

Research on the applicability of the best interests of the child principle as the primary consideration in detention decisions as well as the alternatives to detention

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Research financed by UNHCR

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2017

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I. Abbreviations

BG – Border Guard
BGHQ – Border Guard Headquarters
OFF – Office for Foreigners
DC – District Court
RC – Regional Court
CJEU – Court of Justice of the European Union
ECtHR – European Court of Human Rights
ECHR – European Convention on Human Rights
CRC – Convention on the Rights of the Child
HFHR – Helsinki Foundation for Human Rights
UNHCR – United Nations High Commissioner for Refugees

II. Introduction

The focus of the research was to assess the applicability of the best interests of the child principle as the primary consideration in detention decisions as well as when considering the alternatives to detention. Following the introduction of the amendment to the Act on Foreigners,¹ the best interests of the child principle shall always be considered by courts when ruling on the detention of foreigners for the purposes of migration proceedings. Although the national law does not specify how the best interests of the child should be assessed, referring in this regard to unaccompanied children only², relevant provisions and guidelines can be found in international and European law concerning the rights of children. Moreover, under the principal act in this area, i.e. the Convention on the Rights of the Child,³ the detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Despite that, according to statistical data presented in one of the latest reports on the detention of foreigners in Poland, the average period of stay in a detention centre in the case of families with children is even longer than other foreigners.⁴

The research was conducted by the Helsinki Foundation for Human Rights (HFHR) for the United Nations High Commissioner for Refugees (UNHCR) Representation in Poland. The expected result of the study was to collect more detailed information on the detention of children seeking international protection as well as on the application of alternative measures to be used for advocacy purposes for ending the detention of children in Poland. For this reason, the study involved the analysis of relevant legislation in place and available statistical data as well as the practice of Polish courts ruling on the detention of families with children seeking international protection and the practice of the Border Guard applying alternatives to detention.

¹ Act of 12 December 2013 on Foreigners (Journal of Laws 2013, position 1650, with further amendments, hereinafter: Act on Foreigners), available in Polish at: <http://goo.gl/510YPm>.

² Article 397(2) of the Act on Foreigners.

³ The Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (hereinafter: CRC), available at: <http://goo.gl/sQh6cy>.

⁴ The Rule of Law Institute, *Application of alternatives to detention of foreigners in Poland 2014 – 2015. Report from monitoring*, Lublin 2016, available in Polish at: <http://goo.gl/CftuoW>, p. 73.

III. Methodology

The first phase of the study was conducted in the period of 1 August – 30 November 2016 by the HFHR research team. The methodology of the study was prepared beforehand and consulted with the UNHCR. Considering the purpose of the research, the following research methods were applied:

- (1) desk-based research;
- (2) statistical data collection and analysis; and
- (3) audit/review of selected District Courts' case files concerning the detention of families with children seeking international protection in Poland.

The desk-based research included analysis of national legislation and policies in place on the detention of children in Poland. The analysis took into account the major amendment to the Act on Foreigners which came into force on 1 May 2014, introducing the best interests of the child principle to detention proceedings. The results of this part of the study are presented in the chapter "Legal framework".

Upon the request of the research team, statistical data were provided by the Border Guard Headquarters (BGHQ) and selected District Courts in the course of the study. They included the number of requests submitted by all Border Guard Stations to the District Courts on the detention of foreigners and decisions issued by the District Courts upon these requests. The main obstacle in this area was to obtain accurate and reliable data since figures presented by the courts and BGHQ differ significantly. The results of the statistical data analysis are presented in the chapter "Statistical data".

The main core of the research was the review of court decisions on the detention of families with children seeking international protection in Poland. Five District Courts (DC) were chosen to participate in the study: Białą Podlaska, Bielsko-Biała, Kętrzyn, Słubice and Warsaw. They were requested to provide the research team with statistical data on the number of Border Guard requests to detain or prolong detention of families with children seeking international protection in the period of 1 May 2014 – 31 July 2016 as well as to grant researchers access to these case files. The starting date of the timeframe of the research was the date when the amended Act on Foreigners, introducing the provision stipulating courts to consider the best interests of the child when ruling on detention, came into force, while the final date was the day before the project was launched.

The selection of DCs for the study was based on the statistical data, provided by the BGHQ,⁵ according to which 65% of all BG requests to detain or prolong detention of foreigner in the period of 30 June 2015 – 18 October 2016 were submitted to these particular courts. Moreover, DCs in Białą Podlaska and Kętrzyn were the obvious choices as these are two out of three courts in Poland which rule on the prolongation of stay of a child or children in detention since they are situated near detention facilities designated for families with children. According to statistical data gathered during the study, the third DC situated near such facility, i.e. the DC in Przemyśl, examined only two cases of prolongation of child's stay in the detention centre within the period covered, therefore the research team decided not to include that court in the study. In turn, DCs in Bielsko-Biała and

⁵ Statistical data provided to research team by Border Guard Headquarters on 25 October 2016 No. FAX-KG-CU-7093-MŁ/MK/16.

Słubice are courts which usually rule on the detention of foreigners transferred to Poland from Austria and Germany under the Dublin III Regulation⁶ which is often the case of Chechen families with children⁷. Due to the limited timeframe of the study, it was not possible to select more than five courts for research purposes, especially considering that in the majority of them only a very few cases of foreigners' detention were examined since 1 May 2014.

The following number of case files was audited in each District Court:

District Court	Number of audited case files		
	Case files concerning placing a family in a detention centre	Case files concerning prolonging the stay of a family in a detention centre	Total number of case files audited
Biała Podlaska	15	29	44
Bielsko-Biała	13	0	13
Kętrzyn	0	21	21
Słubice	17	0	17
Warsaw	1	0	1
TOTAL	46	50	96

The total number of 96 case files was audited within the framework of the research. Reviewed case files included both decisions on placing families with children in detention centres (46 case files) and on prolonging their stay there (50 case files). Each case file was audited in the premises of the court with the use of a case file audit template which was prepared beforehand by the research team for the purpose of the study. The template included detailed information on the circumstances of the case as well as three principal questions critical from the point of view of the study: (a) Has the court referred to the presence of the child? (b) Has the court assessed the best interests of the child when ruling on detention? and (c) Has the court considered alternatives to detention?

The results of this part of the study are presented in the chapter "Findings of the study".

The second phase of the study was conducted in the period of 13 March - 30 June 2017. In this phase, the HFHR research team audited the Border Guard case files in order to assess how the

⁶ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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 (recast), Official Journal of the European Union L 180/31 (hereinafter: Dublin III Regulation), available at: <http://goo.gl/urdB2Y>.

⁷ 7,989 applications for international protection were lodged in Poland in 2015 by applicants from the Russian Federation, mostly from the Chechen origin. In the same year, 6,566 decisions on discontinuance of the asylum procedure were issued, mostly due to implicit or explicit withdrawal of the application. It is often a case when foreigners decide to leave Poland during the asylum procedure and move to another EU country. Statistics (with OFF commentary) available in Polish at: <http://goo.gl/JgWKmk>.

best interests of the child are considered in the decisions on alternatives to detention applied by the BG. Three BG Stations were chosen to participate in the study: the BG Station in Warsaw (Nadwiślański BG Regional Unit), the BG Station in Terespol (Nadbużański BG Regional Unit) and the BG Station in Świecko (Nadodrzański BG Regional Unit). They were requested to provide the researchers access to random case files in which the alternatives to detention were applied towards families with children seeking international protection in the period of 1 May 2014 – 31 July 2016. According to the received statistical data⁸, the above-mentioned BG Regional Units had applied alternatives to detention in a majority of cases within the researched period (Nadwiślański BG Regional Unit – 385 cases, Nadbużański BG Regional Unit - 231, Nadodrzański BG Regional Unit - 390).

It is worth mentioning that the chosen BG Stations have also different characteristics: the BG Station in Terespol is situated on the border crossing with Belarus where the highest number of the asylum applications are being submitted⁹, the BG Station in Świecko is situated at the border with Germany and receives asylum-seekers who are transferred back from that EU Member State under the Dublin III Regulation, whereas the BG Station in Warsaw is based in the capital area where the headquarters of the OFF is situated as well as three reception centres for the asylum-seekers. Warsaw is also an important transit point with two international airports, including the largest airport in Poland as well as international buses and trains.

Although the research team did not receive the exact number of the alternatives applied by each BG Station, they managed to audit a certain part of them. The following number of the case files was audited in each BG Station:

Border Guard Station:	Number of case files audited:
Warsaw	28
Terespol	28
Świecko	28
TOTAL:	84

The total number of 84 Border Guard case files was audited within the framework of the research. Each case file was reviewed in the premises of the BG Station with the use of the case file audit template which was prepared beforehand by the research team for the purpose of the study. The results of this part of the study are presented in the chapter “Findings of the study”.

⁸ Statistical data provided by the Border Guard Headquarters on 5 September 2016, letter No. FAX-KG-CU-5755/IV/MK/16, attachment No. 3

⁹ According to the OFF data in 2016, 68% of the asylum applications were submitted in Terespol, data available in Polish at: <https://goo.gl/dd5NPM>.

IV. Legal framework

There are six detention centres for foreigners in Poland for the purpose of securing administrative proceedings, including the procedure on granting international protection. Three of them are designated for families with children (in Biała Podlaska, Kętrzyn and Przemyśl¹⁰). Detention provisions which regulate placing foreigners, including children, as well as prolonging their stay in the detention centres are set out in two domestic legal acts, i.e. the Act on Foreigners and the Protection Law.¹¹

Under the Convention on the Rights of the Child, a child is defined as “a human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier.”¹² This definition is consistent with the definition of a “minor” set out in the Civil Code¹³ and is being used both in the Act on Foreigners and the Protection Law. In Poland, it is important to distinguish between the definition of a “minor” and a “juvenile” set out in Criminal Law who, in contrast, is a person below the age of seventeen years.¹⁴

1. Domestic detention provisions

1.1. Grounds for detention

According to Polish law, foreigners seeking international protection, as a rule, shall not be detained unless one of the premises listed in the Protection Law occurs. Before the introduction of the amendment to the Protection Law, i.e. until 12 November 2015, foreigners seeking international protection could only be placed in the detention centre if it was necessary to:

- (1) establish their identity;
- (2) prevent them from abusing the asylum procedure;
- (3) prevent them from posing a threat to other people’s safety, health, life or property;
- (4) protect the defence or safety of the state or public order and safety.¹⁵

Furthermore, asylum seekers could have been placed in the detention centre, if:

- (1) they had illegally crossed or attempted to cross the border, unless they were coming directly from a territory of persecution or serious harm, immediately submitted an application for asylum and presented reliable reasons for illegal entry.¹⁶

¹⁰ Only families with children under school age can be placed in the detention centre in Przemyśl.

¹¹ Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (Journal of Laws 2012, position 680, with further amendments, hereinafter: Protection Law), available in Polish at: <https://goo.gl/82sMW0>

¹² Article 1 of the CRC.

¹³ Article 10 of the Act of 23 April 1964 - the Civil Code (Journal of Laws 1964, No. 16, position 93, with further amendments, hereinafter: the Civil Code), available in Polish at: <https://goo.gl/DqvyMQ>.

¹⁴ Article 10 § 2 of the Act of 6 June 1997 - the Criminal Code (Journal of Laws 1997, No. 88, position 553, with further amendments, hereinafter: the Criminal Code), available in Polish at: <https://goo.gl/sN8Hxc>.

¹⁵ Article 87(1) of the Protection Law, applicable until 12 November 2015.

¹⁶ Article 87(2)(1) of the Protection Law, applicable until 12 November 2015.

- (2) they posed a threat to the safety, health or life of other foreigners staying in the reception centre or employees of the centre.¹⁷
- (3) they were not fulfilling their duties foreseen in the decision on alternatives to detention.¹⁸

On 13 November 2015, an amendment to the Protection Law came into force. The main purpose of the introduced amendment was to implement into national law the provisions of the recast Asylum Procedures Directive,¹⁹ the recast Reception Conditions Directive²⁰ and the Dublin III Regulation.²¹ Under the adopted amendment, the grounds for detention of foreigners seeking international protection have changed and asylum seekers can be placed in the detention centre if alternatives to detention cannot be used²² and only:

- (1) in order to establish or verify their identity;
- (2) to gather information connected with the application for international protection which cannot be collected without detaining an applicant if there is a significant risk of their absconding;
- (3) in order to issue or execute the return decision when the return procedure is being conducted towards an applicant for international protection or the decision on their return has already been issued, if they had the possibility to submit an application for international protection beforehand and there is a justified assumption that they applied for asylum only to delay or prevent their return;
- (4) when it is necessary for national defence or national security reasons or for the protection of public safety and order;
- (5) in accordance with Article 28 of the Dublin III Regulation, when there is a significant risk of absconding of an applicant for international protection and their immediate transfer to another EU country is not possible.²³

The “risk of absconding” of the applicants for international protection, stipulated in the above-mentioned provisions, exists particularly if they:

- (1) are not in a possession of documents confirming their identity when applying for international protection;
- (2) crossed or attempted to cross the border illegally, unless they are so-called “directly arriving” (i.e. arrived from the territory where they could be subject to persecution or serious harm) and presented credible reasons of illegal entry as well as submitted an application for international protection immediately;

¹⁷ Article 87(2)(2) of the Protection Law, applicable until 12 November 2015.

¹⁸ Article 88(1) of the Protection Law, applicable until 12 November 2015.

¹⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Official Journal of the European Union L 180, 29.6.2013, p. 60–95 (hereinafter: Asylum Procedures Directive), available at: <https://goo.gl/WmBHWZ>.

²⁰ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection Reception Conditions Directive, Official Journal of the European Union L 180, 29.6.2013, p. 96–116 (hereinafter: Reception Conditions Directive), available at: <https://goo.gl/4H6NTs>.

²¹ Justification of the draft amendment to the Protection Law, available in Polish at: <http://goo.gl/5zWMwg>.

²² Article 88a(1) of the Protection Law.

²³ Article 87(1) of the Protection Law.

- (3) entered Polish territory during the period when their data were included in the list of undesirable foreigners in Poland or in the Schengen Information System in order to refuse entry.²⁴

1.2. Duration of detention

The decision on the detention of an applicant seeking international protection for a period up to 60 days is issued by a competent District Court upon the request of the BG.²⁵ If an application for international protection is submitted during the stay of the applicant in the detention centre, the period of their detention is prolonged up to 90 days from the day of filing the application if the grounds for detention described in the point 1.1 of this chapter exist.²⁶

The detention order can be challenged in front of the Regional Court (2nd instance court) within 7 days.²⁷ Applicants receive the detention order in the Polish language with a translation into a language they declared understandable.²⁸ Both the BG²⁹ and the courts³⁰ can impose on the applicant alternatives to detention. The decision of the BG on alternatives to detention can be challenged before District Courts³¹ while the decision issued by the District Courts can be challenged before Regional Courts,³² both within 7 days.

Until 12 November 2015, prolongation of the detention period of an asylum seeker was possible if a negative decision issued by the Office for Foreigners (OFF)³³ was delivered to them prior the expiration of the detention period initially ruled.³⁴ Following the amendment of the Protection Law, the period of the applicant's stay in the detention centre can be prolonged if a final decision on granting international protection has not been issued before the expiration of the detention period and grounds for detention still exist.³⁵ The detention period shall not be prolonged, however, if the delay in completing the procedure for granting international protection is not caused by the applicant himself.³⁶

The detention period of applicants for international protection can be prolonged for a period not exceeding 6 months in total.³⁷ For failed asylum seekers and other migrants in return procedures, the maximum period of detention is 12 months; however, it can be prolonged for another 6 months if the person concerned submits a complaint to the administrative court against a return decision.³⁸

²⁴ Article 87(2) of the Protection Law.

²⁵ Article 89(1) of the Protection Law.

²⁶ Article 89(2)(3) of the Protection Law.

²⁷ Article 88b(4) of the Protection Law.

²⁸ Article 72 § 3 of the Criminal Code.

²⁹ Article 88(1)(2) of the Protection Law.

³⁰ Article 88b(2) of the Protection Law.

³¹ Article 88(2) of the Protection Law.

³² Article 88b(3) of the Protection Law.

³³ First instance authority in the procedure for granting international protection.

³⁴ Article 89(4) of the Protection Law, applicable from 1 May 2014 to 12 November 2015.

³⁵ Article 89(4) of the Protection Law, applicable since 13 November 2015.

³⁶ Article 89(4) of the Protection Law, applicable since 13 November 2015.

³⁷ Article 89(5) of the Protection Law.

³⁸ Article 404(5) of the Act on Foreigners.

The draft amendment to the Protection Law³⁹ (pending proceedings at the Parliament) has introduced new grounds for detention for the purpose of the border procedure. This may result in a higher number of foreigners, including children, being placed in detention.

2. Alternatives to detention

Alternatives to detention were introduced into Polish law on 1 May 2014, both to the Act on Foreigners and the Protection Law. They can be applied to foreigners seeking international protection, including families with children. These measures include: (a) an obligation to report to the BG authority (b) bail and (c) an obligation to reside at an indicated place.⁴⁰ Alternatives to detention can be either applied by the BG⁴¹ or by the court.⁴² Following the amendment to the Protection Law, detention shall be a measure of last resort.⁴³

Moreover, one of the alternative measures can be applied by the first instance authority in international protection proceedings. OFF can order an applicant to reside at a designated place which they could not leave without permission as well as oblige them to report to the authority indicated in the decision at specified intervals of time. The decision on such alternatives to detention can be issued if:

- (a) an applicant for international protection had not been placed in a detention centre because it could cause a serious threat to their life or health; or
- (b) an applicant for international protection was released from the detention centre based on the OFF decision issued because the evidence of the case indicated that the asylum seeker meets the conditions for being recognised as a refugee or for being granted subsidiary protection.⁴⁴

The draft amendment to the Protection Law (pending proceedings at the Parliament) provides that in the case of a detention for the purpose of the border procedure if applied, the alternatives to detention should be applied jointly. This may lead to the situation where foreigners, not being able to fulfil all the criteria (especially bail), would be excluded from the possibility of benefiting from the alternatives to detention.

3. Detention of children seeking international protection

Under the Protection Law, unaccompanied children seeking international protection shall not be detained.⁴⁵ They are instead placed in a foster care facility.⁴⁶ Moreover, the detention shall not be applied towards applicants seeking international protection if it can constitute a threat to their life or

³⁹ <https://bip.mswia.gov.pl/download/4/33796/Projektustawy-KSE.pdf>

⁴⁰ Article 88(1) of the Protection Law.

⁴¹ Article 88(3) of the Protection Law.

⁴² Article 88b(2)(3) of the Protection Law.

⁴³ Article 88a(1) of the Protection Law.

⁴⁴ Article 89c of the Protection Law.

⁴⁵ Article 88a(3)(3) of the Protection Law, applicable from 13 November 2015; Article 88(3)(1) of the Protection Law, applicable from 1 May 2014 to 12 November 2015.

⁴⁶ Article 62(2) of the Protection Law.

health, their condition may indicate that they are victims of violence or they are disabled persons.⁴⁷ *A contrario sensu*, since the above-mentioned list is exhaustive, children seeking international protection accompanied by adult members of their family can be detained without any restrictions.⁴⁸ They are placed, together with the members of their families, in one of the detention centres designated for families with children.

Although it is not expressly provided in the Protection Law, jurisprudence indicates that the Act on Foreigners should be applied as a complementary act to it.⁴⁹ It is significant since some of the detention provisions, including the application of the best interests of the child principle, only appear in the Act on Foreigners.⁵⁰ Article 401(4) of the latter stipulates that “[t]he court examining a request for the detention of a foreigner with a minor under his custody is guided also by the welfare of that minor”.⁵¹

The best interests of the child principle is an important provision missing from the Protection Law, however, it occurs in the Act on Foreigners. There are more provisions like this in both laws. Under the Act on Foreigners, a detainee should be released if the detention constitutes a threat to his/her life or health.⁵² Also, under the Act on Foreigners, a minor should be placed in the same room with his/her family members.⁵³ Although this is missing from the Protection Law both provisions should be applied equally, therefore, in practice, families seeking international protection are also detained in the same room and released if detention constitutes a threat to their life or health.⁵⁴

Furthermore, it must be noticed that since 13 November 2015, under the amended Protection Law, children are considered a group which requires special treatment during the procedure on granting international protection.⁵⁵ These provisions are implemented directly from the Article 21 of the Reception Conditions Directive (RCD) according to which the reception conditions provide for an adequate standard of living guaranteeing the subsistence of applicants and protecting their physical and mental health.⁵⁶ This standard is implemented “in accordance with Article 21 of RCD, as well as in relation to the situation of persons who are in detention” which means that it also covers children and not only in reception centres, but in detention centres as well.

4. The best interests of the child principle

The best interests of the child is a general principle which shall be of a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.⁵⁷ The above-mentioned principle is

⁴⁷ Art. 88a(3)(1-3) of the Protection Law, applicable from 13 November 2015; Article 88(3)(2) of the Protection Law, applicable from 1 May 2014 to 12 November 2015.

⁴⁸ Articles 87 – 89(cb) of the Protection Law.

⁴⁹ Court of Appeal, Lublin, Judgement from 4 June 2014 No. II AKz 277/14.

⁵⁰ Article 401(4) of the Act on Foreigners.

⁵¹ Article 401(4) of the Act on Foreigners.

⁵² Article 406(1)(2) of the Act on Foreigners.

⁵³ Article 414(3) of the Act on Foreigners.

⁵⁴ *Still behind bars: Report on the Monitoring of Guarded Centres for Foreigners by the Helsinki Foundation for Human Rights and the Association for Legal Intervention*, 2014, available at: <http://goo.gl/G5CYyI>.

⁵⁵ Art. 68(1) of the Protection Law.

⁵⁶ Article 17(2) of the Reception Conditions Directive.

⁵⁷ Article 3 in conjunction with Article 22 of the CRC.

expressed very briefly in the Act on Foreigners and is directed only to the criminal courts examining BG requests on the detention of children. Although the Act on Foreigners specifies only how the “best interests” of an unaccompanied child should be assessed by the court, it may serve as a guideline also in cases of children accompanied by the adult members of their family. Under Article 397(2) of the Act on Foreigners, when determining the best interests of an unaccompanied child, the court considers in particular: the level of his/her physical and mental development, his/her personality traits, the circumstances of his/her arrest and personal conditions in favour of detention.

Therefore, it is important to underline relevant provisions set in international law and relevant guidelines since this principle applies to all children, obviously including children seeking international protection, both unaccompanied or accompanied by their family members.

The best interests of a child should be a primary concern when considering actions that affect them, including undertaking the decision to detain children or the adults on whom they depend. The term “best interests” broadly refers to the child’s well-being and is assessed in relation to a range of factors including a child’s age, physical and mental health, level of maturity, current living arrangements, safety, culture and traditions, environment, experiences, and the presence or absence of parents. These factors may have an impact on children’s ability to cope with their situation and are important elements in assessing their specific needs. Establishing children’s best interests requires children’s active involvement. Gathering information involves not only talking to adults in a position to shed light on a child’s history and situation but listening to the children’s own version of events. Obtaining children’s informed consent can be a complex undertaking because of their age, psychological state, ability to understand, whether they are in a stressful or insecure environment, feel under peer pressure, etc.⁵⁸

CRC explicitly provides that “[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily” and that detention of any type should only be used against children as “a measure of last resort and for the shortest appropriate period of time”.⁵⁹ When determining the best interests of the child, it is important to consider all rights of the child. In addition to the norms contained in the CRC, there are other relevant legal basis, both at the international and the national level that may affect such decisions. In accordance with CRC⁶⁰, the higher standard must always apply. International and regional instruments of relevance include those on general human rights, international humanitarian law, refugee law and child-specific instruments.⁶¹

Soft laws are also valuable interpretative sources⁶². The UN Committee on the Rights of the Child states to “expeditiously and completely cease the detention of children on the basis of their immigration status arguing that such detention is never in the child’s best interest”.⁶³ UNHCR specifically states that „[C]hildren should never be criminalized or subject to punitive

⁵⁸ Children and detention, International Committee of the Red Cross, 2014, p. 6, available at: <http://goo.gl/F5L1vf> , as well as UN High Commissioner for Refugees (UNHCR), *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: <http://www.refworld.org/docid/5423da264.html>, p. 31

⁵⁹ Article 37(b) of the CRC.

⁶⁰ Article 41 of the CRC.

⁶¹ UNHCR Guidelines on Determining the Best Interests of the Child, 2008, p. 15, available at: <http://goo.gl/SBYRqZ> .

⁶² *Ibid.*

⁶³ UN Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, February 2013, par. 78, available at: <http://goo.gl/FN1yiK>

*measures because of their parents' migration status. Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements as determined by the competent childcare authorities".*⁶⁴ Also, the Commissioner for Human Rights for the Council of Europe has stated that "as a principle, migrant children should not be subjected to detention".⁶⁵ For these reasons, the best interests of the child principle, set in Polish domestic law, shall always be considered in light of the above-mentioned standards.

V. Statistical data

For the purpose of the study, the BGHQ was requested to provide detailed statistical data on the detention of foreigners covering the period of 1 May 2014 – 31 July 2016. The questions sent by the research team to BGHQ concerned:

- (1) the number of requests to detain foreigners seeking international protection submitted by the BG to the District Courts;
- (2) the number of requests to prolong the detention period of foreigner seeking international protection submitted by the BG to the District Courts;
- (3) the number of BG decisions on alternatives to detention applied towards foreigners seeking international protection.

The BGHQ was requested to provide the above-mentioned data distinguishing the number of cases concerning children seeking international protection. They were also requested to provide the exact number of the requests to the DCs submitted by each Regional BG Unit with the information on the result of each court proceeding as well as the number of the decisions on alternatives to detention issued by all Regional BG Units.

Statistical data provided by the BGHQ⁶⁶ allowed the research team to formulate the following conclusions:

- (1) In the researched period, children seeking international protection were placed in detention centres based on court decisions issued upon the requests of the following BG Regional Units: Nadbużański BG Regional Unit – 35 children were involved in the total number of 106 requests which resulted in 106 court decisions on detention of 141 persons, Śląsko-Małopolski BG Regional Unit – 61 children were affected out of the total number of 76 requests which resulted in 76 court decisions on detention of 137 persons), Nadodrzański BG Regional Unit – 42 children were affected out of the total number of 80 requests which resulted in 80 court decisions on detention of 122 persons and Morski BG Regional Unit – 51 children were involved out of the total number of 36 requests which resulted in 36 court decisions on detention of 87 persons).

⁶⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: <http://www.refworld.org/docid/5885c2434.html>

⁶⁵ Council of Europe, Commissioner for Human Rights, *Positions on the Rights of Minor Migrants in an Irregular Situation*, Position Paper (2010)6, Strasbourg, 25 June 2010, available at: <http://goo.gl/WVB9QU>.

⁶⁶ Statistical data provided by the Border Guard Headquarters on 5 September 2016, letter No. FAX-KG-CU-5755/IV/MK/16.

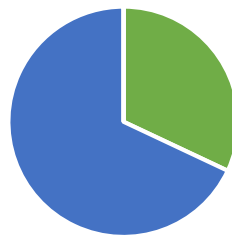
There were no requests to detain children seeking international protection from: Warmińsko-Mazurski BG Regional Unit (only 1 request was submitted which resulted in the decision on detention of a foreigner seeking international protection), Podlaski BG Regional Unit (the total number of 4 requests were submitted which resulted in 4 court decisions on detention of 4 persons), Bieszczadzki BG Regional Unit (the total number of 9 requests were submitted which resulted in 9 court decisions on detention of 9 persons), Karpacki BG Regional Unit (the total number of 5 requests were submitted which resulted in 5 court decisions on detention of 5 persons) and Nadwiślański BG Regional Unit (the total number of 89 requests were submitted which resulted in 72 court decisions on detention of 72 persons).

According to the presented data, in the period of 1 May 2014 – 31 July 2016 all BG Regional Units submitted in total 406 requests on the detention of foreigners seeking international protection. These requests concerned 595 persons in total; out of which 189 were children. It means that **around 32% of all BG requests on the detention of foreigners seeking international protection concerned children.**

Children and adults seeking international protection in BG requests on detention

1 May 2014 – 31 July 2016

Total of 406 requests, including 189 children

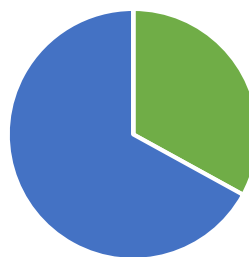


■ Children ■ Adults

Children and adults seeking international protection detained under the decisions of the DCs

1 May 2014 – 31 July 2016

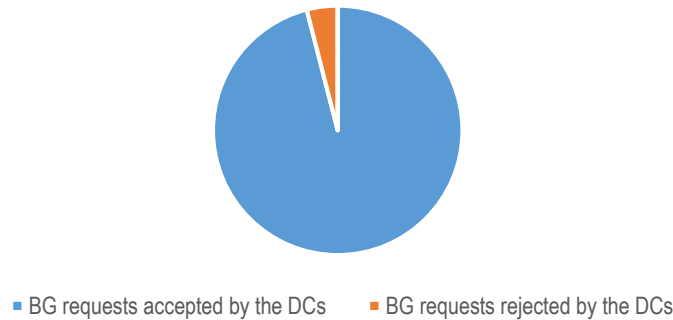
Total of 389 decisions



■ Children ■ Adults

Moreover, the presented data shows that in the researched period **the clear majority of all BG requests to detain foreigners seeking international protection were accepted by the DCs (96%)** while only 4% of them were rejected.

DCs acceptance of BG requests to detain foreigners seeking international protection

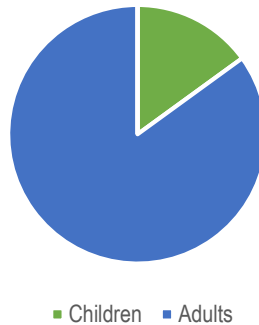


- (2) Detention centres designated for families with children are located in Biała Podlaska, Kętrzyn and Przemysł. They are covered by the Nadbużański BG Regional Unit, the Warmińsko-Mazurski BG Regional Unit and the Bieszczadzki BG Regional Unit which are also the Regional Units responsible for submitting the requests to competent DCs to prolong the period of a foreigner's stay in a detention centre. In the researched period two out of three Regional Units, i.e. Nadbużański and Warmińsko-Mazurski BG Regional Units submitted requests to competent DCs to prolong the detention period of families with children seeking international protection. As a result, the detention period of 21 children was prolonged in the detention centre in Biała Podlaska (from the total number of 13 requests which resulted in 10 court decisions on prolongation of detention of 31 persons), 6 children in the detention centre in Kętrzyn (from the total number of 12 requests which resulted in 10 court decisions on prolongation of detention of 16 persons) and none in Przemysł (from the total number of 108 requests which resulted in 108 court decisions on the prolongation of detention of 108 persons).

Since the remaining detention centres are not designated for children, there were no requests on prolongation of the detention period of a child seeking international protection submitted by the Nadodrzański BG Regional Unit (from the total number of 14 requests which resulted in 14 court decisions on prolongation of detention of 14 persons), the Nadwiślański BG Regional Unit (from the total number of 6 requests which resulted in 6 court decisions on prolongation of detention of 6 persons) and the Podlaski BG Regional Unit (no requests on prolongation).

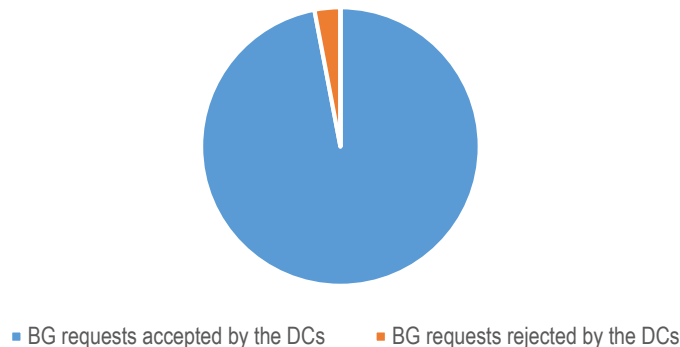
According to the BGHQ's data, in the period of 1 May 2014 – 31 July 2016 all BG Regional Units submitted in total 153 requests on the prolongation of detention of foreigners seeking international protection which included 27 children. It means that **around 15% of all BG requests on the prolongation of the detention period concerned children.**

Children and adults seeking international protection in BG requests on prolongation of the detention period



Moreover, the collected data shows that in the researched period, **the clear majority of all BG requests to prolong the detention period of foreigners seeking international protection were accepted by the DCs (97%)** while only 3% of them were rejected.

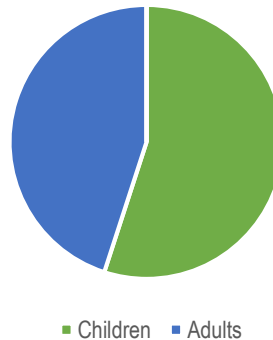
DCs acceptance of BG requests to prolong the detention period of foreigners seeking international protection



- (3) According to the statistics received from the BGHQ, alternatives to detention towards children seeking international protection were applied only by: the Nadbużański BG Regional Unit (278 children included in the total number of 231 BG decisions on alternatives concerning 509 persons), the Morski BG Regional Unit (25 children included in the total number of 23 BG decisions concerning 48 persons) and the Karpacki BG Regional Unit (4 children included in 1 BG decision concerning 5 persons). The analysis of that data leads to the conclusion that **children accounted for around 55% of the total number of foreigners seeking international protection on whom alternatives to detention were applied by the BG** (307 children included in the 255 BG decisions concerning 562 persons)⁶⁷.

⁶⁷ However, it has to be mentioned that during the second phase of the research it turned out that although it was not included in the initially received statistical data, other BG Regional Units have applied alternatives to detention towards children as well (at least the Nadwiślański BG Regional Unit and the Nadodrzański BG Regional Unit).

Children and adults seeking international protection in BG decisions on alternatives to detention



BGHQ was also requested to provide the number of all the requests submitted to the DCs by all BG Stations within each Regional BG Unit, distinguishing the DCs which examined these requests. Despite the fact that statistical data provided by the BGHQ covered only the period of 30 June 2015 – 18 October 2016⁶⁸, the selection of DCs which issued the most considerable number of detention (and prolongation of detention) decisions for the purpose of the review of the case files was made on that basis.⁶⁹ The selected DCs were requested to provide the statistical data on the number of the decisions on the detention on families with children seeking international protection covering the researched period. The collected data presents as follow:

- (1) The DC in Białą Podlaska received 13 BG requests to detain families with children seeking international protection (all of them were accepted)⁷⁰ and 40 requests to prolong the detention period of such families (35 requests were accepted, 3 requests were rejected and 2 cases were discontinued).⁷¹
- (2) The DC in Kętrzyn received 34 BG requests to prolong the detention of families with children seeking international protection (all of them were accepted).⁷²
- (3) The DC in Bielsko-Biała received 17 BG requests to detain families with children seeking international protection (all of them were accepted).⁷³
- (4) The DC in Słubice provided information on the total number of BG requests on the detention of a foreigner not indicating the number of children included in these requests.⁷⁴ The DC in Warsaw granted the research team access to the case files for the purpose of the study, however, it did not provide information on the number of BG requests on the detention of foreigners including children.

⁶⁸ Statistical data provided by the Border Guard Headquarters on 25 October 2016, letter No. FAX-KG-CU-7093-MŁ/MK/16.

⁶⁹ For more information please see the subchapter "Methodology".

⁷⁰ Statistical data provided to the research team by the DC in Białą Podlaska on 11 August 2016, No. Adm.5102 – 19/2016/K/II.

⁷¹ Statistical data provided by the DC in Białą Podlaska on 15 September 2016, No. Adm. 5102 – 22/2016/VII K.

⁷² Statistical data provided by the DC in Kętrzyn on 16 September 2016, No. A-412-13/16.

⁷³ Statistical data provided by the DC in Bielsko-Biała on 20 September 2016, No. A/01761/248/16.

⁷⁴ Statistical data provided by the DC in Słubice on 26 August 2016.

VI. Findings of the study

A. Detention

1. The main focus of the audit of case files

Following the amendment to the Act on Foreigners, which came into force on 1 May 2014, the courts shall consider the best interests of the child when ruling on the detention of families with children. Article 401(4) of the Act on Foreigners introduced this obligation by stating that “[t]he court examining a request for detention of a foreigner with a minor under his custody is guided also by the welfare of that minor”.⁷⁵ As mentioned in the subchapter “Legal framework”, the best interests of the child is a principle which derives directly from Article 3 of the CRC. Under the General Comment of the Committee on the Rights of the Child,⁷⁶ assessing the best interests of a child consists in balancing and evaluating all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. It is carried out by the decision-maker and requires the participation of the child. Hence, in the Polish detention context, the best interests of a child shall be assessed by the court ruling on the detention of a child.

For this reason, the main core of the study was the audit of the case files in five Districts Courts which rule on the detention of families with children seeking international protection. Each case file was audited with the use of the case file audit template prepared beforehand for the purpose of the study. When reviewing the case files, researchers had access to the entire documentation gathered in the case which usually included: the BG’s request to detain a foreigner, protocol of the detention hearing and the District Court’s decision on detention. In those cases where the appeal proceeding was initiated, the case files also contained the letter of appeal as well as the decision of the Regional Court. In some of the case files some other documents were included as well, such as medical or psychological documentation (either submitted by the BG or by the foreigner himself), the foreigner’s application for international protection, the protocol of foreigner’s apprehension by the BG, etc.

After careful analysis of each case file, researchers were able to answer the following questions:

- (1) has the court accepted the BG request to detain the foreigner with his/her children?
- (2) has the court referred to the presence of the child when ruling on the detention?⁷⁷
- (3) has the court assessed the best interests of the child when ruling on the detention, and how?
- (4) has the court considered alternatives to detention?
- (5) has the court ruled on detention for the shortest possible period of time?⁷⁸

⁷⁵ Taking into account the definition of the “best interests of the child” and the understanding of the “welfare of a child” (or, in other words, their well-being) as stipulated in the Polish law, it must be considered that these two terms are equivalent.

⁷⁶ Committee on the Rights of the Child, General Comment No. 14 (2013), par. 47.

⁷⁷ When ruling on the detention of families, DCs issue a separate decision on detention for each adult foreigner and include their children in one of these decisions, usually considering the mother. Therefore, the personal data of children are always mentioned in the operative part of the court decision on detention of one of the parents. However, it was interesting from the point of view of the study whether the courts mention the presence of children also in the remaining part of a decision when justifying the detention order. For this reasons, if a child was only mentioned in the operative part of the judgement and not in the justification part, researchers indicated in the template that the court did not refer to the presence of a child.

⁷⁸ Provisions of Polish law provide a maximum period of detention of a person seeking international protection (depending on the circumstances of applying for international protection, it is either 60 or 90 days). This period can be later prolonged;

2. Statistics deriving from the analysed cases

A total number of 96 case files were audited within the framework of the study. The BG requests either to detain or prolong the detention of foreigner were accepted by the District Courts in 93 cases while rejected in only 3 of them. The courts referred to the presence of a child in 35 cases and his/her best interests were assessed in 14 of them. The alternatives to detention were considered in 37 cases, however, they were not applied in any of the cases reviewed. In all audited cases the maximum admissible period of detention was ruled by the court. This statistical data may be used for the careful assessment of the general practice of Polish courts since the majority of all detention proceedings (around 65%) are run by these courts which were selected to the study.⁷⁹

The presented data shows that in the clear majority of cases District Courts not only neglected to assess the best interests of the child but did not even refer to the child's presence. Although the personal data of a child was always mentioned in the operative part of the decision, in most of the analysed cases the court did not refer to the child's presence in the justification part, when reasoning the necessity to detain a foreigner. Courts usually only assessed the situation of the child's parent, treating the child more like "an attachment" to the parent than a separate party of the court proceeding.

Moreover, since the alternatives to detention were not considered by the courts in most of the cases analysed and were not applied in any of them but instead the maximum period of detention was ruled in every case, it cannot be concluded that the detention of children in Poland is applied as a measure of last resort and for the shortest appropriate period of time as defined in the CRC.

3. District Court's assessment of the best interests of the child

In these rare cases where the welfare of the child was examined by the DC during the detention proceeding, it was usually limited to the statement that "taking into account the welfare of the child as well as the protection of his/her interests, it would be justified to place the child in the detention centre along with his/her legal guardian" or "the analysis of the case files does not indicate on the existence of grounds stipulated in Article 88(3)(2) of the Protection Law which could preclude the application of the detention towards the foreigner or their children". Since the exact same sentences were repeated in many decisions reviewed during the study, it may be assumed that courts automatically added them to the justification of the detention decisions without actual consideration of the individual situation of the given child/children. Moreover, in none of the cases analysed during the study, no additional actions were undertaken by the courts to assess the situation of children, such as ordering their medical or psychological examination or interviewing them. Furthermore, referring to the "analysis of the case files", in the justification of many decisions, it demonstrates that courts assess the situation of a child relying in this regard only on the documentation presented

however, it shall not exceed 6 months in total. Under these provisions, the courts can rule on placing foreigner in a detention centre for the period shorter than provided as a maximum.

⁷⁹ Statistical data provided to the research team by the Border Guard Headquarters on 25 October 2016, letter No. FAX-KG-CU-7093-ML/MK/16.

by the BG without taking their own initiative in this regard despite it is possible according to the Polish Criminal Procedure.⁸⁰

In the clear majority of audited cases (about 85% of them), the District Courts did not examine the best interests of a child, usually not even referring to the child's existence. The justification of the detention decisions as well as the decisions on the prolongation of the detention were often rewritten word for word from the justification of the BG request. If the BG indicated that detention would not cause any harm to the well-being of the child, the court repeated this statement without conducting any further examination of the specific situation of a child. It happened also in cases when the BG did not submit any documentation confirming such statement.

Meanwhile, one of the analysed cases can demonstrate how important a medical and psychological examination of a child is. The case⁸¹ considered a family with two minor children placed in the detention centre in Biała Podlaska for two months (by the DC in Słubice). The family appealed against the DC decision to the Regional Court which upheld the decision of the DC. In the justification of the decision, the second instance court stressed that: "Allegations that the interests of minors or his psychophysical state have not been sufficiently taken into account are just empty words and vague statements" [an error in the number of minors is part of the quote].⁸² Later, due to the ongoing procedure on granting the family international protection, the BG requested the DC in Biała Podlaska to prolong the period of the family's stay in the detention centre for the next three months and the request was accepted by the DC. In the justification of the prolongation decision, the DC did not refer to the presence of children nor assessed their best interests for the purpose of the detention proceeding. Two weeks later the DC was informed by the BG that the family was released from the detention, under the decision of the Chief Commander of the BG Station in Biała Podlaska, due to the poor medical condition of one of the children, a 6-year-old boy. According to the psychiatrist's opinion: "the medical condition of the child required his pharmacological treatment and the change of the environment as well as the care of his parents". The psychiatrist recommended releasing the family from the detention centre and placing them instead in the reception centre for foreigners for the sake of the well-being of the child. Despite the fact that the court had examined the detention request only two weeks earlier when the medical condition of a child was probably already poor, the court did not find any grounds to release the family from the detention centre.

The following quotation from the justification of one of the detention decisions can demonstrate the common position of DCs on the detention of children, according to which a stay in a detention centre can be considered as a good thing for the child:

"Moreover, when staying in the detention centre, the supervision and care will be provided for the foreigner and his child".⁸³

One DC regularly indicated in the justification of its decisions that foreigners supported the BG requests to detain them⁸⁴ which is surprising, especially in the light of the fact that later in some of

⁸⁰ Article 167 of the Act of 6 June 1997 - the Code of Criminal Procedure (Journal of Laws 1997, No. 89, position 555, with further amendments, hereinafter: the Code of Criminal Procedure), available in Polish at: <https://goo.gl/yvqyXs> [accessed on 2/11/2016].

⁸¹ Case files No. 27 (District Court in Biała Podlaska).

⁸² Case files No. 67 (District Court in Słubice).

⁸³ Case files No. 69 (District Court in Słubice).

⁸⁴ Case files No. 84, 87 89, 90, 91, 92, 93 (District Court in Bielsko-Biała).

these cases foreigners initiated the appeal proceedings⁸⁵. In one such case, during the detention hearing, a foreigner reportedly supported the BG request to detain him despite the fact that his child had epilepsy.⁸⁶

It is worth to mention that in none of the analysed cases, neither before the District nor the Regional Court, the child was interviewed during the detention proceeding, contrary to Article 12 of the CRC providing for the right of children to express his/her views in every decision that affects them. Meanwhile, according to the Committee on the Rights of the Child⁸⁷, any decision that does not consider the child's views or does not give his/her views due weight according to their age and maturity does not respect the possibility for the child to influence the determination of his/her best interests. Moreover, the fact that the child is very young or in a vulnerable situation, e.g. is an asylum-seeker, should not deprive the child of the right to express his/her views, nor reduces the weight given to the child's views in determining his/her best interests.

In only three of the analysed cases, the BG request was not accepted by the DC and in only one of them, the reason for deciding not to detain a family seeking international protection was the best interests of the child principle. In the case examined by the District Court in Warsaw⁸⁸, the assessment of the situation of a foreigner's children led the court to the conclusion that detention shall not be applied. The case concerned a single-mother from Syria who came to Poland with four of her children and applied for international protection. The DC rejected the BG request to detain them concluding that:

"The foreigner takes care of four of her minor children. It significantly reduces the probability of her absconding or hiding, which entails not only losing an apartment made available to them under the social assistance but also lack the money to maintain the children. (...) When assessing the Border Guard request, the Court took into consideration the provisions under which the detention of children shall be a measure of last resort applied only when other measures are not sufficient and it should be applied for the shortest period possible."⁸⁹

The above-described case can serve as a good example of how the best interests of a child should be assessed by the courts in order to fully ensure his/her rights.

4. Regional Court's assessment of the best interests of the child

Failure to assess the best interests of a child was an argument against the lawfulness of the detention decision often raised in the appeal letters, usually prepared for the detained foreigners by non-governmental organizations or by their professional attorneys. For this reason, Regional Courts far more often referred to the best interests of the child principle in the justification of their decisions than District Courts. In about half of the audited cases (45 of them), the appeal proceeding was initiated by the foreigner, however, in all cases Regional Courts upheld the decisions of the DCs.

⁸⁵ Case files No. 84 (District Court in Bielsko-Biala).

⁸⁶ Case files No. 89, 91, 93 (District Court in Bielsko-Biala).

⁸⁷ Committee on the Rights of the Child, General Comment No. 14 (2013), par. 53 and 54.

⁸⁸ Case files No. 96 (District Court in Warsaw).

⁸⁹ Case files No. 96 (District Court in Warsaw).

When assessing the welfare of a child, as stipulated in the Article 401(4) of the Act on Foreigners, RCs often stated that it means not separating a child with his/her legal guardians (usually parents). Selected quotes from the justifications of the second instance decisions can illustrate this interpretation of the best interests of a child principle:

*“It has to be considered that separating children from their mother would constitute more serious consequences for them than staying with her in the detention centre.”*⁹⁰

*“Placing children in the detention centre, together with their legal guardian aims at protecting their rights and interests and it reflects the principle of the family unity.”*⁹¹

*“The welfare of the child specified in Article 401(4) of the Act on Foreigners undoubtedly requires that child stays under the care of his father who is being his legal guardian.”*⁹²

*“Placing a child in the detention centre, together with her mother, reflects the best interests of the child.”*⁹³

It seems that in the above-mentioned cases, the RC did not even consider the option of releasing the whole family from the detention centre due to the child's welfare. The presented quotes show instead that courts often examine the best interests of a child solely in the light of the family unity principle, assuming that if the grounds for the detention of parents exist, their children shall be placed in the detention centre together with them and not taking into account the possibility to apply alternatives to detention towards the whole family for the sake of the child's well-being. Meanwhile, according to the jurisprudence of the European Court for Human Rights (ECtHR), the fact that children are accompanied by their parents throughout the whole period of detention should not exempt the authorities from their duty to protect children and take appropriate measures as part of their positive obligations under Article 3 of the CRC (Muskhadzhiev and others, application No. 41442/07⁹⁴, judgement of 19 January 2010, § 58, Popov v. France, applications Nos. 39472/07⁹⁵ and 39474/07, judgement of 19 January 2012, § 91). Moreover, under the UNHCR guidelines on detention⁹⁶, all appropriate alternative care arrangements should be considered in the case of children accompanying their parents. Not only because of the deleterious effects of detention on children's well-being but also because the detention of children with their parents needs to balance, *inter alia*, the right to family and private life of the family as a whole, the appropriateness of the detention facilities for children and the best interests of the child.

In a few other analysed cases, the RC pointed out that placing a family with children in the detention centre was inseparably linked with the previous behaviour of parents, such as their illegal border crossing, and foreigners should be aware of the negative consequences of such behaviour. Although it was not stated directly, it seemed like RCs treated detention as a punishment for foreigner's past behaviour and made parents responsible for the detention of their children. The analysis of such justifications led to the conclusion that the child was deprived of liberty as a result

⁹⁰ Case files No. 23 (Regional Court in Lublin).

⁹¹ Case files No. 25 (Regional Court in Lublin).

⁹² Case files No. 31 (Regional Court in Lublin).

⁹³ Case files No. 33 (Regional Court in Lublin).

⁹⁴ <http://hudoc.echr.coe.int/eng?i=001-96825>

⁹⁵ <http://hudoc.echr.coe.int/eng?i=001-108710>

⁹⁶ *Detention guidelines. Guidelines on the Applicable Criteria and Standards relating to the detention of Asylum-Seekers and Alternatives to Detention*, UNHCR, 2012, available at: <http://goo.gl/UJ8i9Z>

of his/her parents' actions, who should be considered solely responsible for that fact. Such interpretation can be illustrated by these selected quotes:

*"When arriving at the Polish border and then moving illegally to Germany, the foreigner should be aware of the consequences of such behaviour."*⁹⁷

*"Undoubtedly, a stay in the detention centre causes some discomfort, especially for children, and has a negative impact on the quality of life, making the standard way of living impossible, however it is inseparably linked with the illegal stay in the foreign country."*⁹⁸

*"Furthermore, when arriving at the Polish border with a minor, the foreigner should be aware of the consequences of such behaviour."*⁹⁹

*"The District Court would like to point out that the situation in which the foreigner's child found itself is a consequence of foreigner's unlawful behaviour."*¹⁰⁰

Meanwhile, under Article 2 of the CRC, children shall be protected against all forms of punishment on the basis of the status or activities of the child's parents, legal guardians or family members. Therefore, they should not be punished for their parents' decision to move from their country of origin to another, especially when seeking international protection. Even if a parent breaches migration provisions it shall not result in punishing their child.¹⁰¹ In every case involving children, alternatives to detention should be considered in the first place. Meanwhile, some RCs claimed that alternatives to detention cannot be used because the foreigners did not have the financial resources to ensure their children's safety in Poland¹⁰² or they did not indicate their place of residence in Poland¹⁰³. For these reasons, RCs decided not to apply alternatives to detention despite the fact that according to the provisions of the Protection Law, foreigners seeking international protection are provided with accommodation and social assistance by the Office for Foreigners.¹⁰⁴

In some decisions, RCs highlighted, usually among some other arguments raised, that the conditions in the detention centre are appropriate for children, especially due to the medical and psychological care provided to foreigners placed there. Some courts also mentioned the right to education which is partially guaranteed in the detention centres. The following quotations demonstrate this view:

*"Besides, children have full care and the right to education in the detention centre."*¹⁰⁵

*"According to the DC's decision, the detention centre is adapted for the stay of foreigners with families and one of its tasks is to provide medical care."*¹⁰⁶

⁹⁷ Case files No. 25 (Regional Court in Lublin).

⁹⁸ Case files No. 6 (Regional Court in Olsztyn).

⁹⁹ Case files No. 31 (Regional Court in Lublin).

¹⁰⁰ Case files No. 69 (Regional Court in Gorzów Wielkopolski).

¹⁰¹ UN High Commissioner for Refugees (UNHCR), *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: <http://www.refworld.org/docid/5885c2434.html>

¹⁰² Case files No. 74 (Regional Court in Gorzów Wielkopolski).

¹⁰³ Case files No. 88 (Regional Court in Gorzów Wielkopolski).

¹⁰⁴ Article 70(1) in conjunction with Article 71(1) of the Protection Law.

¹⁰⁵ Case files No. 25 (Regional Court in Lublin).

¹⁰⁶ Case files No. 66 (Regional Court in Gorzów Wielkopolski).

“Regarding the health condition of the foreigner’s daughter, invoked in the appeal, it has to be stated that she is provided with the medical care in the detention centre.”¹⁰⁷

“Moreover, the foreigner’s son is fully provided with the right to education in the detention centre although it may not completely fulfil her expectations.”¹⁰⁸

“The detention centre in Biała Podlaska meets all of the sanitary-hygienic requirements and children staying there are provided with all necessary living conditions.”¹⁰⁹

“Moreover, it must be pointed out that the stay in the detention centre does not constitute a threat to the foreigner’s health or life, in contrary, it provides them with medical and psychological care. Thanks to that, the health condition of the foreigner can be regularly monitored. Psychological consultations are also possible, if needed. Therefore, there are no grounds to argue that the foreigner’s stay in the detention centre can cause a more serious threat to their health than if they stayed outside the centre.”¹¹⁰

Meanwhile, the analysis of the available reports on the conditions in the detention centres for foreigners leads to the conclusion that the level of both medical and psychological care for children staying in detention centres may not be satisfactory¹¹¹. Moreover, detained children are deprived of their right to education as the proper obligation of schooling is not guaranteed to them¹¹². Finally, it must be underlined that under the ECtHR’s *Kanagaratnam* judgement, the mere fact of placing a child in a guarded centre (irrespectively of its conditions) may cause anxiety and humiliation as well as compromise the child’s development (*Kanagaratnam v. Belgium*¹¹³, application No. 15297/09, judgement of 13.12.2011, par. 67, 68).

In a few decisions, when justifying the decision on upholding the first instance ruling, the Regional Courts claimed that even if a stay in a detention centre can cause some difficulties to the child, they would also occur if they stayed outside the centre. For example, the courts stated that:

“Moreover, it should be considered that the children of the foreigner are too young to understand the situation they are in. Undoubtedly, even their stay outside the detention centre, in the territory of the foreign state, means some change in the children’s lives which may reflect in their psyche.”¹¹⁴

“It has to be noticed that education can cause some difficulties to the foreigner’s daughter also outside the detention centre due to the language barrier.”¹¹⁵

In another decision issued by the Regional Court in Lublin, the court considered a 2-month period of stay in the detention centre as irrelevant to the child’s development:

¹⁰⁷ Case files No. 33 (Regional Court in Lublin).

¹⁰⁸ Case files No. 35 (Regional Court in Lublin).

¹⁰⁹ Case files No. 69 (Regional Court in Gorzów Wielkopolski).

¹¹⁰ Case files No. 64 (Regional Court in Lublin).

¹¹¹ *Still behind bars. Report on the monitoring of Guarded Centres for Foreigners by the Helsinki Foundation for Human Rights and the Association for Legal Intervention*, Warsaw 2014, available at: <http://goo.gl/G5CYyI>

¹¹² Report of the Ombudsman Office on the education of foreign children in Poland, Warsaw 2013, available in Polish at: <http://goo.gl/lDZ8Kq>

¹¹³ <http://hudoc.echr.coe.int/eng?i=001-107897>

¹¹⁴ Case files No. 23 (Regional Court in Lublin).

¹¹⁵ Case files No. 33 (Regional Court in Lublin).

“A 2-month stay in the detention centre is not a period so long that it could significantly influence the psychophysical development of a child.”¹¹⁶

The most disturbing example, however, of how the best interests of a child principle can be interpreted was found in the case examined by the RC in Lublin where the court claimed that:

“The arguments of the complainant do not allow to change the first instance decision, especially since the environment of the detention centre is already known to children who have been staying there from the beginning of March this year, thus almost 2 and a half months.”¹¹⁷

According to this interpretation, the longer the stay of a child in the detention centre is, the more justified it becomes. Contrary to that interpretation, the environment of the detention centre can never be considered as the best one for a child, irrespectively of the period of time spent there. The CRC states expressly that detention shall always be applied for the shortest possible period.

B. Alternatives to detention

1. The main focus of the audition of case files

Following the amendment to the Act on Foreigners, which came into force on 1 May 2014, the Border Guard may apply alternatives to detention towards apprehended foreigners, including those seeking international protection. These measures include: (a) an obligation to report to the BG authority (b) bail and/or (c) an obligation to reside at an indicated place¹¹⁸. In accordance with the general principle deriving from the CRC, the best interests of the child shall always be a primary factor in the decision-making process on whether to apply alternatives to detention towards family with children instead of requesting the court to place them in the detention facility.

For this reason, within the second phase of the study, researchers audited the case files in three BG Stations where the alternatives to detention were applied towards families with children seeking international protection. Each case file was audited with the use of the case file audit template prepared beforehand. When reviewing the case files, researchers had access to the entire documentation gathered in the case by the BG, which usually included: protocol of the foreigner's apprehension, the foreigner's application for international protection, Dublin documentation (if the foreigner was transferred from another Member State under the Dublin III Regulation), etc.

After careful analysis of each case file, researchers were able to answer the following questions:

- (1) Did the Border Guard refer to the presence of the child?
- (2) Did the Border Guard assess the best interests of the child when deciding to apply alternatives to detention, and how?
- (3) Were the best interests of the child the decisive factor when applying alternatives to detention?
- (4) Which alternative measures were applied by the BG and why?

¹¹⁶ Case files No. 61 (Regional Court in Lublin).

¹¹⁷ Case files No. 56 (Regional Court in Lublin).

¹¹⁸ Article 88(1) of the Protection Law.

2. Statistics deriving from the analysed cases

Within the framework of the study, researchers audited 84 case files where the alternatives to detention were applied by the Border Guard. The BG referred to the presence of a child or children in all analysed cases but their best interests were not assessed in any of them. Although the personal data of a child was always mentioned in the operative part of the decision, in the majority of the analysed cases the Border Guard did not refer to their presence in the justification part, when reasoning the application of the alternatives to detention. The Border Guard assessed only the situation of the parents.

There was no clear indication in any case files that alternatives to detention were applied due to the best interests of the child. However, it may be assumed that at least in some of them it could have been a decisive factor although not indicated directly in the decision.

3. Border Guard decisions on alternatives to detention

The alternative measure which was applied by the Border Guard in all analysed cases (84) was an obligation to reside at a designated place. Foreigners were usually obliged to reside in one of the reception centres for foreigners seeking international protection or any other place indicated to them by the asylum authority (Office for Foreigners). In about half of the cases, this measure was accompanied by the obligation to report at the BG authority (40 cases). The latter measure was applied in every case by the BG Station in Terespol, while in only some cases in the remaining two BG Stations.

As mentioned already, in none of the analysed cases the BG assessed the best interests of the child, therefore it could not have been examined how this principle is interpreted by this authority. However, it cannot be excluded that the presence of the child has been a decisive factor in some of the decisions where the alternative measures had been applied by the BG instead of lodging a request to the court to place the family in the detention centre. Yet, it was not reflected in the justification of any decision.

VII. Conclusions

Not only domestic law but international law requires national authorities making decisions on the detention of children to take into consideration their best interests. Since detention under the Act on Foreigners should always be treated as a measure of last resort, the principle of the best interests of the child shall play a primary role in the assessment made by the courts and the Border Guard on whether to place a family with children seeking international protection in the detention facility or apply alternative measures. Moreover, in accordance with the principle deriving from the CRC, the detention of children shall always be applied for the shortest possible period of time.

The research has shown that these principles are rarely implemented by national authorities in practice. In the vast majority of analysed cases, District Courts did not examine the best interests

of the child nor took it into consideration when ruling on detention. Children were usually mentioned only in the operative part of the court decision while in the justification only the situation of their parents was assessed. In only one case the court did not accept the BG request to detain family with children referring to the best interests of the child.

The analysis of the 96 court case files has shown that the best interests of the child were assessed more often in the justifications of the Regional Court decisions since second instance courts related to the arguments raised in the appeals. However, none of the first instance decisions was annulled by the court of the higher instance. The most typical reason justifying the necessity of the detention of a child or children raised by the courts was not to separate children from their legal guardians. Moreover, some courts treated detention as a form of a punishment for the previous behaviour of a foreigner who had illegally crossed the border. According to some courts, the conditions in the detention facility were suitable for children and capable of fulfilling their special needs. Finally, some courts did not consider a 2-month stay in the detention centre as a considerable period of time that may influence the child's welfare or found that the child was too young to properly understand the situation of detention.

The assessment of the situation of a child has always been conducted by the courts based on the documents presented by the Border Guard. In none of the analysed cases did the court make use of their competence to order a medical or psychological examination of the child nor interviewed them in the course of the proceeding. The consequences of such neglect were especially visible in the cases where shortly after the court ruled on the detention of family with a child or children, they were released from the detention facility upon the order of the BG due to the poor health condition of a child/children. It can be assumed that the condition of a child had been deteriorating for some time and the court had the possibility to examine the child before ruling on detention.

In none of the analysed cases did the court decide on applying alternative measures instead of placing the family in the detention facility, despite the provision of the Act on Foreigners according to which detention should always be a measure of last resort.

Alternatives to detention are applied in some cases by the Border Guard. However, although the presence of the child or children was always mentioned in the BG decision, their best interests were never an explicit reason of applying alternative measures instead of requesting the court to rule on detention. The best interests of the child were not assessed in any decision, therefore it was impossible to examine how respective authority interprets this principle in practice.

The research has clearly shown that national authorities usually fail to treat a child as an individual party of the proceeding and thoroughly examine his/her situation before making a decision which naturally affects him/her. Instead, children are more likely to be treated as "an attachment" to the decision made in the case of their parents. Very rarely the best interests of the child are being assessed and have an actual impact on the decision made by authorities. Moreover, as the study has shown, detention is always applied for the maximum period contrary to the principle deriving from the CRC.

It has to be underlined that decisions affecting children, especially those depriving them liberty, should be made by the authorities very carefully. Therefore, it is extremely important that both the courts and the Border Guard not only assess the best interests of the children in the decision-making process but also reflect it properly in the content of the decision. Only then it would be possible to verify whether the welfare of the child was taken into the primary consideration correctly and their individual situation examined thoroughly and with care.