

Title: **Poland: Production of Irregular Migrants through Misguided Migration Policy and Ineffective Use of Regularisation as a Tool in Migration Management**

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Summary: The immigration to Poland which followed the collapse of communism in 1989 and the fall of the Soviet Union in 1991 was something for which Poland was legislatively, administratively and financially unprepared.

These two events, along with EU accession negotiations in the 1990s, forced Poland to try to put in place a framework to deal with immigration. One of the methods employed in the field of irregular immigration was to implement regularisation or legalisation programmes. Poland's first two attempts at regularisation, carried out in 2003 and 2007, were abjectly ineffective. This was due to overly-restrictive criteria and failure to publicise the programmes amongst the target group.

The legislature has finally recognised the need to provide yet another opportunity for illegally-resident third-country nationals to regularise their status and draft legislation published in November 2010 suggests that lessons have been learnt from past mistakes. Meanwhile the Polish courts have played an important role in vindicating the human rights of irregular immigrants by giving effect to the Article 8 ECHR protection of family and private life in the face of administrative decisions to expel which fail to take account of Poland's obligations under Article 8.

Keywords: Poland – irregular / illegal / undocumented immigrants – regularisation – legalisation – Article 8 ECHR

The migration situation in Poland has undergone profound change during the past 22 years. While in 1989 the entry, stay and exit of all non-nationals was governed by a single Act, there are now three substantial pieces of legislation regulating movement of non-nationals, as well as the *Repatriation Act 2000* which provides for acquisition of citizenship by persons of Polish descent.¹ This change is largely the result of events such as the collapse of communist rule in Poland in 1989, the fall of the Soviet Union in 1991 and the country's accession to the EU in 2004. Prior to 1989 the *Aliens Act 1963* governed the conditions of entry into and exit from communist Poland whose migration policy, like that of other Soviet bloc states, was

¹ *The Repatriation Act 2000* was aimed at persons of Polish origin who had remained in countries to the east of Poland, particularly in the Asian region of the former USSR who, as a result of deportation, exile or other types of persecution had not been able to settle in Poland. Section 1(2) of the Act defines a repatriate as someone of Polish descent who has come to Poland on the basis of a repatriation entry visa with the intention of permanent settlement.

isolationist in character.² Restrictive passport and visa policies³ ensured that much emigration was irregular in character⁴ and that immigration was kept at a symbolic minimum.⁵

The fall of the Soviet Union in 1991, however, resulted in large-scale movement into and through Poland with the country becoming a destination for citizens of neighbouring countries such as Ukraine, Belarus and Russia⁶ and the more distant Armenia. Entry into Poland for citizens of these countries was facilitated by a 1979 agreement between Poland and the former Soviet Union concerning visa-free travel.⁷ The 1990s also saw the formation of new Chinese and Vietnamese communities in Poland, as well as inflows of asylum-seekers and lower levels of emigration, phenomena which also made themselves known in other Central European countries at that time.⁸

Poland, however, was ill-equipped to deal with immigration. It lacked experience, the legislative, policy and administrative framework⁹ and the financial resources to deal with immigration procedures and paperwork.¹⁰ Poland's migration law and system of migration management in the first half of the 1990s was moulded under the influence of international organisations such as the IOM, UNHCR and Council of Europe as well as its external partners, with the experience of destination countries playing a key role.¹¹ Migration policy consisted in reacting to dynamically developing phenomena such as illegal migration, for which Poland was both a transit and destination country.¹² The focus of migration policy in the early 1990s was on entry¹³ and sought, *inter alia*, to establish border controls and to facilitate cross-border movement by maintaining non-visa regimes with all European states.¹⁴

Work begun in 1992 on a new Aliens Act came to fruition with the *Aliens Act 1997* which facilitated free movement of persons and focused mainly on conditions of entry, stay and transit through Poland,¹⁵ though even before enactment the Act was outdated due to changes in migration patterns and Poland's obligations in relation to EU accession.¹⁶ Poland began accession negotiations in the field of Justice and Home Affairs (JHA) in 2000 and it was arguably the accession process that was the main driver of change in Polish immigration

² K. Iglicka & M. Ziolk-Skrzypczak, "EU Membership Highlights Poland's Migration Challenges" [2010] Migration Information Source <<http://www.migrationinformation.org/Profiles/display.cfm?ID=800>> (date accessed: 15 December 2010) [hereinafter Migration Information Source].

³ K. Iglicka & K. Gmaj, "Country Report Poland" 5 in *Undocumented Migration: Counting the Uncountable. Data and Trends across Europe* (2008), 5.

⁴ A. Kicingier, "Poland – Return and regularisation procedures as possible responses to the phenomenon of irregular migration" in *Policies on Irregular Migrants: Volume III – France, Portugal and Poland* (Strasbourg: Council of Europe, 2010), 117 [hereinafter Kicingier].

⁵ *Immigration to Poland: Policy, Employment, Integration* (Warsaw: Scholar, 2010), 24.

⁶ Migration Information Source.

⁷ Kicingier, 118.

⁸ Migration Information Source.

⁹ K. Iglicka, "Poland" in A. Triandafyllidou & R. Gropas, eds., *European Immigration: A Sourcebook* (Aldershot: Ashgate, 2007), 263 [hereinafter Poland].

¹⁰ *Ibid.* at 264.

¹¹ The Migration Policy of Poland – Current State and Postulated Activities, 5. PDF available on the website of the Ministry for Internal Affairs and Administration <http://www.bip.mswia.gov.pl/portal/bip/227/19529/Polityka_migracyjna_Polski.html> (date accessed: 7 April 2011).

¹² *Ibid.* at 6.

¹³ Poland, 264.

¹⁴ *Ibid.*

¹⁵ Migration Information Source.

¹⁶ Poland, 264.

law.¹⁷ In 2001 the Polish parliament passed amendments to the 1997 Act which cleared the path toward membership of the EU with one of the most significant amendments being the establishment of the Office for Repatriation and Foreigners,¹⁸ the first government agency whose remit extended exclusively to migration matters.¹⁹ This Office was a central administrative organ with competence in the fields of migration, asylum and citizenship and was established so as to more effectively coordinate the activities resulting from legislative changes made on foot of negotiations in the field of JHA.²⁰ The 2001 amendments were followed by separate Acts dealing with entry and stay of citizens of EU Member States, granting of protection to non-nationals in Poland and the *Aliens Act 2003* which provided, *inter alia*, for Poland's first regularisation programme.²¹

While Poland's accession negotiations saw a concentration on the fight against illegal migration and protection of the border, one of the longest of the EU's external borders,²² one of the main shortcomings at this time was the failure to undertake large-scale analysis which would have allowed for both planned and more effective migration management and the establishment of guidelines for a national migration policy. An important development from the point of view of coordination of migration policies was thus the appointment by the Prime Minister in February 2007 of the interdepartmental Group for Migration Matters.²³

While it would appear that irregular migration commands little attention from politicians and the public in Poland,²⁴ a description often applied to the wider phenomenon of immigration in Poland,²⁵ the irregular population in Poland is estimated by the government to be between 40,000 and 100,000 with NGOs putting the figure somewhere between 400,000 and 500,000.²⁶

Poland's policy on irregular migration has been described as three-pronged, focusing on prevention through border control and facilitation of legal immigration; supervision of legality of both stay and employment; and return or regularisation of illegally present TCNs.²⁷ While the solution favoured by Poland to the presence on its territory of irregular immigrants is return,²⁸ it sometimes regularises the status of irregular immigrants.

¹⁷ *Ibid.*

¹⁸ On 20 July 2007 competence for repatriation and citizenship was transferred to the Minister of the Interior and Administration and the name of the Office for Repatriation and Foreigners was changed accordingly to the Office for Foreigners. *Urząd do Spraw Cudzoziemców*, Broszura UDSC (UDSC: UDSC), 4 available at <http://www.udsc.gov.pl/files/documenty/Urzad_ds_udzoziemcow.pdf> (date accessed: 10 December 2010).

¹⁹ Poland, 264.

²⁰ The Migration Policy of Poland – Current State and Postulated Activities, 6. PDF available on the website of the Ministry for Internal Affairs and Administration <http://www.bip.mswia.gov.pl/portal/bip/227/19529/Polityka_migracyjna_Polski.html> (date accessed: 7 April 2011).

²¹ Poland, 264.

²² The Migration Policy of Poland – Current State and Postulated Activities, 6 – 7. PDF available on the website of the Ministry for Internal Affairs and Administration <http://www.bip.mswia.gov.pl/portal/bip/227/19529/Polityka_migracyjna_Polski.html> (date accessed: 7 April 2011).

²³ *Ibid.* at 7.

²⁴ Kicingier, 122.

²⁵ Kicingier 123.

²⁶ *Biuletyn z posiedzenia Komisji Mniejszosci Narodowych i Etnicznych* (nr 69), nr 4316/VI kad., 27 October 2010, 6 <[http://orka.sejm.gov.pl/Biuletyn.nsf/0/8C25697AB66D6ED7C12577D60047C413/\\$file/0431606.pdf](http://orka.sejm.gov.pl/Biuletyn.nsf/0/8C25697AB66D6ED7C12577D60047C413/$file/0431606.pdf)> (date accessed: 10 December 2010).

²⁷ Kicingier 122.

²⁸ Kicingier, 122.

Pathways to Regularisation

There are a number of legislative provisions which facilitate regularisation of illegal stay. Section 33 of the *Aliens Act 2003*, for example, provides that a residence visa of a maximum of 3 months' validity may be granted to a non-national even in circumstances which would ordinarily involve refusal of a visa²⁹ if the non-national's exceptional personal situation requires his or her presence in Poland.³⁰ If the interests of Poland require that such a visa be issued then there is no 3 month limit to the visa's validity. Residence visas may be extended once a number of onerous criteria have been met.³¹

Another legislative channel which may allow, *inter alia*, for regularisation of illegal stay is that of tolerated stay which is provided for in Part II of the *Act on granting protection to non-nationals on the territory of the Polish Republic 2003*. Section 97(1) provides that a non-national is granted tolerated stay if, *inter alia*, expulsion may be effected only to a country in which there could be a threat to the individual's life, freedom or personal safety or where he could be subjected to torture or inhuman or degrading treatment or punishment or forced to work or deprived of the right to a fair trial or punished without law as understood in the ECHR. Where such circumstances exist there is an obligation to grant tolerated stay. Tolerated stay is also granted to persons who have unsuccessfully applied for refugee status, or had that status withdrawn, and to those issued with decisions of expulsion, in the event of the existence of circumstances such as those outlined in Section 97.³²

The 2003 Regularisation

Poland's first regularisation programme was authorised by parliament in 2003 through Section 154 in Part 16 of the oft-amended *Aliens Act 2003* which essentially provided for the award of a temporary residence permit valid for one year to irregular immigrants who satisfied a number of criteria.

During the first reading of the Bill by the Committee of Administration and Internal Affairs, the Head of the Office for Repatriation and Foreigners suggested that the regularising provision would primarily benefit Armenian families who had been living illegally in Poland for between 8 and 10 years. These families had not in any other way violated Polish law and their children were attending Polish schools.³³ The law as it then was required that such families be expelled from Poland, despite the fact that such expulsion would be devastating, particularly for the children who had already been assimilated in Poland and did not know

²⁹ Section 42 of the *Aliens Act 2003* provides that a non-national is refused a visa if 1) he did not fulfil the conditions for the particular category of visa, 2) his details are recorded in the register of non-nationals whose presence in Poland is undesirable, 3) he does not possess the financial means to cover the cost of his stay in Poland, 3a) he does not possess health insurance, 4) there is a fear that issuing a visa may pose a threat to national defence or security or protection of public order and security or run counter to the interests of Poland, 5) and 7) during the application process he submitted false information or presented as authentic documents which were forged or had been altered.

³⁰ Section 33 also provides that a visa of a maximum of 3 months' validity may be granted to a non-national even in circumstances which would ordinarily involve refusal of a visa if the non-national's appearance before a public body is required, if entry into Poland is required for life-saving medical procedures not available in another State, if there is good reason to believe the non-national is a victim of human trafficking.

³¹ As set out in Section 43.

³² Section 104.

³³ Biuletyn z posiedzenia Komisji Administracji i Spraw Wewnętrznych (nr 70), nr 1558/IV kad., 27 lutego 2003 <<http://orka.sejm.gov.pl/Biuletyn.nsf>> (date accessed: 10 December 2010).

their parents' country or the Armenian language.³⁴ The genesis of the 2003 regularisation may thus be attributed to humanitarian concerns.³⁵ The legislature also expected the regularisation to reduce the shadow economy, increase control of illegal immigration and increase observance of the law and the level of public order and security.³⁶

Section 154(1) provided that a non-national whose presence in Poland on 1 September 2003 is illegal, and who has been continuously resident since 1 January 1997, may submit an application for a temporary residence permit by 31 December 2003 to the governor of the province³⁷ in which he is resident. The governor will issue such a permit, valid for one year, if doing so will not be a burden on the state budget or pose a threat to national security or public order and does not run contrary to the interests of the Republic of Poland. Furthermore, before being granted the temporary residence permit by the governor, an applicant had to: provide legal title to residential accommodation; possess a promise of a work permit or the written declaration of an employer expressing an intention to employ the applicant or, alternatively, possess income or means sufficient to cover for one year the costs of maintenance and medical treatment of himself and dependent members of his family without accessing social welfare.

Section 155 of the 2003 Act provided for what came to be referred to as the "small amnesty." On the basis of Section 155(1) an illegally resident non-national could report his status to the Border Guard or the police within two months of enactment of the Act – 1 September 2003 – and in the event of a decision requiring departure from Poland, voluntary departure before the deadline specified in the decision would ensure that the individual's details would not be entered into the register of undesirable aliens.³⁸ Entry into the register of aliens whose presence in Poland is undesirable entails a ban on re-entry for either 1, 3 or 5 years depending on the circumstances of the non-national's departure. Thus avoidance of such entry in the context of the 2003 regularisation meant that illegally-staying non-nationals could leave Poland and despite their previous illegal stay apply to re-enter immediately through formal legal channels.

The 2003 regularisation must be deemed a failure in every respect. While officials estimated that up to 10,000 people were eligible to apply,³⁹ the scheme ultimately attracted just 3508

³⁴ Biuletyn z posiedzenia Komisji Administracji i Spraw Wewnętrznych (nr 70), nr 1558/IV kad., 27 lutego 2003 <<http://orka.sejm.gov.pl/Biuletyn.nsf>>

³⁵ According to one commentator the Armenian and Vietnamese communities lobbied for both the 2003 and 2007 regularisation. See M. Bieniecki, Regularization of Immigrants in Poland: What was wrong with it and what should be done? Migrationonline.cz, May 2008, 3 <http://aa.ecn.cz/img_upload/6334c0c7298d6b396d213ccd19be5999/MBieniecki_RegularizationinPoland.pdf> (date accessed: 1 October 2010).

³⁶ Materiał Analityczny Wydziału Analiz Migracyjnych DPM MSWiA, September 2009, p 13. Analytical Material of the Dept of Migration Analysis at the Ministry of Internal Affairs and Administration, prepared for the interdepartmental working group Group for Migration Matters. On file with author.

³⁷ There are, since 1999, 16 provinces in Poland. Each province has a governor who is appointed by the national government and an elected assembly, which in turn chooses an executive.

³⁸ Section 155(2) provides that the provisions of Sections 97 and 98 of the Act apply to a decision under Section 155(1) that a non-national leave the territory of Poland by a specified date so as to avoid entry into the register of undesirable aliens. Section 97(1) provides that an alien may be obliged to leave the territory of Poland within 7 days if it appears from the circumstances of the matter that he will do so voluntarily. Section 98(2) provides that such decisions may be appealed to the appropriate governor.

³⁹ M. Dzhengozova, "Poland" in M. Baldwin-Edwards & A. Kraler, eds., *REGINE Regularisations in Europe: Study on practices in the area of regularisation of illegally staying third- country nationals in the Member States of the EU*. Appendix B: Country Profiles of 22 EU Member States and the USA (Vienna: ICMPD, 2009), 109 [hereinafter REGINE].

applications.⁴⁰ While citizens of 62 different countries sought regularisation,⁴¹ over half of the applications were submitted by citizens of Armenia and Vietnam, the two best-organised non-national communities in Poland⁴² who accounted for 85% of the 2413 non-nationals who received positive decisions.⁴³

The failure of the 2003 regularisation has many causes, including fear of expulsion,⁴⁴ the difficulty of proving an offer of work,⁴⁵ lack of awareness of the regularisation,⁴⁶ and the difficulty of proving continuous residence.

While the intention on the part of the legislature may have been to limit the possibility of regularisation to persons who had deep roots in Polish society, it is easy to locate the overly-restrictive eligibility criteria in Dauvergne's description of the worldwide crackdown on extralegal migration as "a reaction to state perceptions of a loss of control over policy initiatives in other areas."⁴⁷ As migration laws and their enforcement come to constitute "the last bastion of sovereignty"⁴⁸ they are wielded ever more zealously.

The 2007 Regularisation

The 2003 regularisation was followed in 2007 by an almost identically-worded programme, again provided for in legislation. Indeed the 2007 regularisation has been described as the second stage of the 2003 programme.⁴⁹ It resulted from the adoption of an amendment tabled by the Senate in May 2007 to the *Act amending the Aliens Act and some other Acts*. An explanatory note accompanying the proposed amendment made clear that it was aimed at persons who had not availed of the opportunity to regularise in 2003.⁵⁰ Indeed during discussion of the proposed amendment at a sitting of the Committee for Administration and Internal Affairs the Head of the Office for Repatriation and Foreigners elaborated that some eligible non-nationals had feared participation in the 2003 regularisation but had seen that such fears were unfounded and so would seek to apply to the second stage.⁵¹ The Junior Minister for Internal Affairs and Administration was at pains to point out that the proposed regularisation was not a new one but a continuation of the 2003 regularisation.⁵² He noted that Poland's imminent accession to Schengen meant that all provisions concerning regularisation or legalisation have to be agreed with Poland's EU partners who Poland should refrain from

⁴⁰ P. Sadowski, *Akcje regularyzacyjne w Wielkiej Brytanii i w Polsce*, Working Papers 1(15) (Warsaw: Natolin European Centre, 2010), 71 [hereinafter Sadowski].

⁴¹ Biuletyn Migracyjny 1, 1 June 2005, <<http://www.migration-news.uw.edu.pl/BiuletynMigracyjny.pdf>> (date accessed: 1 November 2010).

⁴² Biuletyn z posiedzenia Komisji Administracji i Spraw Wewnętrznych (nr 103), nr 1969/V kad., 22 maja 2007, 9.

⁴³ Sadowski, 71 – 72.

⁴⁴ REGINE, 109.

⁴⁵ REGINE, 109.

⁴⁶ REGINE 109.

⁴⁷ C. Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (New York: Cambridge University Press, 2008), 2.

⁴⁸ *Ibid.*

⁴⁹ Sadowski, 67.

⁵⁰ Druk Senatu Rzeczypospolitej Polskiej V Kadencji nr 1715 z dnia 14 maja 2007 r

⁵¹ Biuletyn z posiedzenia Komisji Administracji i Spraw Wewnętrznych (nr 103), nr 1969/V kad., 22 May 2007, 4 and 6 – 7

<[http://orka.sejm.gov.pl/Biuletyn.nsf/0/65B502C0D52A6996C12572F8003C1D08/\\$file/0196905.pdf](http://orka.sejm.gov.pl/Biuletyn.nsf/0/65B502C0D52A6996C12572F8003C1D08/$file/0196905.pdf)> (date accessed: 10 December 2010).

⁵² *Ibid.* at 7.

surprising “with new unjustified measures”⁵³ and amongst whom legislative measures in the realm of regularisation would not be well received. He suggested that such legislation would be ill-advised in light of the discussion of the validity of regularisation, occasioned by the Spanish regularisation, amongst EU countries which have real problems with migration.⁵⁴ The Junior Minister highlighted the need to avoid controversy⁵⁵ and emphasised that regularisation would not be an element of every amendment of the Aliens Act.⁵⁶

There were some differences though between 2003 and 2007. Section 18 of the *Act amending the Aliens Act and some other Acts 2007* envisaged a period of 6 months during which applications for regularisation could be submitted, as opposed to the 4 month period prescribed by the 2003 legislation. The second regularisation, however, was even more restrictive than the first as it precluded submission of applications by persons who had unsuccessfully applied in 2003⁵⁷ and required applicants to have been continuously resident in Poland since 1 January 1997, almost ten years, as opposed to the nearly 7 years’ continuous residence required by the 2003 regularisation. It was also closed to those who had successfully regularised their stay in 2003 only to subsequently fall back into irregular status.

The 2007 regularisation did not provide for a so-called “small amnesty,” a feature which attracted some criticism.⁵⁸ The reason given for this was that the “small amnesty” of 2003 had been availed of by just 282 persons, 139 of whom were Ukrainian citizens who used it as a means of leaving Poland, free of the return bar which would ordinarily attend the departure of an illegally-staying non-national, only to quickly return through formal legal channels for a further stay.⁵⁹

While 2022 non-nationals applied under the 2007 regularisation, with Vietnamese (1125) and Armenian (574) citizens once again constituting a large majority, just 177 applicants, less than 9% of the total, received positive decisions.⁶⁰

The overly-restrictive approach to regularisation adopted in both 2003 and 2007 is partially explained by a desire to avoid disgruntling Poland’s EU partners⁶¹ and deference amongst Polish policymakers to the European Commission stance that regularisation acts as a pull factor.⁶²

The 2011 Regularisation?

There has, however, been some discussion of a further regularisation programme. One commentator has suggested that a new regularisation should be along the lines of the 2003 “small amnesty” and should primarily, though not exclusively, target Ukrainians given their

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 8.

⁵⁶ *Ibid.* at 7.

⁵⁷ Section 18(1)(4) of the 2007 Act.

⁵⁸ Biuletyn z posiedzenia Komisji Administracji i Spraw Wewnętrznych (nr 103), nr 1969/V kad., 22 May 2007, 8.

⁵⁹ *Ibid.* at 9.

⁶⁰ REGINE 109 – 110, on the basis of a response to a questionnaire by the Ministry for Internal Affairs and Administration.

⁶¹ Kicinger, 124.

⁶² Kicinger, 124.

numerical predominance in Poland's irregular population.⁶³ In October 2010 "Immigrants for Amnesty" submitted a petition to the Polish parliament and president calling for new regularisation legislation to vindicate their right to a fair and dignified life.⁶⁴

Despite the extreme reluctance which characterised the government approach to regularisation in 2007, it appears that a third legislatively sanctioned opportunity for non-nationals to regularise their stay in Poland is imminent.

In May 2010 the National and Ethnic Minorities Committee of the Polish parliament discussed a desideratum recommending a further regularisation for irregular immigrants in Poland.⁶⁵ Mention was made of the fact that in recent years irregular immigrants themselves have begun to agitate for regularisation of their situation, sometimes by collecting signatures for petitions from amongst other irregular immigrants.⁶⁶ While concerns were expressed that a one-off regularisation would incentivise greater numbers of irregular immigrants to come to Poland in the hope of future legalisation, with many such immigrants viewing Poland as a transit country on their way to EU Member States in Western Europe,⁶⁷ there was general agreement as to the desirability of further regularisation⁶⁸ and during a sitting of the Committee the following month its members voted to unanimously adopt the desideratum and address it to the Minister for the Interior and Administration.⁶⁹ The desideratum noted that "after six years' membership of the EU Poland faces a great challenge – a broad range of illegal immigrants from many countries living on the territory of the Polish Republic."⁷⁰ It called for the fastest possible resolution of this problem in a manner consistent with Polish state policy and human rights standards as its many negative effects impact not only the Polish state but also migrants' families.⁷¹ It characterised Poland as an increasingly attractive destination for immigrants given the ostensibly contradictory phenomena of its dynamic economic development and the departure in recent years of over a million of its citizens in to seek economic opportunity elsewhere.⁷² The desideratum highlighted the ease with which legally resident immigrants could fall into an irregular situation due to the current state of the law and made reference to the economic and cultural contributions that legalised immigrants make.⁷³ It recognised that the two earlier regularisations did not serve their purpose and the resultant necessity of an effective regularisation campaign for irregular immigrants

⁶³ Bieniecki, M., Regularization of Immigrants in Poland: What was wrong with it and what should be done? Migrationonline.cz, May 2008, 5 – 6

<http://aa.ecn.cz/img_upload/6334c0c7298d6b396d213ccd19be5999/MBieniecki_RegularizationinPoland.pdf>

⁶⁴ Centrum Powitania w Warszawie, "22.10: Zgromadzenie pod Sejmem dot. apelu na rzecz abolicji dla migrantów o nieregulowanym statusie" 2010 <<http://www.centrumpowitania.org.pl/tr/ogloszenia/192-2210-zgromadzenie-pod-sejmem-dot-apelu-na-rzecz-abolicji-dla-migrantow-o-nieregulowanym-statusie.html>> (date accessed: 1 November 2010).

⁶⁵ Biuletyn z posiedzenia Komisji Mniejszosci Narodowych i Etnicznych (nr 59), nr 3722/VI kad., 6 May 2010, 14.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at 16.

⁶⁸ *Ibid.* at 26.

⁶⁹ Biuletyn z posiedzenia Komisji Mniejszosci Narodowych i Etnicznych (nr 61), nr 3826/VI kad., 10 June 2010, 4 <[http://orka.sejm.gov.pl/Biuletyn.nsf/0/955B6F7BD2883DCAC1257746004829C4/\\$file/0382606.pdf](http://orka.sejm.gov.pl/Biuletyn.nsf/0/955B6F7BD2883DCAC1257746004829C4/$file/0382606.pdf)> (date accessed: 10 December 2010).

⁷⁰ Dezyderat nr 18 Komisji Mniejszości Narodowych i Etnicznych Sejmu RP uchwalony na posiedzeniu w dniu 10 czerwca 2010 r. do Ministra Spraw Wewnętrznych i Administracji w sprawie abolicji dla nielegalnych imigrantów.

<[http://orka.sejm.gov.pl/opinie6.nsf/nazwa/mne_d18/\\$file/mne_d18.pdf](http://orka.sejm.gov.pl/opinie6.nsf/nazwa/mne_d18/$file/mne_d18.pdf)> (date accessed: 10 December 2010).

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

continuously present in Poland since 21 December 2007. The Committee thus called on the Minister to take appropriate legislative action.⁷⁴

The Committee's call was heeded. The framework of the draft of the new Aliens Act, *The Draft Outline of the Aliens Bill*, was published by the Ministry of the Interior and Administration on the website of the Office for Foreigners in November 2010.⁷⁵ Running to nearly 80,000 words the draft legislation carries explanations of the proposed amendments and aims to adapt the 2003 legislation to take account of the new migration context as well as new EU directives. The regularisation scheme envisaged in the draft legislation is more applicant-friendly than the two earlier ones. It provides that a non-national who has been continuously present in Poland since 20 December 2007 and whose presence on the date of entry into force of the Act is illegal will, if he applies for such a permit within 6 months of that date, be granted a temporary residence permit for 2 years if to do so does not constitute a threat to national safety or public order or the interests of the Polish Republic.⁷⁶

Residence in Poland on the basis of such a permit, however, will not count toward the legal and continuous residence required of TCNs who apply for the status of long-term EU resident.⁷⁷

Successful applicants will have the right to work without a work permit on condition that they possess a written declaration from an employer expressing intent to employ.⁷⁸

In a position paper on the draft legislation submitted by Caritas Poland as part of the public consultation process, the NGO called for an amendment to be made to make the law applicable to all non-nationals illegally present since 31 December 2010 and to extend the period for submission of applications to 12 months changes.⁷⁹ Such changes are warranted by the need to conduct an extensive information campaign reaching as wide an audience of prospective applicants as possible.⁸⁰

Regularisation through the Courts

Another route out of illegality is of course through judgments of the Courts and the impact they may have on practice on the ground. Article 8 of the European Convention on Human Rights (ECHR) has been invoked a number of times in the Polish Courts by persons appealing against expulsion orders, with the result that the Polish courts have given serious consideration to Poland's Article 8 obligations. Article 8 provides that

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society

⁷⁴ *Ibid.*

⁷⁵ Projekt Założeń do Projektu Ustawy o Cudzoziemcach
<http://www.udsc.gov.pl/Zalozenia_do_projektow,1237.html> (date accessed: 30 November 2010).

⁷⁶ *Ibid.* Chapter 12, point 10.

⁷⁷ *Ibid.* Chapter 12, point 19.

⁷⁸ *Ibid.* Chapter 12, point 20.

⁷⁹ Caritas Poland, Stanowisko w sprawie opublikowanego w dniu 24 lutego 2011 roku projektu założeń do projektu ustawy o cudzoziemcach w ramach konsultacji społecznych
http://www.frog.org.pl/stanowisko_projekt.pdf (date accessed: 30 March 2011).

⁸⁰ *Ibid.*

in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

An important indication of the power of Article 8 ECHR protection to facilitate regularisation of illegally-resident non-nationals in Poland is to be found in a judgment of the Warsaw Supreme Administrative Court from 2005.⁸¹ The applicant, Feliks O., a citizen of Armenia, arrived in Poland at the beginning of 2003. In April 2004 he was detained and found to be in Poland illegally, without a passport and visa and without means of subsistence. He stated that he had not worked in Poland but was a dependant of a Polish citizen with whom he was in an unformalised relationship and had three children. He was issued with an expulsion order by the provincial Governor on the basis of his presence in Poland without the required visa or permit⁸² and for not possessing the financial means necessary to cover the costs of his stay in Poland.⁸³ The Office for Repatriation and Foreigners endorsed the Governor's decision. On appeal to the Provincial Administrative Court the applicant argued that he, his partner and their three children form a family unit. He questioned the finding that he lacked sufficient means to cover the costs of his stay in Poland and argued that the obstacle to legalisation of his stay in Poland is the absence of a passport, disclosing that he left Armenia to avoid conscription and participation in the civil war.

The Provincial Administrative Court found that even in the event of possession of sufficient means to cover the costs of a stay in Poland, the decision of expulsion will stand on the basis of presence in Poland without the required documentation.

The Supreme Administrative Court found fault with the judgment of the Provincial Administrative Court. It held that Article 8 ECHR protection extends to the family ties between a father and child even where there is no legal bond, as long as they have a relationship which indicates the existence of real family ties. Family life extends not only to families based on marriage but also to families based on actual relationships. This much is clear from the jurisprudence of the European Court of Human Rights. The Court held that a decision of expulsion may be inadmissible in light of Article 8 ECHR protection and that the applicant's charge that his family situation had not been taken into consideration by the Court of first instance was well-founded.

The Supreme Administrative Court's finding in relation to Article 8 ECHR was endorsed by the Lodz Provincial Administrative Court in a 2008 case.⁸⁴ Here the applicant, JD, had acquired a temporary residence permit as part of the 2003 regularisation programme but because of serious illness had been unable to apply for extension of the one-year residence permit acquired through the 2003 regularisation programme and was aware that her presence in Poland was illegal. While in Poland she had traded in clothing items without any authorisation. She had already undergone two operations in Poland spending all her earnings on treatment and medication. In addition to her illegal stay, the applicant was not in possession of sufficient funds to cover the costs of her stay in Poland, both of which constitute grounds for a decision of expulsion.⁸⁵ She lived with and was cared for by her son who had a permanent residence permit, a Polish wife and 7 year old child.

⁸¹ II OSK 1148/05 – Wyrok NSA w Warszawie 2005 – 11 – 30

⁸² Section 88(1)(1) of the Aliens Act 2003.

⁸³ Section 88(1)(3) of the Aliens Act 2003.

⁸⁴ III SA/Ld 8/08 – Wyrok WSA w Lodzi 2008 – 04 – 24

⁸⁵ Section 88(1) and (3) of the Aliens Act 2003.

She appealed a decision obliging her to leave Poland, emphasising that she paid herself for all her operations and associated medication and check-ups. She claimed that travel to her country of origin would have a deleterious effect on her health and provided medical testimony to that effect. Furthermore, in her country of origin she had nowhere to live, no close relatives and no one who could take care of her.

Unanimously endorsing the aforementioned finding of the Warsaw Supreme Administrative Court, the Lodz Provincial Administrative Court found furthermore that Article 8 ECHR protection extends to all non-nationals regardless of whether they are in a given State legally or illegally. The issue of family life covers not just relationships based on marriage but also other forms of personal relations such as informal relationships and relationships between parents and children. Moreover, even where Polish legislation may provide for refusal of stay, protection of a non-national from expulsion may flow directly from the provisions of the ECHR.

The Court found that the administrative organs had not referred to the personal and family situation of the applicant and that the obligation on the applicant to leave Poland should have been assessed in light of the protection of private and family life flowing from Article 8 ECHR.

A similar ruling was made by the Warsaw Provincial Administrative Court in 2006.⁸⁶ The applicant, Irina G., entered Poland legally in 1994 with her husband and two daughters. In 1995 she gave birth to a son who spoke only Polish and had never left the country. Following an unsuccessful application for an extension of his residence permit, her husband was forced to leave Poland in 2004.

In 2003 Irina G. applied for a temporary residence permit for herself and her minor son within the terms of the regularisation programme provided for by Section 154(1) of the *Aliens Act 2003*. The organ of first instance refused the application and on appeal, the decision was upheld by the Office for Repatriation and Aliens, and the Warsaw Provincial Administrative Court.

In July 2005 Irina G. was detained in connection with her illegal stay and in August was issued with a decision of expulsion on the grounds that she was in Poland without the required visa or residence permit;⁸⁷ and had not left Poland in the timeframe specified in the initial decision on refusal to grant a temporary residence permit.⁸⁸

The Office for Repatriation and Foreigners upheld the decision to expel and on appeal to the Warsaw Provincial Administrative Court the applicant emphasised that depriving the children of contact with their father and the refusal of her application for a temporary residence permit followed by the obligation on her to leave Poland undermined the integrity of family life. When in August 2005 the office of the provincial Governor issued her with a decision of expulsion, the same organ was processing an application for a temporary residence permit for her minor children and issued a positive decision. Such a state of affairs, according to the applicant, was detrimental to family unity, and did not take into consideration the interests of the minor children and thus constituted a flagrant violation of Article 8 of the ECHR.

⁸⁶ V SA/Wa 2/06 – Wyrok WSA w Warszawie 2006 – 04 – 26

⁸⁷ Section 88(1)(1) of the *Aliens Act 2003*.

⁸⁸ Section 88(1)(7)(b) of the *Aliens Act 2003*.

The Warsaw Provincial Administrative Court found that the “legitimate interests” of Irina G. and her three minor children had not been considered. The Court held that the absence of such considerations violates, *inter alia*, the constitutionally established principle of protection of family and parenthood, values subject to legal protection both in Polish and international law.

The Court noted that in keeping with Article 8 of the ECHR, everyone has a right to respect for his family life and that any limits on this right must be proportional. The principle of proportionality requires consideration of the personal and family situation of the non-national which includes, *inter alia*, the length of time spent in Poland and possible obstacles to residing with his or her family in the country of origin, including the consequences for the family of moving their family life to another country.

The Court noted that during the administrative proceedings the applicant adverted a number of times to the fact that she had three minor children in Poland and that the decision of expulsion would result in separation from her daughters who have temporary residence permits issued by the provincial Governor to remain in Poland where they are attending school. She had also indicated that the children are in Poland solely in her care and that the family is independently supported by income from a company of which she is a shareholder.

The Court found that it was possible that a decision to expel in the instant case would be inadmissible on a consideration Article 8 ECHR which protects the family ties between children and parents against expulsion. It held that the charge that the organ of second instance did not consider the applicant’s family situation was well-founded. It therefore set aside the decision of expulsion.

A recent judgment from the Warsaw Provincial Administrative Court⁸⁹ arguably failed to give due weight to Article 8 ECHR protection in a case against expulsion.

The applicant, SB, had been in Poland continuously since 1985 and in 1998, when he graduated from a Polish university, had been in the country illegally for 9 years. In that same year the provincial Governor issued a decision to expel the applicant in connection with his illegal stay but the applicant continued to reside illegally in Poland. In February 2004, on the basis of the regularisation procedure provided for in Section 154(1) of the *Aliens Act 2003*, the provincial Governor issued the applicant with a temporary residence permit valid until February 2005. Upon expiry of this permit the applicant made no attempt to further legalise his stay and remained in Poland without proper approval, supporting himself by organising musical events. The applicant was thus ordered by the provincial Governor in February 2009 to be expelled in connection with illegal residence and work in Poland. He appealed, highlighting the length of his residence in Poland and his cohabitation with a Polish citizen, arguing that expulsion would violate his right to respect for private and family life. In upholding the Governor’s decision, the Head of the Office for Foreigners emphasised that the applicant’s illegal stay in Poland indicates a disregard for the internationally-recognised right of States to control entry and stay of non-nationals. The fundamental duty of the foreigner who wishes to be present in Poland is one of loyalty to the Polish authorities and this loyalty finds expression in observance of the country’s laws. The Governor’s decision was thus held to be justified.

⁸⁹ V SA/Wa 1398/09 – Wyrok WSA w Warszawie 2010 – 03 – 26

The applicant appealed to the Warsaw Provincial Administrative Court claiming, *inter alia*, that expulsion would infringe his right to family life as understood in the ECHR and respected in Polish law. The Court held that the Office of Foreigners had rightly found the applicant to have violated Polish law and, furthermore, that expulsion would not infringe the right to family life as understood in the ECHR.

The Court had regard to the fact that the applicant had not established a family in Poland and did not fear return to his country of origin where his mother and two brothers, with whom he maintained contact, lived. The applicant had indicated that in the jurisprudence of the ECtHR flowing from Article 8 ECHR in the context of expulsion of foreigners, regard is had to the ties forged with the host country in which non-nationals have spent most of their lives. The Provincial Administrative Court, however, highlighted the fact that when the applicant arrived in Poland in 1985 he was an adult and that he spent 9 years residing illegally before being awarded a temporary residence permit in 2004. Upon expiry of this permit in February 2005 “he again opted for illegal stay...” Thus his stay during more than 13 out of his nearly 24 years in Poland not been legalised.

“In this state of affairs,” the Court held, the applicant could not rely on the length of his stay in Poland to avoid the consequences of violating existing legal regulations.

The Court’s decision here would seem to be disproportionate. The applicant did not pose a threat to national security or public order. By failing to recognise the applicants’ relationship with a Polish citizen the Court is at odds with the acknowledgment of the Warsaw Supreme Administrative Court in 2005 that family life extends not only to families based on marriage but also to families based on actual relationships. The Court therefore attached too much significance to the fact of the applicant’s unauthorised residence, and failed to attach sufficient weight to both the length of time spent in the country and the existence of family ties between the applicant and a Polish citizen.

Conclusion

While Poland’s legislative attempts at regularisation have been an abysmal failure, yielding a meagre return for the time and money invested in them, it would appear from draft legislation currently under review that lessons have been learnt and the recently proposed regularisation programme has the potential to regularise the status of a significant proportion of Poland’s irregular immigrant population, facilitating their emergence from the shadows of the black economy, integration into Polish society and empowering them to demand respect for their fundamental human rights.

The representative sample of cases presented above reveals that the Polish courts play an important role in giving effect to the Article 8 ECHR protection of family and private life in the face of administrative decisions to expel which fail to take account of Poland’s obligations under Article 8.

Bibliography

Primary Material

Cases

V SA/Wa 2420/05 – Wyrok WSA w Warszawie 2006 – 01 – 19

V SA/Wa 2/06 – Wyrok WSA w Warszawie 2006 – 04 – 26

III SA/Ld 8/08 – Wyrok WSA w Łodzi 2008 – 04 – 24

V SA/Wa 1398/09 – Wyrok WSA w Warszawie 2010 – 03 – 26

II OSK 1148/05 – Wyrok NSA w Warszawie 2005 – 11 – 30

Legislation

Act amending the Aliens Act and some other Acts 2007

Act on granting protection to non-nationals on the territory of the Polish Republic 2003

Aliens Act 1963

Aliens Act 1997

Aliens Act 2003

Repatriation Act 2000

Secondary Material

Bieniecki, M., Regularization of Immigrants in Poland: What was wrong with it and what should be done? Migrationonline.cz, May 2008

<http://aa.ecn.cz/img_upload/6334c0c7298d6b396d213ccd19be5999/MBieniecki_RegularizationinPoland.pdf>

Biuletyn Migracyjny 1, June 2005, <<http://www.migration-news.uw.edu.pl/BiuletynMigracyjny.pdf>>

Biuletyn z posiedzenia Komisji Administracji i Spraw Wewnętrznych (nr 70), nr 1558/IV kad., 27 lutego 2003 <<http://orka.sejm.gov.pl/Biuletyn.nsf>>

Biuletyn z posiedzenia Komisji Administracji i Spraw Wewnętrznych (nr 103), nr 1969/V kad., 22 maja 2007, <[http://orka.sejm.gov.pl/Biuletyn.nsf/0/65B502C0D52A6996C12572F8003C1D08/\\$file/0196905.pdf](http://orka.sejm.gov.pl/Biuletyn.nsf/0/65B502C0D52A6996C12572F8003C1D08/$file/0196905.pdf)>

Biuletyn z posiedzenia Komisji Mniejszosci Narodowych i Etnicznych (nr 59), nr 3722/VI kad., 6 May 2010,

Biuletyn z posiedzenia Komisji Mniejszosci Narodowych i Etnicznych (nr 69), nr 4316/VI kad., 27 October 2010,

<[http://orka.sejm.gov.pl/Biuletyn.nsf/0/8C25697AB66D6ED7C12577D60047C413/\\$file/0431606.pdf](http://orka.sejm.gov.pl/Biuletyn.nsf/0/8C25697AB66D6ED7C12577D60047C413/$file/0431606.pdf)>

Biuletyn z posiedzenia Komisji Mniejszosci Narodowych i Etnicznych (nr 61), nr 3826/VI kad., 10 June 2010,

<[http://orka.sejm.gov.pl/Biuletyn.nsf/0/955B6F7BD2883DCAC1257746004829C4/\\$file/0382606.pdf](http://orka.sejm.gov.pl/Biuletyn.nsf/0/955B6F7BD2883DCAC1257746004829C4/$file/0382606.pdf)>

Caritas Poland, Stanowisko w sprawie opublikowanego w dniu 24 lutego 2011 roku projektu założeń do projektu ustawy o cudzoziemcach w ramach konsultacji społecznych

<http://www.frog.org.pl/stanowisko_projekt.pdf>

Dezyderat nr 18 Komisji Mniejszości Narodowych i Etnicznych Sejmu RP uchwalony na posiedzeniu w dniu 10 czerwca 2010 r. do Ministra Spraw Wewnętrznych i Administracji w sprawie abolicji dla nielegalnych imigrantów.

<[http://orka.sejm.gov.pl/opinie6.nsf/nazwa/mne_d18/\\$file/mne_d18.pdf](http://orka.sejm.gov.pl/opinie6.nsf/nazwa/mne_d18/$file/mne_d18.pdf)>

Druk Senatu Rzeczypospolitej Polskiej V Kadencji nr 1715, 14 May 2007

Dzhengozova, M., "Poland" in M. Baldwin-Edwards & A. Kraler, eds., *REGINE Regularisations in Europe: Study on practices in the area of regularisation of illegally staying third- country nationals in the Member States of the EU*. Appendix B: Country Profiles of 22 EU Member States and the USA (Vienna: ICMPD, 2009).

Group for Migration Matters, *The Migration Policy of Poland – Current State and Postulated Activities*. April 2011. PDF available on the website of the Ministry for Internal Affairs and Administration

<http://www.bip.mswia.gov.pl/portal/bip/227/19529/Polityka_migracyjna_Polski.html>

Iglicka, K., "Poland" in A. Triandafyllidou & R. Gropas, eds., *European Immigration: A Sourcebook* (Aldershot: Ashgate, 2007).

Iglicka, K., & Gmaj, K., "Country Report Poland" in *Undocumented Migration: Counting the Uncountable. Data and Trends across Europe* (2008)

Iglicka, K., & Ziolk-Skrzypczak, M., "EU Membership Highlights Poland's Migration Challenges" [2010] Migration Information Source

<<http://www.migrationinformation.org/Profiles/display.cfm?ID=800>>

Immigration to Poland: Policy, Employment, Integration (Warsaw: Scholar, 2010).

Kicinger, A., "Poland – Return and regularisation procedures as possible responses to the phenomenon of irregular migration" in *Policies on Irregular Migrants: Volume III – France, Portugal and Poland* (Strasbourg: Council of Europe, 2010).

Materiał Analityczny Wydziału Analiz Migracyjnych DPM MSWiA, September 2009.
Analytical Material of the Dept of Migration Analysis at the Dept of Migration Policy,
Ministry of Internal Affairs and Administration, prepared for the interdepartmental working
group, Group for Migration Matters. On file with author.

Projekt Założeń do Projektu Ustawy o Cudzoziemcach
<<http://www.udsc.gov.pl/Zalozenia,do,projektow,1237.html>>

Sadowski, P., *Akcje regularyzacyjne w Wielkiej Brytanii i w Polsce*, Working Papers 1(15)
(Warsaw: Natolin European Centre, 2010).

Urząd do Spraw Cudzoziemców, Broszura UDSC (UDSC: UDSC, 200?),
<http://www.udsc.gov.pl/files/documenty/Urząd_ds_udzoziemcow.pdf>