as Art. 8 of the European Convention on Human Rights.

2.6 The proposal for a directive on the rights of long-term third country nationals as agreed upon by the Council on 5 June 2003, provides for a number of rights approximating the situation of long-term residents to the status of EU-citizens. Will the implementation of the Directive involve major legal and policy changes in your country? What are the major points of concern if any, concerning the approximation concept of the directive relating to:

- non-discrimination in social rights;
- the concept of “civic citizenship” (see also extended impact assessment on the Communication on Integration of June 11, 2003);
- family reunification and access of family members to the labour market;
- security of stay?

The status of long-term residents (enjoying a settlement permit) in Poland under the AA seems generally in line with the Directive of 25 November 2003 concerning the status of third country nationals who are long-term residents (2003/109/EC) including the approximation of certain rights to the status of Polish nationals. No major legal changes seem to

be necessary save implementation of regulations on the terms of residence in Member States other than the one which conferred long-term status.

2.7 Considering the perspective of a future common migration policy as developed by the Commission in the Open Coordination Communication (COM 2001, 387) and the Communication on a Migration policy of the European Union (COM 2000, 757 final), how do you assess the role of the Community organs in determining a European migration policy in terms of competences of the Member States to decide on residence rights and admission to the labour market and integration? Should harmonization of legislation go further, and if so, in what respect?

No official position concerning the perspectives of a future common migration policy exists.

### PART III ASYLUM AND REFUGEE LAW

Poland acceded to the 1951 Refugee Convention only in 1991. Since then the creation process of the comprehensive Polish asylum system has begun. The process reflects the increasing number of persons seeking protection in Poland, as well as the EU accession requirements. Thus, the impact of EU asylum legislation and policies may be regarded as decisive. As such, it has given rise to major concerns concerning the conformity of some of the EU standards and policies with the 1951 Refugee Convention system and other relevant human rights standards.

The 1997 Constitution guarantees in Art. 56 that aliens may be granted asylum in Poland and those seeking protection from persecution may be granted refugee status. The APA of 2003 provides that four forms of protection may be granted to aliens within the territory of Poland: a) asylum; b) refugee status; c) subsidiary protection (known as tolerated residence); d) temporary protection.

The institution of asylum in Polish law originates from legal traditions prior to the accession to the 1951 Refugee Convention in 1991. Asylum may be granted when an alien is in need of protection and cumulatively granting asylum is in the best interest of Poland. The institution is of a highly discretionary character. The appeal procedure is limited to challenging expulsion only. The practical importance of the institution is marginal.

3.1 Have the Dublin Rules worked satisfactorily and what is expected of the Dublin II Regulation No. 343, 2003 of 18 February 2003?

The future application of the Dublin II Regulation of 18 February 2003 (343/2003) will undoubtedly lead to an increase in the number of

asylum-seekers in Poland which will be a challenge for the effectiveness of the Polish asylum system. Moreover, the below mentioned inconsistencies with the EU standards cause special concern in this respect.

3.2 Has the Eurodac Regulation No. 2725/2000 of 11th December 2000, concerning the establishment of Eurodac for the comparison of fingerprints for an effective application of the Dublin Convention, operative since January 15, 2003, resulted in an increase of Dublin cases? Has Eurodac become effective in your country or is it expected to become effective eventually?

A special workgroup has been established within the Repatriation and Aliens Office in order to ensure the effective participation of Poland in Eurodac following the accession.

3.3 What major changes, if any, will the implementation of the amended proposal for a directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, on which the Council has reached political agreement on most points in June 2003, bring for the legislation and practice in your country in particular relating to:

- rights of applicants in the procedure;
- administrative and judicial appeal procedures;
- the use of safe third country and safe country of origin concepts;
- detention of asylum seekers;
- airport and border procedures?

As far as the rights of applicants in the refugee procedure are concerned, they are generally compatible with the proposed Directive. The rights include: the right to be informed in an understandable language about the procedure and applicant's rights and obligations (Art. 22 APA); the right to be interviewed (Art. 27.2 APA); and the right to communicate with the UNHCR and other refugee organisations (Art. 23.1 APA). Moreover, extensive guarantees for unaccompanied minors, violence victims and disabled asylum-seekers are provided (Art. 47–55 APA). Also, the special status of the UNHCR is guaranteed (Art. 23.2–8 APA).

The right to be interviewed is generally limited to the obligation of the determining authority to interview an applicant. The lack of further statutory guarantees on the right to an interview – save the guarantees for unaccompanied minors, victims of torture and disabled asylum-seekers – is significant in the light of the proposed Procedure Directive standards in this respect. However, the standards are generally met in practice.

Also, problems may arise in the context of the right to legal assistance and representation. Free legal assistance to asylum-seekers is effectively offered by NGOs and other relevant entities such as university legal clinics which asylum-seekers are free to consult. However, there is no formal

obligation for authorities to ensure such assistance. The problem becomes especially important in the case of detained asylum-seekers. The problem is currently being debated.

The determining authority at first instance of the refugee procedure is the Head of the Repatriation and Aliens Office. The appeal authority body of second instance is the Refugee Council which is an independent administrative body of quasi-judicial character. The Refugee Council is entitled to examine both points of law and facts. An applicant is allowed to remain on the territory during the appeal procedure before the Refugee Council. From the decision of the Refugee Council an appeal to an administrative court may be lodged. Lodging an appeal to the court does not result in leave to remain on the territory but such leave may be granted by both the Refugee Council (*ex officio* or on request) or the court (on request). Since 1 January 2004 and following the reform of the Polish administrative judicial system the administrative judicial procedure consists of two instances. The administrative courts are not entitled to make decisions on the merits of a case. The procedure is compatible with the proposed Procedure Directive requirements. However, taking into account the four-instance refugee procedure and the cassational character of administrative courts' judgements, ensuring that the procedure results in a final decision within a reasonable time seems to be a challenge.

It seems that the concepts of "safe third countries" and "safe countries of origin" are good illustrations of the difficulties faced in adopting the EU measures to the Polish legal system. Art. 35.3 of the 1997 Aliens Act in its original version stated that access to the asylum procedure is to be denied if an asylum-seeker "*has arrived in the territory of the Republic of Poland from a safe country of origin or a safe third country and the application lodged by him/her is manifestly unfounded*". Thus, it was not in conformity with the EU soft law measures, or with international refugee law standards. The Polish regulation was changed in this respect by the 1997 Aliens Act's amendment of April 2001 and the lists of "safe third countries" and "safe countries of origin" have been abolished. The issue of whether an asylum-seeker came from a "safe third country" was determined in an admissibility decision by the relevant determining authority (the Head of the Repatriation and Aliens Office). As regards the "safe countries of origin" concept, if the relevant authority determined – while examining an application – that an asylum-seeker had come from a "safe country of origin", it was a ground to recognise an application as manifestly unfounded and refuse the granting of refugee status (accelerated procedure applied here). The regulation on "safe countries of origin" has been incorporated

in the 2003 Aliens Act. However, the same rule was extended to the “safe third country” concept as well (Art. 14.1.3). *De lege lata*, both coming from a “safe country of origin” and a “safe third country” constitute a ground for recognising an application as manifestly unfounded and refusing the grant of refugee status (accelerated procedure applies here). Such a regulation is far from the approach taken in this respect by the Commission in the proposed Procedure Directive. However, the pending debate within the Council must also be taken into account. As far as the definitions of the “safe country of origin” and the “safe third country” concepts are concerned, they are defined in Art. 2.2 and 2.3 of the AA respectively.

The 2003 APA has introduced regulations on the detention of asylum-seekers (Chapter : Art. 40–46 APA). The regulation is based on the internationally recognised principle that generally asylum-seekers should not be detained. Yet, it allows for far reaching exceptions. An asylum-seeker is to be detained and placed in a guarded centre or in a deportation centre if he or she: submits an application at the border being not entitled to enter; submits an application while staying illegally within the territory; illegally entered or attempted to enter before submitting an application; was issued a decision obliging him or her to leave or a decision on expulsion before submitting an application; was issued a decision on expulsion after submitting an application (Art. 40 APA). Asylum-seekers who are unaccompanied minors, disabled or victims of torture must not be detained (Art. 47.5 and Art. 54.3 APA respectively). Asylum-seekers are detained upon a court’s decision and a subsequent court review is also provided. According to the authorities, the regulations on detention were introduced in order to stop the abuse of the refugee procedure (e.g. an alien not entitled to enter submits a refugee application and subsequently disappears within the territory). Nevertheless, the extensive character of detention causes serious concerns. The problem of the detained asylum-seekers’ rights, such as the right to be informed of one’s own legal status (the APA is silent in this respect) or the right of access to effective legal assistance and representation (the APA regulation is limited to providing free contact with the UNHCR or refugee organisation representatives), seems especially important in the context of Art. 5 of the European Convention on Human Rights. Yet, as far as the proposed Procedure Directive is concerned, the implementation of the provisions on the detention of asylum-seekers, which are rather ambiguous, does not seem to require any changes.

There are no special airport and border procedures regarding refugee procedures (save the above mentioned regulations on detention). An

application may be lodged at the border to a commanding officer of the Border Guard checkpoint and subsequently must be transferred to the determining authority (the Head of the Repatriation and Aliens Office) within 48 hours.

**3.4** What measures have been undertaken to implement Directive 2003/9 of 27 January 2003, on reception of asylum seekers in your country relating to:

- the flexibility clauses in the Directive;
- restriction of free movement;
- access to the labour market;
- rights of migrant workers under Article 11 § 2 of the Directive?

As far as minimum standards for the reception of asylum-seekers are concerned, the relevant regulations of the 2003 APA are based on the Directive of 27 January 2003 laying down minimum standards for the reception of asylum-seekers (2003/9/EC). Generally, the standards of the Reception Directive are met. However, according to Polish regulations asylum-seekers do not enjoy access to the labour market. Amendments adjusting the regulation to the requirements of Art. 11 of the Reception Directive will be necessary. The APA does not provide any limitations upon asylum-seekers' freedom of movement save those detained.

**3.5** What steps have been undertaken to implement the Directive on temporary protection, COM 2001, 55 in national law? Are there any procedures for burden sharing arrangements? Is there a legal basis for the admission of refugees for the purposes of receiving temporary protection in a mass-movement situation?

The institution of temporary protection was introduced into the Polish legal system for the first time only in the 2001 amendment of the 1997 Aliens Act. The previous lack of relevant regulations was significant especially in 1999 when it impeded the process of granting protection to the Kosovars. The 2003 APA introduced an extensive regulation on temporary protection in Chapter 3 (Art. 106–118). The regulation is based on the Temporary Protection Directive of 20 July 2001 (2001/55/EC). Till the accession to the EU the temporary protection regime has been introduced by the Council of Ministers of the Republic of Poland (Art. 108.1–3 APA in conjunction with Art. 146.3 APA). Following the accession the temporary protection regime will be introduced in accordance with the decision of the Council of the EU. Additionally, the Council of Ministers of the Republic of Poland will retain the competence to grant temporary protection to those not covered by the decision of the Council of the EU (Art. 107 APA in conjunction with Art. 146.1 APA).

However, it is worth noticing that the APA establishes the duration of temporary protection for one year. Further, the temporary protection regime may be extended by two six-month periods for a maximum of one year (Art. 106.2–3 APA). This regulation is in conformity with Art. 4.1 of the Temporary Protection Directive. It seems, however, that it falls under the competences of the Council of Ministers of the Republic of Poland only. The duration of temporary protection introduced by the Council of the EU is to be determined independently in its decision. Remarkably, in consequence the maximum duration of the temporary protection regime introduced by the Council of the EU will be three years (Art. 4.1–2 of the Temporary Protection Directive), whereas the maximum duration of the temporary protection regime introduced by the Council of Ministers of the Republic of Poland will be two years.

Moreover, certain minor inconsistencies between the APA regulation and the Temporary Protection Directive may be identified. Art. 9 of the Temporary Protection Directive clearly requires that persons enjoying temporary protection are to be informed about their legal status in writing. Art. 111 of the APA formulates the same requirement but it is silent as far as the form is concerned.

Other standards of the Temporary Protection Directive have been met in the APA. The right to apply for refugee status of persons enjoying temporary protection is not suspended. No special procedures for burden sharing arrangements exist.

**3.6** The Council has reached political agreement on the principles for a Directive on minimum standards for the qualification and status of third country nationals as refugees or persons who otherwise need international protection, COM 2001, 510 final (see Council documents of June 2003). What measures are envisaged to implement the Directive, once it is adopted, in your country relating to:

- the definition of refugee;
- the definition of persons entitled to subsidiary protection;
- status of persons entitled to subsidiary protection;
- the issue of internal flight alternative as defined by the Directive;
- exclusion clauses, particularly issues of terrorism?

To what extent are the refugee policies as reflected in the law and jurisprudence of your country in accordance with the proposal for the directive?

According to Art. 13.1 APA refugee status *is* granted to an alien covered by the definition of refugee contained in the 1951 Refugee Convention and the 1967 New York Protocol. This is a significant change in comparison to the previous regulations. According to the previous regulations under the 1997 Aliens Act (both before and after the amendment of 2001) refugee

status only *might* be granted to those covered by the convention definition. Note that Art. 56.2 of the 1997 Constitution states that refugee status may be granted to an alien seeking protection from persecution within the territory of Poland according to binding international agreements. It is questionable whether the new provision of Art. 13.1 APA is in conformity with the further APA provisions providing for grounds for the refusal of refugee status additional to those set out in the convention definition, such as: coming from a safe country of origin; coming from a safe third country; responsibility under an international agreement to examine an application by another State-Party to the 1951 Refugee Convention (in all three cases applications are to be regarded as manifestly unfounded and refused; Art. 14.1.3–4); or being granted refugee status in another state (Art. 15.3).

The interpretation of the definition of refugee in the convention concerning such issues as agents of persecution, nature of persecution, refugees *sur place*, etc., is not statutorily established save the regulation on the internal flight alternative (see below). Yet, a restrictive interpretive approach has prevailed in the case-law of the determining authorities so far.

The subsidiary protection has been comprehensively introduced to the Polish legal system only by the 2003 APA. This form of protection, subsidiary to refugee status, is known as tolerated residence (*pobyt tolerowany*).

According to Art. 97 APA a tolerated residence leave is granted – in the refugee status procedure or in the context of the expulsion procedure – to an alien who must not be expelled because an expulsion:

- a) would lead to the violations of rights defined in Arts. 2–7 of the European Convention on Human Rights;
- b) may not be put into effect for independent grounds;
- c) would be contrary to a judicial decision on the inadmissibility of the expulsion or to a decision of the Minister of Justice denying expulsion;
- d) would be based on grounds other than being a threat to national security or defence or to public security and order and an alien is a spouse of a Polish national or an alien who has been granted a residence permit.

This regulation causes some concern. The criteria of selecting only some human rights seem to be unclear. It is also unclear why only international obligations under the European Convention on Human Rights have been taken into account.

The status of persons enjoying tolerated residence leave generally approximates to that of recognised refugees. However, the former are not issued with a travel document and are not entitled to receive means of support and integration facilities.

Until the entry into force of the 2003 APA, the internal flight alternative was a ground for recognising an application as manifestly unfounded and for refusing the grant of refugee status (accelerated procedure applied here). The APA changed this approach: the internal flight alternative constitutes a ground for refusing the grant of refugee status (Art. 15.1.1 APA). However, an asylum-seeker must not be refused refugee status on the sole ground of an internal flight alternative if it would not be reasonable to expect him or her to move to another part of the country of origin (Art. 15.2 APA). Thus, the regulation of the APA generally reflects the approach of the proposed Qualification and Status Directive. However, a strong presumption against the internal flight alternative if an agent of persecution is associated with the national government is not statutorily established under the APA.

There are no special exclusion regulations. Art. 15.1.2 provides that refuge status is to be refused if the exclusion clauses of the 1951 Refugee Convention apply.

3.7 In the Commission's Communication of 22 November, 2000, COM 2000, 755 (see also 2nd Commission Report COM 2003, 152 final) the Commission's concept of a common European asylum procedure and a uniform status for those who are granted asylum valid throughout the Union is set out. Do you consider that the concept is generally in line with your country's asylum policy? Are the concerns of refugee organizations, such as Amnesty International and other organizations, of an undermining of the international regime for the protection of refugees shared in the political circles responsible for decision-making of your country?

3.8 The open coordination-mechanism, as suggested by the Commission, provided for first stage and second stage legislation in which the flexibility provisions in some of the directives on migration and asylum are to be replaced by full harmonization. Is this concept discussed in your country and what are the perceptions relating to the gradual establishment of a European asylum policy which might eventually replace national procedures and national decision-making?

The concept of a common European asylum procedure and a uniform status for those who are granted asylum seems to be accepted in Poland and may be regarded in line with the Polish asylum policy which is aimed at adjusting to the EU standards. However, it must be stressed that there is no public debate concerning asylum policy. Neither are the political circles actively involved in the process. Thus, such concepts as a

common European asylum system or an open co-ordination mechanism are debated to a very limited extent within expert circles only.

3.9 The Communication of June 2003, towards a more accessible, equitable and managed asylum system – in reaction to the UK paper – develops some ideas on new approaches to pursue an orderly and managed arrival of persons in need of international protection. What is the political reaction in your country to the concept of an outside accessed asylum procedure, distribution of refugees and responsibility-sharing and other new concepts and ideas in coping with mass refugee movements?

There are no official political positions concerning such concepts as outside accessed asylum procedures, distribution of refugees and responsibility-sharing, etc.

#### PART IV TERMINATION OF ILLEGAL RESIDENCE, RETURN AND REPATRIATION

An expulsion decision is issued if the following circumstances provided in Art. 88 AA are fulfilled:

- a) illegal residence;
- b) illegal employment or self-employment;
- c) lack of sufficient financial means;
- d) an alien's data are in the register of aliens undesirable within the territory of Poland;
- e) an alien's further stay would be a threat to national safety or security or the protection of public security and order or would be contradictory to national interests;
- f) illegal entry or an attempt to enter illegally;
- g) non-compliance with a decision obliging an alien to leave the territory of Poland voluntarily;
- h) non-compliance with fiscal obligations towards Poland;
- i) completion of an imprisonment sentence for an intentional criminal offence or fiscal offence.

A decision obliging an alien to leave the territory of Poland voluntarily within seven days may be issued in the circumstances listed under a–c above (Art. 97.1 AA).

4.1 How many third country nationals without a valid residence permit are currently, according to estimates, staying in your country? How many deportations have actually been made in previous years? Is the whole enforcement process considered as acceptable?

There are no official figures on the estimated number of aliens residing illegally within the territory of Poland. According to the data delivered by the Polish Border Guard in 2002 4836 expulsions took place. 1172 of them were due to illegal residence within the territory of Poland.

The 2003 AA introduced special provisions aimed at decreasing the number of aliens residing in Poland illegally. First, Art. 154 AA provided for the possibility of legalising the situation of illegal residence of aliens within the territory of Poland under determined conditions (known as the large abolition). An application for the legalisation of an illegal stay might be submitted till 31 December 2003. Secondly, Art. 155 AA provides for the possibility for aliens residing illegally to leave the territory of Poland without being listed in the relevant registers (known as the small abolition). To benefit from this regulation an alien must have registered, within two months since the AA entered into force, to the Police or the Border Guard and must have left the territory of Poland in accordance with the subsequent decision obliging him or her to leave. No relevant statistical data is available yet.

**4.2 What has been undertaken to implement the Directive of 28 November 2002, dealing with the facilitation of unauthorized entry, transit and residence?**

The standards of the Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (2002/90/EC) are met in the relevant criminal law regulations (Art. 264 of the Criminal Code of 6 June 1997, *Journal of Laws 1997, No. 88, item 553, as amended*).

**4.3 How many illegal applicants have been apprehended at or near the border? How many criminal procedures for human trafficking have been instituted in the last year?**

According to the data delivered by the Polish Border Guard in 2002 5372 persons were apprehended at or near the border while entering the territory of Poland illegally (660 of whom were apprehended on the eastern borders with Russia, Lithuania, Belarus and Ukraine). This is a decrease of 13.14% in comparison with 2001 when 6186 persons were apprehended (790 on the eastern border).

As far as criminal proceedings for human trafficking are concerned, only two proceedings were instituted in 2002 according to the data delivered by the Polish Border Guard.

**4.4 What efforts have been undertaken in your country regarding the Budapest June 2003 recommendations concerning the harmonization of penalty scales with regard to the crime of the smuggling of migrants and trafficking of persons, in line**

with Council Directive 2002/90 of 28th November 2002? Did your country sign the relevant UN protocols on the smuggling of migrants?

In 2002 the governmental National Programme on Combating and Preventing Human Trafficking was adopted. The National Programme is in line with the obligations of Poland under the UN Protocol on preventing, combating and punishment of human trafficking of 2002 to which Poland is a State-Party. The programme is of a comprehensive character and provides for various measures such as education (including special training programmes for the Border Guard), victim protection schemes, media co-operation etc. As far as legal developments are concerned, the National Programme provides for:

- a) Introducing the definition of human trafficking to the Criminal Code. Human trafficking is penalised by the Criminal Code (Art. 253), however, it has not been defined which results in differentiated interpretations by courts. The human trafficking definitions of the 2002 Protocol and the Council Framework Decision on combating human trafficking of 19 July 2002 (2002/629/JAI) are to be implemented. The relevant amendment of the Criminal Code is planned by 1 May 2004.
- b) Introducing special short-term residence permits for victims of human trafficking who co-operate with the authorities. The relevant amendment of the AA is planned for the first half of 2004.
- c) Adhering to the UN Optional Protocol to the Convention on the Rights of the Child concerning the Sale of Children, Child Prostitution and Child Pornography. This will occur in the first half of 2004.

**4.5** What measures have been taken to implement the Council Directive of 28 May 2001, on the mutual recognition of decisions on the expulsion of third country nationals? What, if any shortcomings or gaps of the Directive should be corrected in a further directive on cooperation on expulsion or deportation of third country nationals?

No measures implementing the Directive of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (2001/40/EC) have been adopted so far.

**4.6** Do readmission agreements or other international treaties or arrangements with the aim of controlling and curbing illegal immigration and facilitating return exist in your country? Have they functioned satisfactorily?

Readmissions agreements concluded by Poland are generally considered to function satisfactorily. According to the data delivered by the Polish Border Guard 4836 persons were readmitted from Poland to other states

in 2002 (in comparison: 5954 in 2001) and 5281 persons were readmitted to Poland (3452 Polish nationals and 1856 aliens; in comparison: 7623 persons /5399 Polish nationals and 2224 aliens/ in 2001).

**4.7 To what extent have EU-standards and recommendations influenced your country's return policy? Have efforts been undertaken to cooperate with other EU Member States in enforcing return decisions by common deportation actions, exchange of information, facilitation of air and land transit, common principles on flight security, etc.?**

According to the Repatriation and Aliens Office, no co-operation with the EU Member States in enforcing return decisions by common deportation actions, facilitation of transit, etc., has taken place so far.

**4.8 Do you consider that there is a need to elaborate a common legal regime for air deportations (legal status of armed guards on board of the aircrafts, rights of the aircraft commander, legal rules in case of transit stops, applicability of national police law on board of aircraft on flight, etc.)?**

No official position exists concerning a need to elaborate a common legal regime for air deportation.