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European standards within the scope of foreigners detention

Europejskie standardy w zakresie detencji cudzoziemców

The article refers to the standards within the scope of performing an administrative and legal measure depending on placing a foreigner in a guarded detention centre while waiting to return to the country of origin or for the application for international protection to be reviewed. The study focuses on the guarantees that result from Directive 2008/115/EC, which constitutes a basic instrument for harmonising legislation of EU Member States within the scope of detention of third country citizens. The source of inspiration for the EU legislator has been, and still is, the case law of the European Court of Human Rights, which has resulted in significant directives of interpretation in relation to the law of European states – creating a high standard of protection of foreigners' rights. The guarantees concerning the detention of third country nationals, which have been put forward to date, are currently being verified mainly due to the ongoing migration crisis in the European Union and the related pressure on the pace of implementing the solutions that oblige foreigners to return.

Key words: detention, foreigners, return policy, migration, Directive 2008/115/EC, human rights, European Court of Human Rights.

Artykuł dotyczy standardów w zakresie wykonywania środka o charakterze administracyjnoprawnym polegającym na umieszczeniu cudzoziemca w strzeżonym ośrodku detencyjnym w oczekiwaniu na powrót do kraju pochodzenia lub na rozpoznanie wniosku o ochronę międzynarodową. Opracowanie skupia się na gwarancjach wynikających z dyrektywy 2008/115/WE, stanowiącej podstawowy instrument harmonizacji

ustawodawstw państw członkowskich Unii Europejskiej w zakresie detencji obywateli państw trzecich. Źródłem i inspiracją prawodawcy unijnego było oraz nadal jest przede wszystkim orzecznictwo Europejskiego Trybunału Praw Człowieka, z którego wynikają istotne dyrektywy wykładni w odniesieniu do prawa państw europejskich – tworząc wysoki standard ochrony praw cudzoziemców. Dotychczas ukształtowane gwarancje w zakresie detencji obywateli państw trzecich podlegają aktualnie weryfikacji przede wszystkim ze względu na trwający kryzys migracyjny w obszarze Unii Europejskiej oraz związaną z nim presję dotyczącą tempa realizacji rozstrzygnięć zobowiązujących cudzoziemców do powrotu.

Słowa kluczowe: detencja, cudzoziemcy, polityka w zakresie powrotów, migracja, dyrektywa 2008/115/WE, prawa człowieka, Europejski Trybunał Praw Człowieka.

Introduction

The most severe and direct measure applicable to foreigners – i.e. persons who do not hold Polish citizenship, awaiting return to their country of origin, or their application for international protection to be examined - is to place them in specially created closed facilities, called detention centres. Hidden under this euphemistic name, which is used under European Union law, are places which *de facto* are prisons[1]. Placing a foreigner in such a centre resembles remanding a person in custody, although according to the division that is in force in Poland only some of the detention centres are referred to by the legislator as 'detention centres for foreigners' (Article 399 of the Aliens Act); the others function as 'guarded centres' (Article 398a of the Aliens Act). The foreigners who are detained in such centres themselves see these places as prisons, and they treat the time spent there in terms of mental torture which arouses their great objection[2]. The reason for this is that the grounds for using this measure are not related to any criminal offence, but to the

[1] W. Klaus, *Cudzoziemcy niemile widziani. Detencja cudzoziemców jako przykład kryminalizacji migracji*, [Foreigners are not welcome. Detention of foreigners as an example of criminalising migration] [in:] *Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych*, [A foreigner status in Poland with regard to contemporary international challenges] ed. D. Pudzianowska, Warsaw 2016, p. 177.

[2] Ibidem.

autonomous premises under Section IX of the Aliens Act of 12 December 2013[3] (hereinafter: 'Aliens Act').

Placing foreigners in a detention centre has legal and administrative character, although the institution contains a number of elements from other branches of law. In the doctrine and case law, parallel to detention, the issue of criminalising migration has been considered as a subject of analyses on the borderline of administrative and criminal law which arouses a number of controversies[4]. The differences between the measure of detention and criminal sanctions with regard to a foreigner and his/her illegal stay in the territory of the state were highlighted in the case law of the Court of Justice of the European Union (hereinafter: 'CJEU' or 'the Court'), which also strongly narrowed the grounds for using detention. On the basis of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals[5] (hereinafter: 'the Directive' or 'the Return Directive') the position was expressed that the Return Directive itself is less restrictive than it initially seemed, including the case law of the Court[6].

Europe has uniform legal standards with regard to the detention of foreigners, as provided for in EU legislation. They have their source in the rich case law of the European Court of Human Rights (hereinafter: 'ECtHR'), which has been formed on the basis of the provisions of the Convention for the Protection of Human Rights and Fundamental

[3] Consolidated text: Journal of Laws of 2020, item 35, as amended.

[4] See V. Mitsilegas, *The Criminalisation of Migration in Europe. Challenges for Human Rights and the Rule of Law*, Heidelberg – New York – Dordrecht – London 2015, *passim*; A. Colombo, Foreigners and immigrants in Italy's penal and administrative detention system, „European Journal of Criminology" 2013, vol. 10, no 6, p. 749 et seq.; W. Burek, J. Markiewicz-Stanny, Dopuszczalność sankcji karnej pozbawienia wolności za naruszenie zakazu wjazdu przez cudzoziemca – uwagi z perspektywy prawa UE i prawa międzynarodowego praw człowieka [Admissibility of a criminal penalty of imprisonment for the violation of an entry ban imposed on a foreigner – comments from the perspective of EU and international human rights law[in:] Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych [A foreigner status in Poland with regard to contemporary international challenges], ed. D. Pudzianowska, Warsaw 2016, p. 208 et seq.

[5] Official Journal of the EU L 2008 No. 348, item 98.

[6] S. Peers, *EU Justice and Home Affairs Law*, Oxford 2016 r., pp. 520-521; T. Molnár, *The Place and Role of International Human Rights Law in the EU Return Directive and in the Related CJEU Case Law: Approaches Worlds Apart?*, ed. S. Carrera et al., Leiden 2018, p. 105; M.L. Basilien-Gainche, *Immigration detention under the Return Directive: The CJEU shadowed lights*, „European Journal of Migration and Law", vol 17(1), Leiden 2015, p. 104. See also: C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford 2016, p. 297; L. Mancano, *The European Union and Deprivation of Liberty. A Legislative and Judicial Analysis from the Perspective of the Individual*, Oxford – London – New York – New Delhi – Sydney 2019, 197.

Freedoms (Journal of Laws of 1993, No. 61, item 284; hereinafter: ‘ECHR’ or ‘Convention’)[7].

A characteristic feature of detention of foreigners is the fact that currently only the Border Guard is responsible for running detention centres – not the Prison Service. Starting from the moment of introducing these facilities in the territory of the Republic of Poland, pursuant to the Act of 5 January 1995 on the amendment of the Aliens Act[8], the responsibility for their operation rested with the Police, and the supervision over the correctness of detention and the decision to place people under detention were handled by a prosecutor. Since the end of 1997, the Border Guard has been entrusted with the co-management of some of the centres, and since 2009 it has been the only formation responsible for the functioning of these facilities[9]. Currently, a decision on placing a foreigner in a detention centre is issued by a common court (Article 401(1 and 2) of the Aliens Act. Due to the fact that the Border Guard lacks professionalisation in the field of executing isolation measures, it is particularly important that the EU and Polish legislators, as well as courts and tribunals, formulate standards of conduct in the execution of detention measures.

Regulating detention in EU law

The basic act at the level of EU law, which forms the basis for the harmonisation of national legal regulations on detention, is the said Return Directive, which is a horizontal act applicable to all third-country

[7] The ECHR is particularly coherent with the content of: the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Journal of Laws of 1989, No. 63, item 378) and the International Covenant of Civil and Political Rights of 19 December 1966. (Journal of Laws of 1977, No. 38, item 167) – and with the relevant provisions of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended; hereinafter: ‘Constitution of the Republic of Poland’).

[8] Journal of laws No 23, item 120.

[9] W. Klaus, *Cudzoziemcy niemile widziani*. *Detencja cudzoziemców jako przykład kryminalizacji migracji*, [Foreigners are not welcome. Detention of foreigners as an example of criminalising migration][in:] *Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych*, [A foreigner status in Poland with regard to contemporary international challenges] ed. D. Pudzianowska, Warsaw 2016, p. 177.

nationals staying illegally in the territory of EU Member States[10]. In turn, the detention of foreigners who seek international protection is regulated by Directive 2013/33/EU of 26 June 2013 on the establishment of standards for the reception of applicants for international protection[11]. Separate provisions on the detention of foreigners subject to be transferred to another EU Member State are contained in the so-called Dublin III Regulation[12].

From the point of view of the subject matter of this study, the provisions of Chapter IV of the Return Directive, entitled: 'Detention for the purpose of removal', are of the utmost importance. They contain model provisions for the legislation of the EU Member States, which are obliged to implement them, as well as other countries that have adopted the Directive. The provisions contained in it form the essence of the standards of detention that have been developed over decades, mainly in ECtHR case law[13].

General rules

First of all, the Directive lays down, in Article 15(1) (1), the principle of the detention of a third-country national as an *ultima ratio* measure, which Member States may use only if 'sufficient but less punitive measures cannot be applied in the case in question'. At the same time, it sets out the general rationale for implementing this measure: "in order to prepare a return or to carry out a removal process, in particular if (a) there is a risk of absconding, or (b) the third-country national in question

[10] I. Wróbel, *Wspólnotowe prawo imigracyjne* [Community immigration law], Warsaw 2008, pp. 412-413; K. Strąk, *Polityka Unii Europejskiej w zakresie powrotów* [EU policy with regard to returns], Warsaw 2019, p. 44; J. Augustin, *Die Rückfürungsrichtlinie der Europäischen Union. Richtliniendogmatik. Durchführungslflichten. Reformbedarf*, Berlin 2016, p. 10; A. Baldaccini, *The Return and Removal of Irregular Migrants under EU Law: an Analysis of the Returns Directive*, "European Journal of Migration and Law" 2009, no. 11(1), p. 1.

[11] Journal Journal of the EU L 2013 No. 180, item 96.

[12] Regulation of the European Parliament and of the Council of 26 June 2013 on establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ UE L 2013, No. 180, item 31).

[13] A. Baldaccini, *The Return and Removal of Irregular Migrants under EU Law: an Analysis of the Returns Directive*, „European Journal of Migration and Law" 2009, no. 11, p. 13 et seq. A.E. Lambert et al., *French Law on the Detention and Return of Irregular Migrants and the European Directive*, „European Human Rights Law Review" 2010, no. 4, p. 384 et seq.

avoids or impedes the preparation for return or the removal process"[14]. According to recital 16 of the Directive, the use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the measures used and objectives pursued.

The fundamental principle of detention of foreigners is that any detention measure may be applied for as short a period as possible and only as long as preparations for expulsion are under way, and that it is subject to execution with due diligence (Article 15(1) (2) (4-6) of the Directive). The detention measure shall be maintained as long as the conditions are met and this is necessary to ensure effective removal. The conditions for detention cease to apply and the person in question is released immediately if it turns out that there are no longer any reasonable prospects for his or her removal on legal or other grounds, or that the general condition for detention is no longer met.

Each Member State shall determine the maximum period of detention, which must not exceed six months. EU Member States must not extend this period, except for a limited time which does not exceed another twelve months in accordance with national law, if, despite all reasonable efforts, the removal may take longer due to (a) a lack of cooperation on the part of the third-country national in question, or (b) delays in obtaining the necessary documentation from third countries.

The decision on the application of a detention measure shall be made by administrative or judicial authorities. If the decision to detain was taken by the administrative authorities, the Directive, in Article 15(1), provides for specific conditions concerning that decision, in particular the need to submit it to judicial review without delay[15]. The judicial authority must be independent, autonomous and adversarial[16]. In Poland, this standard is met – as already mentioned above, the decision to place a foreigner in a guarded centre or to place him/her under arrest for foreigners is issued by a district court competent for the place of the foreigner's current stay at the request of the Border Guard (Article 401 (1) and (2) of the Aliens Act). Pursuant to Article 15(3) of the Directive, in each case a detention measure is subject to control at reasonable

[14] See the CJEU judgment of 6 December 2011 in Case *Alexandre Achughbabian v. Préfet du Val-de-Marne*, C-329/11, ECLI:EU:C:2011:807.
[15] See the CJEU judgment of 5 June 2014 in Case *Mahdi*, C-146/14 PPU, ECLI:EU:C:2014:1320.
[16] M. Schieffer, *Directive 2008/115/EC,* [in:] *EU Immigration and Asylum Law. A commentary*, ed. K. Hailbronner, München 2010, p. 1543.

intervals of time upon request of a given third-country national or *ex officio*. In the case of extended periods of detention, the controls are subject to supervision by a judicial authority.

Detention conditions

In accordance with the model provisions of Article 16 of the Return Directive, detention shall normally take place in special detention centres. Where a Member State cannot provide for third-country nationals to be held in a special detention centre and is forced to use a prison for this purpose, third-country nationals in detention are held separately from ordinary prisoners.

According to recital 17 of the Directive, third country nationals in detention must be treated in a humane and dignified manner with respect for their fundamental rights, and in accordance with international and national law. Without prejudice to initial detention by law enforcement authorities, as regulated by national law, detention should in principle be provided in a special detention facility.

In this respect, the provisions of Article 4 of the EU Charter of Fundamental Rights[17], Article 3 of ECHR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[18], which prohibit torture and inhuman or degrading treatment or punishment, are consistent and legally relevant. The standards for persons deprived of their liberty developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[19] also deserve attention. Chapter IV of these standards includes proposals for immigration-related deprivation of liberty[20]. In line with these standards: “(...) centres should provide accommodation in properly equipped and clean rooms, providing sufficient living space for the persons who stay there. In addition, care should be taken to ensure

[17] Official Journal UE C 2007 No. 303, item 1.
[18] The Convention adopted by the United Nations General Assembly on 10 December 1984, Journal of Laws of 1989 no. 63, item 378.
[19] Functioning on the basis of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, drawn up in Strasbourg on 26 November 1987, Journal of Laws of 1995, No. 46, item 238.
[20] K. Strąk, *Polityka Unii Europejskiej w zakresie powrotów* [EU policy with regard to returns], Warsaw 2019, p. 223.

that the premises are properly designed and arranged so as to avoid any association with prisons. With regard to the activity regimen, the detainees should have access to open-air exercises, a day-room with radio/TV and newspapers/magazines, as well as other appropriate leisure activities (e.g. board games, table tennis). The longer the duration of the stay at such centres, the more developed the programme of activities for immigrants should be"[21].

Particular attention shall be paid to vulnerable persons. They are provided with emergency health care and basic treatment of diseases (Article 16 (3) of the Directive).

Foreigners placed in a detention centre should be able to contact their legal representatives, family members and competent consular authorities in due time upon their request. They should be regularly informed about the rules of stay in the centre and about their rights and obligations. This also includes being informed about their right, in accordance with national law, to contact national, international and non-governmental organisations and authorities. Those organisations and bodies shall have the possibility to visit detention centres in so far as they serve to detain third-country nationals in accordance with this Chapter. Such visits may require authorisation (Article 16(2), (4) to (5) of the Directive).

Detention of minors and families

In Article 17(5) of the Directive, the EU legislator has explicitly expressed the principle, formulated and reiterated on several occasions in ECtHR case law, that the best interests of a child shall be a primary consideration in the detention of minors pending removal.

The standard that unaccompanied minors and families with minors are only placed in detention centres as a last resort and for the shortest period possible (Article 17(1)) has already been established in ECtHR case law and adopted in the Directive. Unaccompanied minors are provided with accommodation in facilities with staff and equipment adapted to the needs of persons of that age. Minors in detention shall have the opportunity to participate in leisure time activities, including games, play and recreational activities appropriate to their age and, depending

[21] Publ.: https://rm.coe.int/16806ce906;

on the length of their stay, they shall have access to education (Article 17(3)-(4)).

According to Article 17(2) of the Return Directive, families awaiting removal in a detention centre shall be provided with separate rooms that guarantee an adequate level of privacy.

Selected problems of detention in the case law of the ECtHR and the CJEU

1. The legal prerequisites for the detention of foreigners

It follows from the case law of the ECtHR that one of the basic conditions for detention to be considered as meeting the standard of the Convention is that it should have an explicit and up-to-date legal basis[22], and must be compatible with this law. In the case of *Shamsa v. Poland*[23], the complainants (two brothers of Libyan descent) were detained in Warsaw without valid identity documents and residence permits. They were ordered to be expelled within 90 days, and until that time they had been placed in custody for foreigners. The authorities made three unsuccessful attempts to implement the expulsion order because the brothers did not want to cooperate. Under Polish law, the expulsion order had to be executed within 90 days, otherwise the person in question would have to be released. The complainants formulated an allegation that the Border Guard kept them at the Warsaw airport (in the transition zone) for the purpose of deportation, after the expiry of time that allowed deportation under Polish law, i.e. after 25 August 1997. The authorities continued their deportation operations, with no legal basis, after the statutory deadline of 3 September 1997, when the complainants were taken to hospital by the Police for examination and left there. The Court pointed out that

[22] See J. Białas, *Detencja cudzoziemców w Polsce a standard EKPC Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych*, [Detention of foreigners in Poland and the ECHR standard. The status of a foreigner in Poland in the face of contemporary international challenges] ed. D. Pudzianowska, Warsaw 2016, p. 201.

[23] Judgment of 27 November 2003, complaint no. 45355/99 and 45357/99, publ.: hudoc.echr.coe.int.

a several day long detention period, which did not take place as a result of an order by court, by a judge or any authority empowered to apply the law, could not be regarded as 'lawful' within the meaning of Article 5(1) of the Convention (right to liberty and personal security). Given that the detention between 25 August and 3 September 1997 was not 'provided for by law' or 'authorised', the Court ruled that the Article 5(1) of the Convention was infringed.

Procedural guarantees for foreigners placed in detention centres and awaiting return to their country of origin or examination of their applications for international protection are equally important. In the case *O.S.A. and Others v. Greece*[24], the complainants did not have access to means of appeal under which they could challenge the decisions that ordered their removal and extended their detention. The complainants were Afghan nationals who only understood Farsi and had no lawyers to represent them. The documents issued to them by the authorities were written in Greek and did not specify which administrative court had jurisdiction to hear the appeal. Therefore, the ECtHR found a violation of Article 5(4) of the Convention (right of appeal to a court to determine without delay the legality of the detention).

In turn, in the case *Bistieva and Others v. Poland*[25], the Court stressed, inter alia, that the use of detention should be a measure of last resort, possible only if no other alternatives can be used to secure the proceedings in progress.

2. Detention conditions

2.1. Placing a foreigner under detention in prison

In the judgment of 17 July 2014, C-474/13, the CJEU answered the question of the referring court, namely: with regard to the expulsion procedure and the detention measure, is it compliant with Article 16 (1) of the Directive to detain a third-country national in an ordinary prison with other prisoners if that foreign national consents?

[24] Judgment of 21 March 2019, complaint no. 39065/16, publ: hudoc.echr.coe.int.
[25] Judgment of 10 April 2018, complaint no. 75157/14, publ: hudoc.echr.coe.int.

In the circumstances of this case, the Vietnamese national went to Germany without identity papers and a residence permit. On 29 March 2012 a detention order was issued for her to be expelled from Germany by 28 June 2012. However, earlier, i.e. on 30 March 2012, the foreigner gave her written consent to be placed in prison together with persons serving prison sentences, because she wanted to make contact with her compatriots in the same prison.

Under the decision of 25 June 2012 the District Court in Nuremberg (*Amtsgericht Nürnberg*) extended her detention with a view to expelling her by 10 July 2012. The Nuremberg Regional Court (*Landesgericht Nürnberg*) dismissed the complaint against this order. In the course of the proceedings following the action brought by a foreigner, who had been deported to Vietnam, the German Federal Court of Justice (*Bundesgerichtshof*) referred to the CJEU for a preliminary ruling on the above question.

The CJEU took the view that Article 16 (1) of the Return Directive contains an unconditional obligation to separate foreigners from prisoners in custody. The Court also recalled its views expressed in earlier case law, which made it clear that the mere absence of a special detention centre in one of the federal states of Germany did not in itself constitute grounds for departing from that provision. In the Court's view, the obligation to separate immigrants from ordinary prisoners laid down in Article 16 (1) of the Directive is not merely a technical rule that relates to the detention of foreign nationals in prisons, but contains a basic condition for that kind of detention, without which such detention would, in principle, be contrary to the directive in question. The situation of a foreigner awaiting removal to his country of origin must be significantly different from that of a detained offender.

2.2. Inhuman or degrading treatment or punishment

The European Court of Human Rights has repeatedly stressed in its case law that a well-founded fear of the State that leads to curbing frequent attempts to circumvent immigration restrictions cannot deprive foreigners of the freedoms and rights stemming from the ECHR, including Article 3 thereof. As indicated by the Court in its judgment

of 21 January 2011 in the case *M.S.S. v. Belgium and Greece*[26]: "(...) deprivation of liberty of foreign nationals combined with protection that is intended for them is permissible in order to enable the State to protect itself against illegal immigration, while complying with international obligations, in particular the 1951 Geneva Convention relating to the Status of Refugees, and the European Convention on Human Rights. (...) Where the Court is called upon to examine the compatibility of the manner and method of implementing the measures resulting from the Convention, it must take into account the individual situation of each person. (...) States must have particular regard to Article 3 of the Convention, which protects the fundamental values of democratic States and relates to the prohibition of torture and inhuman and degrading treatment and punishment that are inadequate to the circumstances and situation of the victim".

The case law of the ECtHR provides many examples of violations of Article 3 of ECHR. In the case *Dougoz v. Greece*[27], the complainant (of Syrian descent) was placed in police custody in Greece pending his expulsion to Syria. He was detained for several months at a police station in Drapetsona, in an overcrowded and dirty cell, with insufficient sanitary facilities and a place to sleep, with no hot water, fresh air, natural light or a place to exercise. In April 1998 he was transferred to the police headquarters, where, according to him, the conditions were similar to those in the Drapetsona detention centre. The complainant remained in that facility until 3 December 1998, the date of his deportation to Syria. The Court held that the conditions of the complainant's detention in Drapetsona and at the Police Headquarters, in particular serious overcrowding and the lack of places to sleep combined with excessively long detention periods, constituted degrading treatment which was contrary to Article 3 of the Convention.

By contrast, in the case *A.A. v Greece*[28], the complainant (of Palestinian descent) was detained by the coastal police in the maritime territories of Greece after having fled a refugee camp in Lebanon. He was to be taken back to his country of descent. He complained about the substandard conditions of the prison in Samos: crusted dirt on the floor where the complainant ate and slept, rubbish in the corridors, food prepared in

[26] Complaint no. 30696/09, publ.: hudoc.echr.coe.int.

[27] Judgment of 06 June 2011, complaint no. 40907/98, publ: hudoc.echr.coe.int.

[28] Judgment of 22 July 2010, complaint no. 12186/08, publ: hudoc.echr.coe.int.

unsanitary conditions, lice and skin diseases, boarded up windows, a shower which played the role of a lavatory at the same time, no hot water, access to a small courtyard only in the presence of officers, lack of possibility to use the telephone, and overcrowding (the facility was intended for 100 people, and it housed from 140 to 190). The Court found an infringement of Article 3 of the Convention both in terms of living conditions involving degrading treatment and because of the lack of adequate medical care. The complainant's allegations were verified and confirmed by numerous reports drawn up by international and Greek NGOs.

2.3. Detention of minors

The ECtHR attaches particular importance in its case law to the standards that relate to the detention of foreigners with special needs, especially minors. In the case *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*[29], a five-year-old child, a Congolese citizen, was placed in an adult transit centre run by the Foreigners' Office, near Brussels airport, for a period of less than two months. The minor travelled alone and wanted to join her mother who had been granted refugee status in Canada. The Court found a violation of Article 3 of the Convention (prohibition of inhuman and degrading treatment) because of the conditions in which the child was imprisoned. The minor, who was only five years old, was held for almost two months in an institution which was intended for adults. Not only was she placed there without her parents, but no one was assigned to care for her. No measures were taken to ensure that she received appropriate legal and educational assistance from a competent person specifically assigned to her. In the course of the proceedings before the Court, the Belgian Government held that the institution was not an appropriate place for the child and her needs and that no appropriate conditions and structures were provided. According to the ECtHR, given the circumstances – the age of the minor and that she was an illegal alien in a foreign country, unaccompanied by her parents, from whom she had been separated, and that she was dependent only on herself – the measures taken by the Belgian authorities differed from those which had to be taken in order to fulfil the authorities' obligation to take care of the minor. The conditions of the detention centre caused stress to the child.

[29] Judgment of 12 October 2006, complaint no. 13178/03, publ: hudoc.echr.coe.int.

The authorities who deprived the child of her liberty could not have been unaware of how the detention could affect her psyche.

In the explanatory memorandum of the judgment of 19 January 2012 in the case *Popov v. France*[30], the ECtHR stated that the exceptional vulnerability of a child is a decisive factor and takes precedence over the aspects related to the status of an illegal immigrant. According to the Court, the degree of isolation must be proportionate to the objective which the authorities intend to achieve, namely to enforce the expulsion decision. It follows from the case law of the Court that when dealing with families, the authorities must take the best interests of the child into account when assessing proportionality. Therefore, there is now a broad consensus, also in the area of international law, which supports the idea that the best interests of the child should be a primary consideration when taking decisions concerning minors. The ECtHR stressed that the protection of the best interests of the child consists both in the family being together as far as possible, and in considering alternative measures to ensure that the detention of minors was only a measure of last resort (see § 91, § 140-141 of the above mentioned memorandum).

The Court also referred to the above judgment in other judgments, including the one in *Bistieva and Others v. Poland*[31], where it pointed out that the authorities cannot limit themselves to stating that it is in the good interest of the child to be placed in a guarded centre together with their parents. The authorities must take all necessary steps to restrict, as far as possible, the detention of families with children and effectively uphold the right to family life. In this case, according to the ECtHR, the Polish authorities did not make any effort to find alternative freedom means (in the best interests of children), as they were obliged to do by international law. The Court considered that the period of 5 months and 20 days' imprisonment was too long in this case. Even in the light of the risk of foreigners fleeing, the authorities did not give adequate reasons to justify imprisonment for such a long period of time, resulting in a violation of Article 8 of the Convention (right to respect for private and family life).

[30] Complaint no. 39472/07 and 39474/07, publ.: hudoc.echr.coe.int.
[31] Judgment of 10 April 2018, complaint no. 75157/14, publ.: hudoc.echr.coe.int.

Conclusion

The case law of the European Courts has contributed important directives of interpretation in relation to the national laws of the EU Member States, including Polish law – creating a high standard of protecting foreigners' rights.

The migration crisis of 2015 posed new challenges to European countries and to the European Union. Increasing the effectiveness of returns and the rate of returns in the whole European Union became a priority. On 12 September 2018 the European Commission presented a draft of the new Return Directive to the European Parliament[32]. The aim of this draft is to speed up the procedure of foreigners returning to their countries of origin. A targeted recast of the Directive should, *inter alia*, ensure a more effective use of detention in order to facilitate return operations[33]. An introduction of a new maximum period of three to six months for the detention of foreigners has been proposed. Member States must not extend it, except for a maximum of twelve months, due to a lack of cooperation by the third-country national concerned or delays in obtaining the necessary documentation from third countries[34]. A new regulation has also been provided for in emergency cases when an exceptionally high number of third-country nationals subject to an obligation to return places an unexpected heavy burden on the detention facilities of a Member State or its administrative or judicial personnel. In such an exceptional situation, a Member State will then be able to decide, for the duration of the exceptional situation, to allow for longer periods of judicial review of the detention application, and to take urgent measures in relation to detention conditions which deviate from those provided for in the Directive. If a Member State takes such exceptional measures, it will have to notify the Commission[35].

This draft amendment to the Directive has been subjected to the ordinary legislative procedure in the European Parliament and the EU Council. At the EU Council meeting on 6-7 June 2019, a consensus was

[32] See: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2018:634:FIN [access: 27.04.2020].

[33] See the draft of a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, COM/2018/634 final, publ.: https://eur-lex.europa.eu/legal-content/PL/TXT/DOC/?uri=CELEX:52018PC0634&from=EN [access: see above].

[34] Article 18 (6) of the above mentioned draft.

[35] Article 19 of the above mentioned draft.

reached on, *inter alia*, specific guarantees for children and families, allowing Member States to establish shorter detention periods applicable to children, and to grant families and children the possibility to leave voluntarily, even if there is a risk of absconding or a threat to public policy or public security.

The most recent challenge for European countries and the European Union is the occurrence of the COVID-19 epidemic in Europe. On 23 March 2020, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published a set of rules on how to deal with persons deprived of their liberty in the context of the coronavirus pandemic[36]. The need for state institutions to review their measures and procedures and their resources to ensure that they do not put persons deprived of their liberty at risk of the COVID-19 infection, do not restrict their rights and guarantee protection against all forms of ill-treatment was pointed out by the Ombudsman in his speech of 27 March 2020[37].

[36] See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic issued on 20 March 2020, CPT/Inf (2020)13. The document available at: https://rm.coe.int/16809cfa4b [access: 27.04.2020].

[37] Publ.: https://www.rpo.gov.pl/sites/default/files/Wystąpienie%20do%20premiera%20ws.%20ochrony%20osób%20w%20detencji%20przed%20COVID-19%2C%2027.03.2020.pdf.

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