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BELGISCH COMITE
VOOR HULP AAN VLUCHTELINGEN
B.C.H.V. vzw

Polish asylum procedure and refugee status determination

Report following the mission to Poland from 12 to 15 September 2010

Brussels
Revised December 2011

Introduction

The information gathered and analysed in this report, is based on a mission to Poland in September 2010 supported by Mr Bart Staes, Member of the European Parliament for Greens/ALE. The aim of the mission was to make an assessment of several aspects of the situation of asylum seekers in Poland with more specific attention for the asylum seekers who have been sent back to Poland based on the Dublin Regulation. On average, in 2010, Belgium received 58 asylum seekers every month from Poland, mostly Chechen asylum seekers¹. This makes Poland in 2010 the first European country, Belgium is receiving asylum seekers from². Because of the contradicting information on the situation of asylum seekers in Poland received on the one hand by the Polish and Belgian authorities, and on the other hand by the asylum seekers themselves and Polish and other NGOs, it was deemed appropriate to conduct this mission. During this mission, we had the opportunity to have an extensive meeting with the first level Polish asylum administration UdSC³. During this meeting, presided by the General Director of the Office for Foreigners⁴, we had the chance to listen to presentations and exchange ideas with the doctor coordinating medical assistance for asylum seekers, the Head of the Country of Origin Information Unit, the Head of the Polish Dublin Division, a staff member of the Social Benefits Unit and a staff member of the Refugee Status Determination Unit. We visited several reception centres⁵ and a closed reception centre/prison for asylum seekers close to the Belarus border⁶. In the open reception centres, we visited the premises and talked to the directors, the social assistant (if such a role existed), the psychologist (if there was a psychologist) and the asylum seekers themselves. Some of these asylum seekers had been sent back to Poland by Belgium under the Dublin Regulation. Contacts with Polish NGOs specialised in asylum were foreseen, the participating members of the mission met members of the staff of the Helsinki Foundation for Human Rights, the Stowarzyszenie Interwencji Prawnej (Association for Legal Intervention) and the Fundacja Międzynarodowa Inicjatywa Humanitarna (International Humanitarian Initiative), specialised in psychological problems of asylum seekers. We met with the National Office of UNHCR in Warsaw and with the consul and chief commissioner of the Belgian embassy.

This report consists of two main chapters. The first gives a brief description of the Polish asylum system and gives legal officers working in the field of asylum and asylum applicants who will be sent back to Poland under the Dublin Regulation an idea of the current system. The second part gives an assessment of the refugee status determination procedure in the light of UNHCR guidelines, UNHCR Handbook, ECtHR jurisprudence and the European Acquis Communautaire.

¹ These figures are based on the Eurodac hit figures communicated by the director of asylum of the Immigration Office in Belgium on a monthly basis to the Belgian Refugee Council's contact meeting.

² Belgium had 701 Eurodac hits with Poland in 2010.

³ Urząd do Spraw Cudzoziemców, usually translated into English as Office for Foreigners. The Office for Foreigners constitutes a part of the Ministry of the Interior and Administration.

⁴ Mister Arkadiusz Szymanski.

⁵ The reception centres of Moszna, Bielany and Linin. A list with all reception centers, including their contact details, is available at the UdSC website: http://www.udsc.gov.pl/Listy_osrodkow_dla_uchodzcow_464.html

⁶ The closed centre and prison (are situated in the same building) of Biała Podlaska.

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Part I: Brief overview of the asylum procedure in Poland⁷

By way of introduction to the refugee status determination (*infra* RSD) procedure in Poland, it seems appropriate to give some general information on the asylum procedure in Poland.

A. Legislation and authorities

The basic legislation on international protection consists of:

- the Polish constitution of 2 April 1997
- the Aliens Act of 13 June 2003 on granting protection to Aliens on the territory of the Republic of Poland⁸ (modified by the Amendment of 29 May 2008)
- the Aliens Act of 13 June 2003⁹ (concerning the entry into, stay in and departure from the Polish territory by foreigners)
- the Act of 14 July 2006 on the entry into and residence in the territory of the Republic of Poland of the citizens of the EU Member States and their family members

The responsible authorities directly involved in the Polish asylum procedure are:

- Border Guards;
- Head of the Office for Foreigners (Urząd do Spraw Cudzoziemców);
- Council for Refugees (Rada do Spraw Uchodźców);
- Regional Administrative Court in Warsaw (Wojewódzki Sąd Administracyjny w Warszawie);
- Supreme Administrative Court.

For information on appeals and legal assistance, see below.

B. Different forms of protection

According to the information received from the UdSC and the Helsinki Foundation for Human Rights, there are three main forms of protection to be granted to a foreigner asking for asylum in Poland¹⁰: the **refugee status** (status uchodźcy), **subsidiary protection** (ochrona uzupełniająca) and the **tolerated stay permit** (zgoda na pobyt tolerowany). The first two

⁷ The information given in this chapter is based on the information received during our mission in September 2010, more precisely:

- UdSC, "Asylum seekers in Poland 2005-2010, statistical data", Office for Foreigners, 21.
- Helsinki Foundation for Human Rights, "Brochure on national asylum procedure", 2010, 20. The brochure was made in the context of the transnational Dublin project: "Transnational network for counselling and assisting asylum seekers under a Dublin procedure" funded by the ERF and coordinated by Forum réfugiés (France).

⁸ Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej

⁹ Ustawa o cudzoziemcach

¹⁰ There are two more forms of protection provided under Polish law: *asylum* (which is different than refugee protection provided in the 1951 Geneva Convention. According to art. 56.1 of the Polish constitution iuncto article 90 Aliens Act of June 2003: an alien may be granted *asylum* in Poland on his/her request, if it is necessary to provide him/her protection and if it is in great interest of the Republic of Poland) and *temporary protection*.

protection forms are based on the Geneva Convention of 1951¹¹ and the Qualification Directive¹², the last form is a non-EU based national protection status. This last form of protection is granted if the expulsion of the foreigner:

- 1) would constitute a threat to his/her life, freedom and personal safety, when in the country of origin he/she could be subjected to torture, inhuman or degrading treatment or punishment (art. 3 ECHR)¹³; could lead to forced labour; would deprive the right to a fair trial; or could lead to punishment without any legal grounds, within the meaning of the European Convention for the Protection on Human Rights and Fundamental Freedoms;
- 2) would violate the right to family life within the meaning of the European Convention on Human Rights and Fundamental Freedoms (art. 8 ECHR) or would violate the child's right determined in the UN Convention on the Rights of the Child to the extent of making a threat to the psychophysical development of such child;
- 3) is unenforceable due to reasons beyond the control of the authority executing the decision on expulsion and beyond the control of this foreigner (e.g. the foreigner is considered stateless or does not have any documents and his/her identity cannot be confirmed).

C. Submission of the asylum request

In Poland, an asylum request should be submitted through the border guard officer to the Head of the Office for Foreigners. Any asylum seeker entering Poland illegally should apply for asylum as soon as possible at the border or at the airport. An asylum application made on the territory has to be submitted through the border guard division in Warsaw. In case of detention, the request has to be submitted through the border guard division covering the territory where the detention centre is located. The border guard officer takes a photograph and fingerprints of the asylum applicant(s) (all persons older than 14 years old). This information is entered into the Eurodac database¹⁴. The border guard should inform the asylum seekers of their rights and obligations in the asylum procedure¹⁵.

The asylum seeker is supposed to express clearly the wish to ask for asylum or the need for protection ("status uchodźcy" means "refugee status", commonly in Polish the word "azyl" is used for "asylum"¹⁶). In principal, the border guard cannot refuse to register the asylum request. The border guard has to pass the asylum application to the Head of the Office for

¹¹ Convention relating to the status of refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967.

¹² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. (*infra* Qualification Directive)

¹³ There seems to be an overlap of one of the three forms of serious harm as defined in article 15 b of the Qualification Directive concerning the qualification for subsidiary protection and this form of protection based on art. 3 of the ECHR, although art. 3 ECHR offers indeed a wider protection than art. 15b QD.

¹⁴

http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133081_en.htm

¹⁵ According to Helsinki Foundation for Human Rights and the Association for Legal Intervention (SIP) written information is provided by the Border Guards (extracts of relevant legislation), available in Polish, Russian, English, French, Hindi, Urdu, Punjabi, Georgian, Vietnamese... The interpreter provides the information from the leaflet orally if there is no written information available in the language spoken by the foreigner.

¹⁶ According to Halina Niec Legal Aid Centre, the mere use of the word "asylum" is not considered by the Border Guards at Terespol as proof enough of expressing intention of seeking international protection. At the border with Ukraine in Medyka no preliminary interviews were taken and all persons expressing the will of seeking asylum (including those who merely used the word "asylum") were accepted.

Foreigners within 48 hours from the moment of submitting the application by the asylum seeker¹⁷. Sometimes problems are observed for Chechens coming into Poland via Belarus. According to the information in the European Council for Refugees and Exiles (ECRE) guidelines “*in some situations Poland does not admit Chechens to its territory and they are returned back to Belarus. Some of these “returnees” make several attempts to enter Poland and seek asylum there.*”¹⁸ ECRE got this information from the Belarusian Movement of Medical Workers. When the request is registered, the border guard conducts a short interview concerning the personal data and basic information on the reasons for applying for asylum. During this interview the asylum seeker is entitled to use his own language; an interpreter should be present. The importance of this short interview should not be underestimated, as the statements will be compared with the statements given during the interview at the Office for Foreigners at a later stage.

When a person decides to apply for asylum, his visa for entering Poland is deemed invalid and his passport is taken by the border guard and sent to the Head of the Office for Foreigners. The asylum seeker is issued a temporary identity document, which is valid for one month, and afterwards can be extended by the Head of the Office for Foreigners until the end of the asylum procedure. This explains why many Chechen asylum seekers who leave Poland during their asylum procedure, arrive in other European countries without their passports.

The asylum seeker is now instructed to go to the centres in Dębak or Biała Podlaska, the two central reception centres, where they receive first shelter. Later they are dispatched to regular reception centres. The transfer to the two centres is not organised by the authorities and there is no detailed information available about public transport. The majority of asylum seekers enter Poland through the border town Teraspol (Poland-Belarus), but there are also asylum applications at the borders with Ukraine and Slovakia. In spite of the fact, that Teraspol has a railway station, asylum seekers are driven into the hands of taxi drivers, who sometimes ask several hundreds of dollars for a drive.

In the case that an asylum seeker arrived in Poland illegally, he/she may be transferred to a closed detention facility, which is managed by the Border Guard. This is also common practice in the case of returning asylum seekers in the framework of the Dublin Regulation.¹⁹

D. Dublin procedure

In the refugee status procedure, the Head of the Office for Foreigners will first check if Poland is the responsible state for examining the asylum application, by applying the Dublin Regulation²⁰.

¹⁷ By law, each application has to be transferred to the Head of the Office for Foreigners. The only exception is when the application does not indicate the name and surname of the applicant or the country of origin and those data could not have been obtained from the applicant or through personal search (e.g. of the documents possessed by the applicant).

¹⁸ ECRE, Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum seekers and refugees in Europe, revised March 2011, 27.

¹⁹ Detention for asylum seekers is in Poland possible in the case that 1) the authorities are not certain about the identity of the concerned person; 2) the border was crossed/or attempted to cross illegally; 3) a threat exists to other peoples life, safety, health or property; 4) the safety of the state is in threat; 5) abuse of the asylum proceeding is obvious (information received during our visit to the detention facilities in Biała Podlaska, 13/09/10). More information on detention, see *infra*.

Several situations are to be distinguished.

a) Poland is the responsible State for examining the application and the asylum seeker is transferred to Poland.

This is the case in the following (non-exhaustive list of) situations:

- the asylum seeker applied for asylum in Poland and then went to another EU country
- the asylum seeker was in the possession of a valid residence permit in Poland or valid Polish visa and applied for asylum in another country²¹
- the asylum seeker entered Poland illegally by land, sea or air, then went to another EU-country and applied for asylum there (exception: the responsibility of Poland expires after 12 months from irregular border crossing²²)
- the asylum seeker came to Poland, did not need a visa to enter Poland, but left Poland and applied for asylum in a country where a visa was required

Although asylum seekers, after applying for asylum, are expected to stay on Polish territory until the end of the procedure, many leave Poland before the procedure finishes. Asylum seekers give Belgian NGOs a variety of reasons why they left Poland, including: family reunification, problems with the provision of social benefits, and a lack of protection by the Polish authorities (they are convinced to have valid refugee claims but have not been formally recognized by the Polish authorities) or invoke threats of “Kadyrovtsy” (people working for/supporting Kadyrov) and no sufficient response of the Polish authorities. There is a high possibility that the authorities will make a take back or take charge request to the Polish Dublin division for these groups of asylum seekers. According to the Polish legislation, an asylum seeker crossing the border without a passport (which is often the case for people who left Poland during their asylum procedure because they were asked to surrender their passport at the moment of applying for asylum) or crossing the border with a passport but having a visa only valid in Poland, is considered to have crossed the border illegally²³. This is a sufficient reason to be detained by the border guards in case of return and to be placed in a detention centre for 30 to 60 days.

So an asylum seeker who is transferred back to Poland, will be handed over to the border guard, who can apply to the court within 48 hours to place the asylum seeker in a detention centre, because he or she crossed the border illegally. According to NGOs, the decisions of the court are shortly reasoned in a standardized way. The border guard is not obliged to apply to the court to detain asylum seekers, who have crossed the border illegally, which gives the impression of an arbitrary decision. It is confirmed by Polish NGOs that sometimes women with minor children are not detained, but are directed to the Office for Foreigners, where they can apply for a re-opening of their case and for social assistance. The re-opening of the case is not automatic, the asylum seeker needs to apply for it. Persons in detention are not entitled to social assistance.

²⁰ Council Regulation (EC) n° 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

²¹ art. 9, 1 and 2 Dublin Regulation

²² art. 10 Dublin Regulation

²³ “Crossing the border” should be understood as leaving the Polish territory or entering Poland.

In case the asylum seeker did not apply for asylum before being sent (back) to Poland, it is recommended that he/she does so as soon as possible (e.g. at the airport through the border guard officer). The application for asylum passes through the border guard officer to the Head of the Office for Foreigners.

b) Responsibility of another EU Member State (or Iceland, Norway and Switzerland)?

When the asylum seeker is present in Poland, the Dublin division of the Office for Foreigners will check if another EU Member State (or Iceland, Norway and Switzerland) is responsible for the asylum procedure. This is the case when:

- a Eurodac hit²⁴ indicates that the fingerprints of the asylum seeker were taken first in another State, which is part of the Dublin system
- the asylum seeker has a valid visa or a valid residence permit for any of the countries participating in the Dublin system
- the asylum seeker declares that he/she crossed any of these countries when travelling to Poland
- other elements, like public transport tickets, receipts etc. are an indication that the asylum seeker was in another participating country

In these situations, Poland will make a request to take charge of or take back the foreigner to the country they consider competent for examining the asylum request. The Dublin procedure can take several weeks or months because it takes time to get an official answer from the state the request was made to. If Poland turns out to be the responsible country, the asylum procedure will now focus on the reasons why the applicant left the country of origin or habitual residence. If another country is responsible for the examination of the asylum application, Poland will transfer the person to that country based on the transfer decision. An appeal to suspend can be lodged within 14 days with the Polish Council for Refugees²⁵.

In case Poland is responsible for the examination of the application, but the asylum seeker wants to join a family member²⁶ in another participating country and is able to provide proof of the family link, the Head of the Office for Foreigners needs to be informed by the applicant of this wish and will request the country where the family member or dependant relative is present, to take charge of the case based on the so called humanitarian clause (art. 15 Dublin Regulation). As for now this humanitarian clause does not contain any obligation for the addressed State.

In a report²⁷ of Halina Niec, some major problems with Dublin transfers to and from Poland are indicated. There are the problems with providing adequate rooms for families with little children, lack of legal regulations allowing for providing returnees with meals during transfer

²⁴ A "Eurodac hit" is a match between fingerprints taken in different "Dublin" countries. It gives an indication that the applicant might have tried to apply for asylum before in another country.

²⁵ Rada do Spraw Uchodźców

²⁶ According article 2 (i) of the Dublin Regulation are considered as 'family members' insofar as the family already existed in the country of origin: the spouse of the asylum seeker or his or her unmarried partner in a stable relationship (...) (ii) minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependant (...); (iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried.

²⁷ http://www.pomocprawna.org/images/stories/pomoc_uchodcom/dublinRaport2010_eng.pdf

procedure, the need to provide more interpreters in order to streamline the procedure, and foreigners providing inconsistent information on their state of health. Another difficulty, mentioned in the report, is connected with late hour of transfers. If the transfer takes place after 2 p.m., the whole procedure finishes late in the evening. If adults are accompanied by children they often get tired and hungry. If foreigners are referred to the reception center in Debak, they may use special rooms where they can be accommodated 24/7 and receive food packages even late at night. In case the Border Guard files the court to detain the foreigner and the court sitting cannot take place on the day of arrival, families are separated: parents are placed in detention facilities, whereas children are referred to an orphanage or police child chamber.

E. Practical proceedings of the asylum request

Once the Dublin procedure is finished, the application of asylum will be examined by the above-mentioned administrative bodies and courts on the merits of the case. The three forms of protection will be examined in one procedure (refugee status, subsidiary protection status and tolerated stay permit).

A crucial phase in the procedure is the hearing, during which the applicant is questioned about his/her situation in the country of origin and travel route. The summons is sent by a letter by post or by fax. Therefore, it is important to keep the asylum services informed about the correct contact information. During the interview, the asylum seeker is entitled to be assisted by an interpreter, and if necessary, due to communication problems (e.g. because of different dialects), NGOs advise to mention this straight away to the officer conducting the interview. In practice, however, most protection officers interview Chechen asylum seekers directly in Russian without a professional interpreter, a language which is often not spoken without difficulties, especially in the case of younger generation Chechens. The assistance of a lawyer during the interview is also recommended by the NGOs (but see *infra* legal assistance). The credibility of the statements will be assessed by the authorities, so detailed and non-conflicting statements are of crucial importance. The officer, interpreters, lawyers and social workers are bound by a duty of professional confidentiality. After the interview, the applicant is entitled to receive a copy of the hearing (in Polish). He/she has to sign the copy, which implicates he/she agrees on the contents. The contents of the typed version of the hearing proceedings are considered to be translated orally to the applicant in an understandable language before signature.

Documents and other evidence may be presented at any stage of the proceedings (before, during or after the interview) before the authority takes the decision. The authorities require original documents, but the asylum seekers can keep the originals and submit copies of the originals presented. There is no obligation to provide for a translation.

According to Polish legislation, first instance proceedings should not last more than 6 months. In practice, the regular proceedings usually take longer. If the instances did not take a decision in this six months period of time, the applicant is entitled to work legally in Poland for a defined period of time²⁸.

²⁸ This is in line with art. 11 Reception Directive (Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers): Art. 11: “If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the

F. Different results of the procedure and their respective forms of residence permits

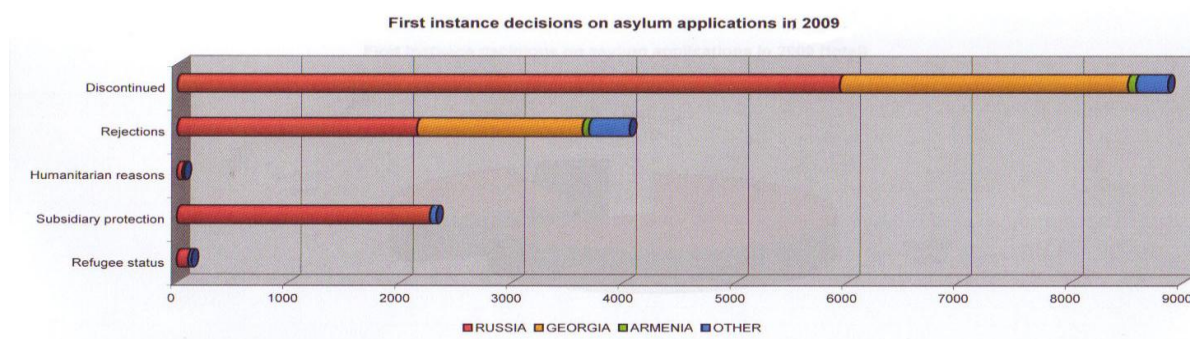
The Polish asylum procedure has the following possible results:

- a) in most of the cases, the application is rejected or discontinued
- b) the applicant is granted refugee status
- c) the applicant is granted subsidiary protection
- d) the applicant is granted a tolerated stay permit

a) Application is rejected or discontinued

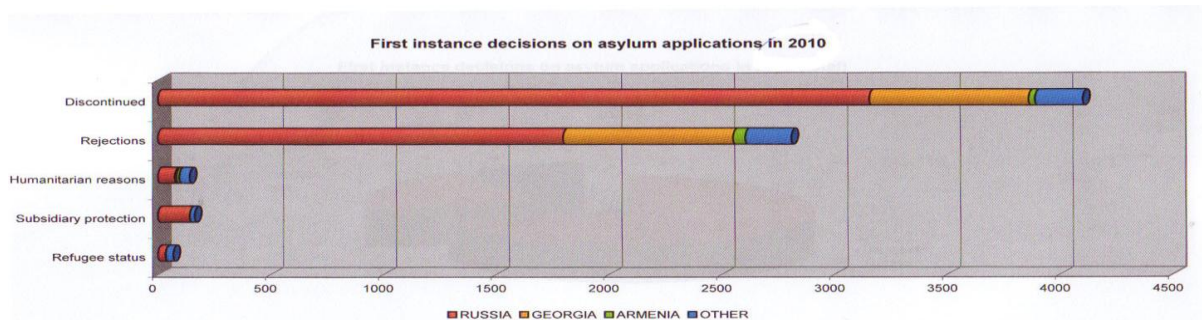
Based on the figures received from the UdSC (Office for Foreigners), we can see that (with exception of the discontinued asylum applications) most asylum applications are rejected²⁹. According to these statistics Poland receives most asylum requests from people with Russian nationality (most of them from Chechen origin). It is remarkable that in comparison with 2009, in which 2261 persons with Russian nationality received subsidiary protection, in the first eight months of 2010 only 141 persons with Russian nationality received subsidiary protection. Refugee status was accorded to 102 Russians in 2009 and to 33 Russians during the first 8 months of 2010. Tolerated stay permits were granted to 46 persons in 2009 and to 74 persons during the first eight months of 2010.

Table 1: First instance decisions on asylum applications in 2009



applicant, Members States shall decide the conditions for granting access to the labour market for the applicant.”

²⁹ In 2010, from 1 January 2010 till 1 September 2010 (8 months), there were 4.067 asylum applicants. 67 persons were granted refugee status, 162 persons were granted subsidiary protection, 140 persons got a tolerated stay permit, 2.809 applications were rejected and **4.100 asylum applications were discontinued**. In comparison with the year 2009 (12 months), 10.587 persons introduced an asylum request, 131 persons got a refugee status, 2.316 persons got subsidiary protection (2.261 of them with Russian nationality), 65 tolerated stay permits and 4.043 rejected applicants. UdSC (Office for Foreigners), Asylum seekers in Poland, 2005-2010, statistical data, 1 September 2010. (statistics received during our_mission)



source: UdSC (Office for Foreigners), asylum seekers in Poland 2005-2010, statistical data, 1 September 2010.

Appeal and legal assistance

Rejected asylum seekers or asylum seekers who do not agree with a subsidiary protection or tolerated stay permit (decision taken by the *Urząd do Spraw Cudzoziemców* (**Office for Foreigners**³⁰)) can appeal within fourteen days from receiving the decision to the **Council for Refugees** (*Rada do Spraw Uchodźców*) through the Head of the Office for Foreigners. Asylum seekers have the right to legal assistance, but during the mission, we have come to the conclusion that only in exceptional cases asylum seekers were assisted by a lawyer during their procedure. This problem is confirmed in the UNHCR AGDM report of 2009 where it is stated that: *“In Poland, legal assistance in asylum cases is provided by specialized NGOs³¹. Those organizations are based in urban centres whereas reception centres are mostly located in rural areas. This seriously limits the possibilities of asylum-seekers to access legal assistance. Financial constraints on the side of NGOs reduce the number of visits to the centres they can fund. This is especially true for remote centres such as Moszna, Bezwola and Linin³².”* There is no state-sponsored system of legal aid for asylum seekers in Poland in the proceedings for the Head of the Office for Foreigners and the Refugee Board.

Concerning the legal assistance, we would like to point the problem of the absence of, or low staffing levels of, social assistants. We observed that in centres with hundreds of asylum seekers, there was only one social assistant, who was supposed to do all of the administrative and social work. Initial guidance on finding legal assistance was even not considered to be their task. Often the director of the centre had to fulfil the role of social assistant. Our findings during the mission confirmed what is quoted in the AGDM-report mentioned above: *“social workers in the centres are too overworked to respond to all individual questions. The lack of knowledge of the Polish language on the other hand prevents persons of concern from seeking assistance in public institutions such as local authorities or the police. In many focus groups the participants said they needed to know which legal status entitles them to what kind of assistance. “I need to fill in all these forms in Polish and I have no one to ask for assistance”, an elderly man from Chechnya complained. The interviewees claim that they receive little*

³⁰ According to D. DOPIERAŁA, “Refugee Status Determination – the Role of the Court”, *UNHCR*, 2009, 84-85.

³¹ Legal assistance is **only** provided by NGOs and other comparable institutions (e.g. so-called legal clinics) and funded either by the institution itself or through various projects (e.g. European Refugee Fund).

³² « Being a Refugee, How Refugees and Asylum Seekers Experience Life in Central Europe”, AGDM-report, UNHCR, Budapest, 2010, 43.

reliable legal information. They often distrust what they are told by the staff and feel that they are not updated on recent changes in the law³³.”

When an asylum seeker has introduced an appeal to the Council for Refugees, the Council can:

- grant refugee status, subsidiary protection or a tolerated stay permit;
- cancel the decision of the Head of the Office for Foreigners, and order the Head of the Office to reconsider the case
- reject the appeal and confirm the decision as it was

This decision is the end of the administrative proceedings, which means that the decision given to the applicant contains the decision on expulsion (unless such a deportation decision was already given before the applicant introduced his/her asylum request). The person has 30 days to leave the country. If a complaint will be lodged against this decision, it is necessary to apply to the court to withhold the deportation until the end of the procedure.

One can lodge a complaint within 30 days to the **Regional Administrative Court in Warsaw³⁴** (Wojewódzki Sąd Administracyjny w Warszawie) against the decision of the Council for Refugees. Against the ruling of the court a cassation appeal is possible to the **Supreme Administrative Court**, this complaint has to be prepared by a professional lawyer. These Courts are only empowered to review the legality of the administrative acts from the point of view of the conformity with law.

Forced and voluntarily return

In case of a final negative decision, the applicants can be ordered to leave the country within 30 days. Forced returns for people with Russian nationality are increasing, as the number of negative decisions is increasing. In general the border guards deport people to Belarus^{35,36}. In 2010, 246 Russian citizens were deported from Belarus³⁷.

The possibility of voluntarily return with or without the help of the International Organization for Migration to the country of origin is foreseen and has been used often in Poland in recent years. Despite the right that refugees and people with subsidiary protection have to travel,³⁸ (see *infra*) recognised Chechens, or Chechens with subsidiary protection, mostly have troubles to travel to Belarus. Based on the information of the Polish Helsinki Foundation for Human Rights in cases like this, people with refugee status are generally returned to Poland but those with subsidiary protection may even be returned to the Russian Federation, if Russia is looking for them. In 2009, there was even a case of a recognised refugee (Chechen) who

³³ « Being a Refugee, How Refugees and Asylum Seekers Experience Life in Central Europe, AGDM-report, UNHCR, Budapest, 2010, 43.

³⁴ The Regional Administrative Court in Warsaw is the only court among 16 regional administrative courts in Poland, which adjudicates cases pertaining to aliens. D. DOPIERAŁA, Refugee Status Determination – the Role of the Court, UNHCR, 2009, 84-85.

³⁵ ECRE, Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum seekers and refugees in Europe, revised March 2011, 25.

³⁶ Failed asylum seekers with Russian nationality are being sent to Belarus if they came via Belarus to Poland.

³⁷ ECRE, Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum seekers and refugees in Europe, revised March 2011, 27. The statistics are provided by the Department of Citizenship and Migration of the Ministry of Internal Affairs of the Republic of Belarus.

³⁸ With the exception of travelling to their country of origin if they do not want a withdrawal of their protection status.

travelled to Belarus several times and lost her refugee status³⁹. According to the Helsinki Foundation this attitude can be explained by the assumption of the Polish authorities that Chechens travelling to Belarus are suspected to return voluntarily to Chechnya.

Several Chechen asylum seekers testified that Ramzan Kadyrov and his surroundings are putting tremendous pressure on the Chechen population all over Europe to come back to Chechnya and are going to great lengths to present the situation as safe, often using returned refugees in the media to testify how good it is to be back home. It is therefore unclear to what extent Chechen refugees or Chechens with other forms of protection have been able to make a correctly informed decision to go back. ECRE refers to the reports in 2009 of Ramzan Kadyrov opening “Chechen Cultural Centres” in countries with high numbers of Chechen refugees and refers to the information from Memorial Grozny who explains the situation of three families who returned to Chechnya, believing the Russian TV reports of support packages for returnees including renovation of accommodation, financial assistance and help with finding employment. All three families experienced problems upon return, had no access to housing or employment and in one case the family received threats. They all were frightened and worried about their safety in Chechnya⁴⁰.

b) Refugee status

Refugee status is granted for an indefinite time (except in the case of withdrawal). But the “identity” card (called “karta pobytu⁴¹”, literally translated “stay card”) is only valid for three years⁴². The refugee travel document is only valid for two years. Both documents are issued by the Head of the Office for Foreigners. After five years of uninterrupted stay since the introduction of the asylum request, the refugee can apply for a permit to settle. After five more years of stay on the basis of the permit to settle, the person can apply for Polish citizenship⁴³.

Table 2: Persons granted refugee status (*status uchodźcy*) at first instance 2005- September 2010

Citizenship	2005	2006	2007	2008	2009	2010
Russia	285	384	104	129	102	42
Belarus	9	18	3	14	20	17
Iraq	-	1	5	28	1	5
Somalia	5	2	1	6	2	N.A.
Iran	3	0	0	0	4	N.A.
Afghanistan	N.A.	N.A.	N.A.	N.A.	N.A.	4
Other	10	18	3	9	2	12
Total	312	423	116	186	131	82

Source: Office for Foreigners (UdSC)

³⁹ ECRE, Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum seekers and refugees in Europe, revised March 2011, 34. The Helsinki Foundation for Human Rights informed the Belgian Refugee Council that in the meantime, the Administrative Court cancelled the decision on withdrawing the refugee status.

⁴⁰ ECRE, Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum seekers and refugees in Europe, revised March 2011, 34.

⁴¹ *Karta pobytu* is a document issued to all foreigners who have any form of legal stay in Poland. The card indicates on which basis it was granted (e.g. permit for tolerated stay, right to settle etc). It only certifies the legal stay.

⁴² According to the information obtained by the Helsinki Foundation for Human Rights and SIP, every three years a new “Karta” is delivered in case of “status uchodźcy”, except for the situation of the application of art. 1C ’51 Convention.

⁴³ The rules differ if the person is married to a Polish citizen.

c) Subsidiary protection

By the Law of 18 March 2008⁴⁴, Poland fully implemented the Qualification Directive and introduced the subsidiary protection (SP), the so called “ochrona uzupelniająca”. The subsidiary protection status is also granted for an indefinite time. The “identity” document is also called “karta pobytu” but is only valid for two years⁴⁵ and the Polish travel document (issued by the authority called “voivode”, pronounced as “wojewoda”) for a foreigner with SP is only valid for one year. According to SIP a specific problem arises for people granted SP to obtain this travel document. The Polish travel document was never issued automatically, one had to apply for it and could obtain it if he had a good reason (eg if the passport of the country of origin was lost or expired). As people granted SP are not considered as refugees, the authorities direct them to the embassies of their countries of origin to get a new travel document if the old one is expired or lost. If the person is afraid to address himself to the embassy (which is often the case) he/she loses *de facto* the possibility to travel.

As for the refugee status, an uninterrupted stay of five year is requested before the foreigner has the possibility to apply for a permit to settle and five more years based on the permit of settle are requested before a person can apply for citizenship.

In both situations (refugee status or SP), foreigners have the right to financial assistance to support their integration (the so-called Individual Integration Programme⁴⁶) **for maximum one year**, and they have the right to work and study on the same terms as Polish citizens. After this period it is expected that the concerning person has settled his/her new life, learned the language and found a job.

Table 3: Persons granted subsidiary protection status (*ochrona uzupelniająca*) at the first instance 2008-2010

Citizenship	2008	2009	2010
Russia	1.057	2.261	141
Iraq	3	22	5
Sri Lanka	8	16	1
Afghanistan	1	3	3
Palestinian Territory	0	0	3
Other	5	14	9
Total	1.074	2.316	162

Source: Office for Foreigners (UdSC)

With respect to the subsidiary protection, we observe a high number in 2008 (the year of transition from the “old tolerated stay permits” into the “new subsidiary protection”) and 2009, and a sharp decline in the first eight months of 2010. In general, we can conclude that 2010 is an absolute nadir or anticlimax in granting whatever form of protection: until

⁴⁴ The Law entered into force on May 29, 2008.

⁴⁵ According to the information obtained by the (Polish) Helsinki Foundation for Human Rights and SIP, every two years a new “Karta” is delivered in case of SP (*ochrona uzupelniająca*).

⁴⁶ As specified in the Act on Social Assistance of 2004 (Journal of Laws of 2004, N° 64, item 593)

September statistics show only 82 refugees, 140 persons with a tolerated stay permit and 162 people with subsidiary protection.

d) Tolerated stay permit

Since March 2008, the “**pobyt tolerowany**” has become the third⁴⁷ protection status. The tolerated stay permit is granted for an indefinite time, the “identity” card is also called “karta pobytu”. The validity is limited to one year⁴⁸ and the only temporary travel document for foreigners with tolerated stay permit that can be issued, is limited to maximum seven days.

A person with a tolerated stay permit can only apply for a permit to settle after ten years of uninterrupted stay, another five years’ stay on the basis of the permit to settle are needed before the person can apply for citizenship. These rights are only granted for people with tolerated stay permit based on a possible risk of violation of articles 2 (right to life), 3 (prohibition of torture), 4 (prohibition of slavery and forced labour), 5 (right to liberty and security), 6 (right to fair trial) or 8 (right to family life)⁴⁹ of the European Convention on Human Rights and Fundamental Freedoms, or if the expulsion would violate the UN Convention on Child’s Rights.

If on the other hand, the tolerated stay permit was granted for the sole reason that the expulsion is unenforceable to reasons beyond the control of the authorities and beyond the control of the foreigner, there is no possibility to apply for a permit to settle and only under particularly justified circumstances can one apply for citizenship.

Like the Polish name “tolerated stay permit” already indicates, the status corresponds rather with the German “Duldung” and should not be mistaken for a full subsidiary protection status (see footnote 46). In fact, this third Polish status does not provide access to social aid and protects just from deportation. After the asylum procedure ends, persons with the tolerated stay permit are left to the street without any means of subsistence.

⁴⁷ Before the Law of 18 March 2008 (entrance into force on the 29th of May 2008), the “tolerated stay permit” was the second protection status. Before this Law, the “tolerated stay permit” was also granted to asylum seekers who qualified for subsidiary protection in the sense of art. 15 QD, together with the above mentioned reasons allowing the granting for the “tolerated stay permit”. As a consequence, after the introduction of the subsidiary protection status, people who were granted a “tolerated stay permit” in the past, based on the grounds foreseen in art. 15 QD, could change their “tolerated stay permit” into a subsidiary protection status. However, asylumseekers who obtained in the past a “tolerated stay permit” based on the other grounds for granting a “tolerated stay permit”, kept this “tolerated stay permit” after the introduction of the subsidiary protection.

⁴⁸ According to the information obtained by the (Polish) Helsinki Foundation for Human Rights and SIP, every year a new “Karta” is delivered in case of a “pobyt tolerowany”. However, in case the pobyt tolerowany was delivered on the basis that the expulsion is unenforceable to reasons beyond the control of the authorities and beyond the control of the foreigner, recently the authorities began to require a confirmation from the foreigner that he still cannot obtain a passport from the embassy.

⁴⁹ According to Halina Niec Legal Aid Center (HNLAC), it should be noted that given the ongoing preparation of a new Act on aliens and Act on granting protection to aliens, this protection instrument will soon undergo a change and foreigners seeking legalisation of stay in Poland solely due to their family ties, will be eligible for a regular residence permit. The tolerated stay permit will be still applied in cases of risks to other basic human rights.

Table 4: Person granted tolerated stay permit (pobyt tolerowany) at first instance 2005-September 2010

Citizenship	2005	2006	2007	2008	2009	2010
Russia	1.768	2.015	2.834	1.486	46	74
Iraq	2	9	18	1	0	0
Armenia	3	1	1	4	6	12
Sri Lanka	1	4	9	5	0	3
Belarus	5	5	1	2	1	2
Other	83	23	23	16	13	54
Total	1.856	2.048	2.876	1.507	65	140

Source: Office for Foreigners (UdSC)

Like Table 4 shows, a significant number of asylum seekers was granted the (former) “tolerated stay permit”, which corresponded in most of the Chechen cases with “a kind of” subsidiary protection, until the introduction of the “full” subsidiary protection in 2008. In the first 8 months of 2010 140 of such cases were reported.

G. Accelerated procedures

The Polish asylum authorities can consider an application manifestly unfounded when the applicant gives other reasons than fear of persecution or a risk of serious harm, or when the applicant comes from a safe country⁵⁰ or gives a false statement (conceals information, submits an application under a false name, etc.) These applications are examined in 30 days, the authorities are (except for unaccompanied minors) not obliged to conduct an interview and the period for appeal is reduced to five days.

In case of subsequent applications, the proceedings can be discontinued if the application is claimed “inadmissible” because of a lack of new elements justifying the application, after previously being rejected.

H. Detention

This chapter only gives the broad outlines of detention in the Polish asylum procedure. Common reasons given for detaining asylum seekers include the need to establish the identity of the applicant, to prevent an abuse of the asylum procedure, to prevent a threat to other people’s safety, health, life or property, to protect the defence or safety of the state or safety and public order. An asylum seeker can be detained when he or she illegally crossed or attempted to cross the border or entered Poland (is staying in Poland) without permission.

However, under Polish law, a foreigner should not be detained if he or she comes directly from a country in which he or she had a well founded fear of persecution or a real risk of serious harm. In these situations, the applicant is considered to have introduced an asylum application immediately.

⁵⁰ The authorities decide whether or not a country has to be considered as a safe third country (in the sense of art. 27 Asylum Procedures Directive), based on information of the Ministry of Foreign Affairs, international and national reports. There is no formal list of safe countries of origin. Source: Helsinki Foundation for Human Rights and SIP (Association for Legal Intervention).

Applicants can also be detained for the purpose of expulsion. This detention can take place in a guarded centre for foreigners or detention centre for the purpose of expulsion (very similar to a classic prison regime). This last type of centre has a far more rigorous regime⁵¹ and is applied when it is deemed necessary for state's security or defence of public safety and order.

Detention is always based on a decision of the Court, and the detention period is 30 to 60 days. According to several asylum seekers we met during our mission, the period of 30 days is often prolonged to 60 days and even 90 days. It was not clear for the asylum seekers why.

An appeal can be lodged within seven days from receiving the ruling. After this period, the stay in detention can be prolonged if the Head of the Office for Foreigners applies for it. The maximum time an asylum seeker can spend in detention is one year. An extension of the stay in detention for three months is applied when a detained irregular immigrant decides to apply for asylum.

Detained applicants have the right to take contact with NGOs dealing with refugee issues, or providing legal assistance. They also have the right to personal contact with the representative of the High Commissioner for Refugees⁵². According to NGOs, the major complaints from women and children detained⁵³ concern the quality of medical care provided and the lack of access to education for children. Our own observations at the detention centre of Biała Podlaska confirm several of these constraints. The official presentation guaranteed a high level of medical care, education possibilities and legal assistance, but when asking the detained asylum seekers about their experiences, we got a different picture (see e.g. *supra* information on legal assistance.)

⁵¹ e.g. people are watched by camera's 24 hours a day, seven day's a week.

⁵² This is in line with art. 14, 2, b and 14, 7 Reception Directive (RD). Poland did not use the possibility to differ from aforementioned provisions on contact with UNHCR, foreseen in Art. 14, 8 RD in case of detention.

⁵³ It is worth mentioning that Belgium has been condemned by the European Court for Human Rights (violation of art. 3 and 5§1 ECHR) for detention of minor children (*in casu* four children aged seven months to seven years old) taking into consideration the duration of their imprisonment (more or less one month) and their state of health: ECtHR, 19 January 2010, n° 41442/07, Muskhadzhiyeva and others v. Belgium.

Part 2: Assessment of RSD in Poland

A. Analysis of Polish asylum decisions for people with Russian nationality, latest general developments

In the framework of this report, we deem it appropriate to have a closer look at the refugee status determination procedure in Poland because according to the findings of the mission, one of the most commonly given reasons by the Chechen asylum seekers to leave Poland and introduce an asylum request in other European countries, was a feeling that their refugee request had been incorrectly refused. According to the statistics of the UdSC, Poland mostly receives asylum applications from persons with Russian nationality, mostly of Chechen origin; from 2005 till the 1 September 2010, the highest proportion of asylum seekers came from Russia (80%), followed by Georgia (11%), Armenia (1%), Belarus (1%), Ukraine (1%) and other nationalities (6 %) ⁵⁴. As the delegates of the mission are only confronted with Chechen “Dublin-cases” in Belgium, the analysis will focus on decisions from the Polish asylum authorities in Chechen cases. The sources used for this analysis are four reports on the definition of refugees published by the Law Clinic of Warsaw University, in collaboration with the Helsinki Foundation for Human Rights, the Rule of Law Foundation (Fundacja Instytut na Rzecz Państwa Prawa) and the Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej). The four reports contain an analysis of decisions and rulings from the Polish asylum authorities, compiled by the named partners of the project ⁵⁵. Other recent Polish decisions analysed are partly transferred by the Association for Legal Intervention, considered by them as being representative and partly received by the Belgian Refugee Council (CBAR-BCHV) in 2010 from Chechen asylum seekers present in Belgium and having a file pending in a Dublin procedure. A last source is the information transposed by the Polish Helsinki Foundation for Human Rights to ECRE in the framework of the ECRE Guidelines on the Treatment of Chechen IDP’s, Asylum Seekers and Refugees in Europe (see for first reference footnote 14, further referred to as ECRE Guidelines on Chechens).

⁵⁴ UdSC, Asylum seekers in Poland, 2005-2010 Statistical data, Office for Foreigners, Warsaw, 2010.

⁵⁵ The four reports are: 1) A. GAJEWSKA, “Definicja uchodźcy: uzasadniona obawa przed prześladowaniem. Analiza decyzji administracyjnych w sprawach o nadanie statusu uchodźcy”, Uniwersytet Warszawski wydział prawa I administracji klinika prawa, Warszawa, 2007, 23. (A. GAJEWSKA, “**Definition of refugees: well-founded fear of persecution**. Analysis of administrative decisions regarding granting refugee status”, Warsaw University, Faculty of Law and Administration, Law Clinic, Warsaw, 2007, 16.) 2) A. GAJEWSKA, “Definicja uchodźcy: prześladowanie. Analiza decyzji administracyjnych w sprawach o nadanie statusu uchodźcy”, Uniwersytet Warszawski wydział prawa I administracji klinika prawa, Warszawa, 2007, 27. (A. GAJEWSKA, “**Definition of refugees: persecution**. Analysis of administrative decisions regarding granting refugee status”, Warsaw University, Faculty of Law and Administration, Law Clinic, Warsaw, 2007, 17.) 3) A. GAJEWSKA, “Definicja uchodźcy: “indywidualizacja” obawy w sytuacji konfliktu zbrojnego. Analiza decyzji administracyjnych w sprawach o nadanie statusu uchodźcy”, Uniwersytet Warszawski wydział prawa I administracji klinika prawa, Warszawa, 2007, 10. (A. GAJEWSKA, “**Individualisation of fear in case of an armed conflict**, Analysis of administrative decisions regarding granting refugee status”, Warsaw University, Faculty of Law and Administration, Law Clinic, Warsaw, 2007, 10.) 4) A. GAJEWSKA, “Przesłanki nadania statusu uchodźcy, a pobyt tolerowany. Analiza decyzji administracyjnych w sprawach o nadanie statusu uchodźcy”, Uniwersytet Warszawski wydział prawa I administracji klinika prawa, Warszawa, 2007, 9. (A. GAJEWSKA, “**conditions to be granted refugee status or tolerated stay permit**. Analysis of administrative decisions regarding granting refugee status”, Warsaw University, Faculty of Law and Administration, Law Clinic, Warsaw, 2007, 6.)

According to the information in the recent ECRE Guidelines on Chechens⁵⁶ for a short period of time⁵⁷ the authorities granted subsidiary protection, because the situation in Chechnya was considered to constitute “indiscriminate violence” in the sense of art. 15, c QD. This soon changed to an application of article 15, b QD, based on the argument that there is no internal armed conflict in Russia. This assertion is increasingly used as a reason to not grant Chechen asylum seekers any protection at all (refugee status, subsidiary protection or tolerated stay). According to the information in the ECRE Guidelines on Chechens, received from their meeting in July 2010 with the Polish Helsinki Foundation for Human Rights, “*the rise in negative decisions in Poland may be linked to the nature of the claims being submitted. There are more young people aged 20-25 applying, who are often not educated, do not speak Russian well and do not provide enough information on their claim [according to the Head of the Office for Foreigners⁵⁸]. There seems to be a widespread fear amongst asylum seekers from Chechnya that it is dangerous to give too much information in Poland and that it is not safe to stay there.*” This fear and distrust has been largely confirmed during the multiple discussions the members of the mission had with Chechen asylum seekers in September 2010.

B. Analysis of the interpretation and application of some constitutive elements of the definition of a refugee by the Polish asylum instances in Chechen asylum cases.

This chapter is neither a scientific nor an in-depth analysis of the Polish RSD in Chechen cases, but rather indicates some concerns.

As indicated in the 1951 Convention⁵⁹ the term “refugee” shall apply to any person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

We often refer in this chapter to the UNHCR Handbook, based on the role of UNHCR as a guardian of the 1951 Convention, as indicated in several dispositions of the 1951 Convention itself⁶⁰, as in the Qualification Directive⁶¹ and the Asylum Procedures Directive⁶².

⁵⁶ ECRE, Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum seekers and refugees in Europe, revised March 2011, 12-13.

⁵⁷The legislation on subsidiary protection has been in force since 2008.

⁵⁸ Insertion by the author

⁵⁹ And adapted by the 1967 Protocol relating to the Status of Refugees.

⁶⁰ -Preamble 1951 Convention: “*Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner*”

- art. 35, 1, 1951 Convention: “*The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.*”

⁶¹ Consideration 15 QD: “*Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according Article 1 of the Geneva Convention.*”

⁶² Art. 21, c APD: “*Member States shall allow the UNHCR: to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.*”

a) Well-founded fear of persecution

“Well-founded fear of persecution” are the key words of the definition of a refugee. According to the UNHCR Handbook *the term “well-founded fear” contains a subjective and objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration*⁶³.

According to the report from the Warsaw University Law Clinic on the well-founded fear of persecution, the Polish authorities also interpret the concept of a well-founded fear as a combination of a subjective element (the mental state of the given person), as well as an objective element, namely an objective situation confirming the fear of the applicant as well-founded⁶⁴. As a consequence, the absence of one of these two elements means that the person cannot be granted refugee status. The weight given to the subjective element sometimes leads, according to the report, to a refusal of protection even if the objective situation is as such that the person might actually be persecuted in case of return to his or her country of origin. This because the person “is not frightened enough”, e.g. does not show enough fear during his/her interview. The report refers to Goodwin Gill’s interpretation of the subjective component of fear⁶⁵ as underlining the importance of subjective aspects of a person’s life, rather than forcing the applicant to prove his subjective fear. This vision is confirmed in the UNHCR Handbook which states that “*an evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions*”⁶⁶.

Several arguments can be found in the refusal decisions to explain why the fear of persecution is not credible, such as late introduction of an asylum application⁶⁷, no application has been made in the first safe country reached, delay before leaving the country, and contradictions

⁶³ § 38 UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html> [accessed 11 March 2011], (*infra* UNHCR Handbook)

⁶⁴ A. GAJEWSKA, “**Definition of refugees: well-founded fear of persecution.** Analysis of administrative decisions regarding granting refugee status”, Warsaw University, Faculty of Law and Administration, Law Clinic, Warsaw, 2007, 4.

⁶⁵ GUY-GOODWIN GILL, *The refugee status in international law*, Oxford, 1996, 40-41.

⁶⁶ § 40 UNHCR Handbook.

⁶⁷ According to art. 37,1 of the Aliens Act of 1997, “*A foreigner without the right to enter the territory of the Republic of Poland has to make a request to obtain refugee status during the border control at entering the territory of the Republic of Poland. 2. A foreigner who has arrived illegally on the territory of the Republic of Poland has to make a request to obtain refugee status immediately after crossing the border. Making this request does not imply that the foreigner is not accountable for crossing the border against the rules.*” The principle that applicants must apply for protection at the earliest possible time is also foreseen in art. 4, 5 (d) Qualification Directive, but the principle is attenuated by the words “unless the applicant can demonstrate good reason for not having done so”. The European Court of Human Rights seems to support a “protection orientated” interpretation of time-limits imposed by national legislation. See judgment ECTHR, 11 July 2000, 40.035/98, *Jabari v. Turkey*, §40: “*It would appear that the applicant’s failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran (...). In the Court’s opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention. (...) The Ankara Administrative Court, on her application for judicial review, limited itself to the issue of the formal legality of the applicant’s deportation rather than the more compelling question of the substance of her fears (...)*”.

between several statements during the interview. In some decisions, Polish asylum authorities do not accept a well-founded fear in cases of “**provocation**”. The report gives the example of a refusal by the Head of the Office for Foreigners in which it was established that the applicant, a person of Chechen origin, had provoked Russian soldiers by pointing out to them that they were misbehaving when they were harassing an elderly person. According to the Polish authorities, he would not have made such remarks that could “provoke” Russian soldiers if he really feared persecution⁶⁸.

Other reasons used by the Polish asylum authorities for rejecting the claim of a well-founded fear of persecution is the fact **not being well known** to or **not being prosecuted by**⁶⁹ the authorities. For example, one asylum seeker’s application was rejected because the Polish authorities decided that this person did not stand out by undertaking courageous actions against the Russian army and as such did not differentiate himself from other defenders of the capital (during the battle of Grozny during the first Chechen war)⁷⁰.

The **possession of a passport** is also considered in many cases as proof for the absence of a well-founded fear of persecution and would imply protection from that country. Several examples are cited in the report⁷¹:

“Since the authorities of the Russian Federation gave him an international passport, this means that they did not treat him with any caution. If this would not be the case, they would not have enabled him to escape from the country.”⁷²”

“The applicant left her country of origin legally, with a passport that had been issued by the authorities of the Russian Republic. The fact that the applicant received a travel document indicates that the authorities of her country of origin did not treat her with any caution and that she was not a person they were trying to track down. If not she would not have been able to travel abroad.”⁷³”

Some reservations must be made by the supposition that possession of a passport implies protection of the country issuing the passport. The UNHCR Handbook confirms that one should interpret with caution the possession of a passport in the frame of RSD.

“A typical test of the well-foundedness of fear will arise when an applicant is in possession of a valid national passport. It has sometimes been claimed that possession of a passport signifies that the issuing authorities do not intend to persecute the holder, for otherwise they would not have issued a passport to him. Though this may be true in some cases, many persons have used a legal exit from their country as the only means of escape without ever

⁶⁸ A. GAJEWSKA, “**Definition of refugees: well-founded fear of persecution**. Analysis of administrative decisions regarding granting refugee status”, Warsaw university, faculty of law and administration, Law Clinic, Warsaw, 2007, 9-10. “Nakaev case”.

⁶⁹ Judgment received by SIP, assessed by the Belgian Refugee Council: Council for Refugees, 12 August 2010, RdU-588-I/S/10.

⁷⁰ *Ibid.*, p. 10. Head of the Office for Foreigners, 11 June 2003, DP-II-2045/SU/2002, 7.

⁷¹ *Ibid.*, p. 11. In the same sense: decision received by SIP, assessed by the Belgian Refugee Council: Head of the Office for Foreigners, 26 November 2006, DP-II-3325/SU/2004, confirmed by a judgement of the Council for Refugees, 14 February 2007, RdU – 52/1/S/07.

⁷² Head of the Office for Foreigners, 9 January 2007. DP-II-1173/SU/2006, 4.

⁷³ Head of the Office for Foreigners, 21 December 2006, DP-II-584/SU/2006, 3. A similar example was received from SIP, assessed by the Belgian Refugee Council: Head of the Office for Foreigners, 02 September 2009, DPU-420-2960/SU/2008

*having revealed their political opinions, a knowledge of which might place them in a dangerous situation vis-à-vis the authorities.*⁷⁴”

*“Possession of a passport cannot therefore always be considered as evidence of loyalty on the part of the holder, or as an indication of the absence of fear. A passport may even be issued to a person who is undesired in his country of origin, with the sole purpose of securing his departure, and there may also be cases where a passport has been obtained surreptitiously. In conclusion, therefore, **the mere possession of a valid national passport is no bar to refugee status***⁷⁵”.

b) Individual nature of the fear⁷⁶

Although we agree with a case by case consideration of the claims, this may not be foolproof: if the individual nature of the fear is not properly interpreted, persons in need of international protection might be denied this protection because of a too restrictive interpretation of the individual character of the fear.

Armed conflict

According to the report of GAJEWSKA on the individualisation of fear in the case of an armed conflict⁷⁷ it is often underlined in Polish asylum decisions that coming from a country, in which there exists an internal or international armed conflict, is a negative indication for granting the refugee status, because of the lack of an individual persecution⁷⁸. The reasoning is as follows: the violations of human rights and threats for life are resulting from an armed conflict on the territory of a country instead of resulting from an individual focus by the authorities on the applicant. Sometimes, people fleeing an armed conflict are put on the same level as economic migrants, people fleeing natural disasters, famine, etc...⁷⁹

*“The Convention contains an exhaustive list of motifs justifying the recognition as a refugee – this does not concern war refugees, people fleeing natural disasters, famine or poverty.*⁸⁰”

According to the aforementioned report, this exaggerated request of the Polish authorities of individualisation comes from the objective of the state to limit the number of recognised refugees⁸¹.

⁷⁴ § 47 UNHCR Handbook.

⁷⁵ § 48 UNHCR Handbook (putting in bold by the author)

⁷⁶ This is not *as such* a constitutive element of the definition of a refugee.

⁷⁷ A. GAJEWSKA, “Definicja uchodźcy: “indywidualizacja” obawy w sytuacji konfliktu zbrojnego. Analiza decyzji administracyjnych w sprawach o nadanie statusu uchodźcy”, Uniwersytet Warszawski wydział prawa I administracji klinika prawa, Warszawa, 2007, 10. (A. GAJEWSKA, **Individualisation of fear in case of an armed conflict**, Analysis of administrative decisions regarding granting refugee status”, Warsaw university, faculty of law and administration, Law Clinic, Warsaw, 2007, 10.

⁷⁸ Decision directly received by the Belgian Refugee Council, Head of the Office for Foreigners, 20 November 2009, DPU-420-2284/SU/2009 confirmed by judgment of Council for Refugees, 8 April 2010, RdU/179-1/S/10.

⁷⁹ Judgment received by SIP, assessed by the Belgian Refugee Council, Council for Refugees, 13 January 2010, RdU-1261-1/S/09. Judgment received by SIP, assessed by the Belgian Refugee Council, Council for Refugees, 12 August 2010, RdU-588-I/S/10.

⁸⁰ Council for Refugees, 9 July 2003, RdU-431-1/S/03, 4.

⁸¹ A. GAJEWSKA, **Individualisation of fear in case of an armed conflict**, Analysis of administrative decisions regarding granting refugee status”, Warsaw university, faculty of law and administration, Law Clinic, Warsaw, 2007, 3.

However, as Professor James Hathaway, author of one of the seminal works on refugee law⁸² puts it, the historical framework of the Convention clearly indicates that it was designed to protect persons within large groups whose fear of persecution is generalized, not merely those who are at risk of personal violence.

Volker Türk⁸³ recently explained it very clearly in his speech on protection gaps in Europe: *“Today, as internal conflicts involving oppression on ethnic, religious, political or other grounds are more frequent and generate displacement, the continuing relevance of the reasons for refugee status contained in the 1951 Convention definition is evident, albeit frequently misapplied. In armed conflict or violent situations, **whole communities may be exposed to persecution for 1951 Convention reasons, and there is no requirement that an individual suffers a form or degree of harm which is different to others with the same profile.** Furthermore, many ordinary civilians may be at risk of harm from bombs, shelling, suicide attacks or improvised explosive devices. These methods of violence may be used in areas where civilians of specific ethnic or political profiles reside or gather, **and for this reason, come within the scope of the 1951 Convention.** Most states concur with UNHCR that the Convention and Protocol apply to refugees fleeing **civil wars**, who have reason to fear being victimized because of their religion, ethnic origin or imputed political opinion⁸⁴.”*

Thus, during the civil war in Chechnya, many ordinary Chechen civilians would have fallen under the scope of the 1951 Convention, because their fear was based on their ethnic origin (“nationality”) and imputed political opinion.

Some asylum authorities, such as the Belgian authorities, did apply the principle of group persecution on the situations of Chechens for a period of time after a fact finding mission in the Caucasus. The standard reasoning repeated in many decisions of the former Belgian Permanent Refugee Appeals Commission (since the modification of the Belgian Aliens Act in 2006, this institute is called Council for Alien Law Litigation) is the following:

“As regards Chechnya, the Commission has repeatedly pronounced itself on the severity of the human right violations affecting the population of this Republic for political, racial and national motives (...); human rights violations on a large scale are observed by several international observers (e.g.: United Nations, Human Rights Committee, Final Observations of the Human Rights Committee: Russian Federation. 06/11/2003. CCPR/CO/79/RUS; HCR, UNHCR Position regarding Asylum-Seekers and Refugees from the Chechen republic, Russian Federation, 22/10/2004; common declaration of Amnesty International, Human Rights Watch, Medical Foundation for Care of Victims of Torture and Memorial: “Worsening of the situation in Chechnya and Ingushetia; new proof of forced disappearances, rape, torture and extrajudicial executions” (...); Ministry of Foreign Affairs, the Netherlands, (...)); that these information are, in general, confirmed by sources in Russia contacted by the Commission (...); that on the 24th of February 2005, the European Court for Human Rights (hereafter the Court) has condemned the Russian Federation for violation of the right to life (art. 2 ECHR) in three cases implying six applicants (...); that these

⁸² Hathaway, J.C., *The Law of Refugee Status* (Butterworths, 1991), 95.

⁸³ UNHCR director of international protection.

⁸⁴ UN High Commissioner for Refugees, *“Protection Gap in Europe? Persons fleeing the indiscriminate effects of generalized violence”*, 18 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d37d8402.html> [accessed 29 March 2011]

three condemnations are a new element of appreciation that leads the Commission to further precise its jurisdiction; that, although these three judgements cannot indeed have, in law, any effects than for the parties concerned, they sanction in reality so many manifestations of violation of the right to life that it cannot be reasonably considered to concern isolated incidents; furthermore, it's important to stress that the Court has established in each of the cases a double violation of the right to life: on the one side, the State is, without legitimate motive, responsible for the death of civilians (Case Khachiev and Akaieva v. Russia) or did not take any necessary measures to protect civilian lives in military operations (case Issaeva v. Russia; ...) and on the other hand, did not undertake an effective research on the subject of these events; that this last point is of a particular importance in the eyes of the Commission, in the sense that the Court established a kind of continued infraction in the head of the Russian authorities; that indeed, their reserve to investigate effectively such extremely serious facts shows an absence of will to repress the violations of the right to life committed in Chechnya by the State organs and, the persistence in their head to fail in their obligation to protect the right of the civilians to life. (...) that these crimes can be imputed to the Russian troops as to Chechen militias depending of the pro-Russian local administration as to the independence militias, or armed groups escaping every kind of control; that in case the Russian authorities are not the immediate author of the crimes or cannot be considered to encourage or tolerate them, they do not seem capable of offering an effective protection to the victims; that these developments lead the Commission to think that the negation of elementary rights of individuals, in the first place the right to life and the right not to be subjected to torture or to inhuman or degrading treatment or punishment, has reached such a level in Chechnya that every Chechen, in case he was not himself part of the authorities or armed structures of the pro-Russian administration, has a well-founded fear of persecution on the sole reason of his nationality in the sense of article 1, section A, paragraph 2 of the Geneva Convention, nationality understood in the sense given by the Council Directive 2004/83/EC, of 29 April 2004 (...), "membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins;" (art. 10, §1, c); that the Commission therefore considers that the population of the Chechen Republic is for the moment victim of a group persecution, "persecution resulting from a systematic policy, capable of hitting in an arbitrary way every member of a determined group for the sole reason of his membership of this group" (...); In this context, one can presume that, under reserve of the proof to the contrary, persons from Chechen origin who had their habitual residence in Chechnya do have a well-founded fear of persecution for reasons of nationality in case of return to Chechnya; that (...), it is becoming to underline that this presumption does not oppose itself to an eventual application of an exclusion clause for persons guilty of crimes and actions described in section F of article 1 Convention of Geneva;

*Considering that on the one hand the de facto maintenance of the system of internal stay permits (former "propiska") in the Russian Federation and on the other hand the multiplication of atrocities against persons of Chechen origin **makes an internal flight alternative impossible** in most of the Chechen cases fleeing their republic of origin (...),⁸⁵"*

⁸⁵ (Belgian) Permanent Refugee Appeals Commission, 4 March 2005, n° 04-3503. In the same sense: (Belgian) Permanent Refugee Appeals Commission, 4 March 2005, n° 04-3388 and (Belgian) Permanent Refugee Appeals

The Belgian asylum authorities no longer apply the principle of “group persecution” to the current situation of Chechens, however persons of Russian nationality (mostly Chechens) were still fifth in the statistics of the Belgian Office of the Commissioner General for Refugees and Stateless Persons on “decisions to grant refugee status per nationality in 2010” (after Guinea, Iraq, Afghanistan and China (Tibet))⁸⁶.

Persons need to be known as dangerous

According to the aforementioned report, Polish asylum authorities demand that the applicant be personally known as “being dangerous” by the authorities of his country of origin in order to accept the possibility of a well-founded fear of persecution. Hereby it seems that an applicant having a close family member that suffered persecution in the past or has a well-founded fear of persecution in the future is not sufficient to accord the refugee status to that applicant too⁸⁷.

A striking example is described in a contribution on sharing good practice⁸⁸ of DOPIERAŁA, a judge of the Regional Administrative Court. The case concerned a **minor** applicant stating the persecution of his family on the grounds of nationality and religion. **His father and other relatives died because of persecution** (this was not contested by the Polish authorities). The applicant himself was beaten, he declared that he feared the same perpetrators who persecuted his family, who were still in power in his home town. He stated that he was not arrested, imprisoned not sentenced by any court. He did not take part in any armed conflict nor did he belong to a political, religious, cultural, social or ethnic association. So, the Head of the Office for Foreigners **refused** to grant the applicant the refugee status and accorded a tolerated stay permit. The applicant lodged an appeal to the Council for Refugees⁸⁹ and applied for the suspension of the proceedings to submit additional documents on the persecution and death of his father as a result of those persecutions. Nevertheless, the Council confirmed the first decision stating that research done by the first instance gave no examples of national minorities persecutions in his province. The Council also stated the need **to indicate the individual character** of the persecution or the fear of such a persecution as condition to be granted a refugee status, **whereas the applicant has referred to the circumstances regarding his father**. Only after proceedings at the Regional Administrative Court that revoked the decision, stating that the new evidence should be taken into consideration, followed by an extraordinary appeal from the Council for Refugees to the Supreme Administrative Court, that directed the case back to the Regional Administrative Court, the applicant was recognised as a refugee. The Court finally took into consideration the assassination of the applicant’s father and relatives and the opinion of a psychologist confirming the real fear of the applicant in case of return.

Commission, 4 March 2005, n° 03-3310. (translated by the author) These judgments are all signed by three judges which reflects a constant jurisprudence in Chechen cases at the time.

⁸⁶ http://www.cgra.be/en/binaries/ASYLUMSTATdecember10_tcm266-114515.pdf

⁸⁷ Judgment transferred by SIP, assessed by the Belgian Refugee Council: Council for Refugees, 13 January 2010, RdU-1261-1/S/09. This judgment considers a case of a single Chechen mother. Her two sons, suspected of being involved in an explosion causing the death of a prosecutor, were recognised as refugees, one in Belgium, the other in Germany. In the same sense: Decision directly received by the Belgian Refugee Council: Head of the Office for Foreigners, 20 November 2009, DPU-420-2284/SU/2009.

⁸⁸ D. DOPIERAŁA, “Sharing good practice – practical experience in protecting refugee’s rights at the Court level”, in X; (ed.), *Judges role in ensuring the quality of asylum decisions*, Sterdyn (Poland), UNHCR – Regional Administrative Court Warsaw, 2008, 87-89.

⁸⁹ In the contribution, the term Refugee Board is used, but we prefer to use in this paper Council for Refugees. It concerns the Rada do Spraw Uchodźców.

The UNHCR Handbook is clear on this issue, in § 43 it states: “*these considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. The laws of the country of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits.*”

We agree with the value of a case by case assessment of the asylum applications, but in the meaning that examining the individual fear implies taking into consideration all the aspects of the individual situation of the persons. The situation of close relatives is an important element in the assessment of the individual situation of the applicant.

According to the authors of the report, the strict interpretation is once again motivated by the desire to restrict the number of applicants recognized as refugees, and in the Polish context, this means Chechens. This reasoning is clear in many Chechen refusal decisions.

“the kernel of the whole matter is that the applicant did not indicate during the proceedings that he has been persecuted by the state authorities because of his nationality or religion. To accept another interpretation of the Convention would lead to the conclusion that every civilian of the Russian Federation from Chechen origin, is a refugee as laid down in the Convention⁹⁰.

“to accept that the above mentioned factors would qualify the applicant as a refugee as laid down in the Convention, would lead to the interpretation that every Chechen man, who could be involved in the activities of the rebels, is a part of a group threatened by the State repressions, would have to be considered as a refugee as indicated in the Convention.⁹¹”

An important nuance made by UNHCR to the evaluation of the individual fear can be found in § 44 of the UNHCR Handbook: “*While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances **indicating that members of the group could be considered individually as refugees.** In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called “group determination” of refugee status, whereby each member of the group is regarded prima facie (i.e. in the absence of evidence to the contrary) as a refugee.*” Hereby, UNHCR clearly indicates that it is not because the group is large that the members of these groups could not be recognised as refugees.

The Belgian Council for Alien Law Litigation recently applied this approach:

⁹⁰ Council for Refugees, 8 November 2004, RdU-561-1/S/2004, 4. In the same sense: Head of the Office for Foreigners, 16 July 2007, DP-II-399/SU/2007, 5; Head of the Office for Foreigners, 25 May 2007, DP-II-2377/SU/2006, 5.

⁹¹ Head of the Office for Foreigners, 23 July 2004, DP-II-2798/SU/03, 4. In the same sense: Council for refugees, 29 August 2002, RdU-806-1/S/02, 4 and Council for Refugees, 13 June 2003, RdU-335-1/S/03, 8. In the same sense: decision received by SIP, assessed by the Belgian Refugee Council, Head of the Office for Foreigners, 26 November 2006, DP-II-3325/SU/2004 confirmed by a judgment of the Council for Refugees, 14 February 2007, RdU-52/1/S/07.

*“the Court repeats that simply invoking reports stating that, in a general way, discriminations or violations of human rights occur in a country, is not sufficient to establish the fact that every citizen of that country has reasons for a well-founded fear of persecution or would face a real risk of torture or inhuman or degrading treatment or punishment. The applicant has to demonstrate in concreto that he has personal reasons to fear persecution or will face a real risk of suffering serious harm, based on the information available on his country. **However, exceptionally, in cases the applicant claims to be part of a group systematically exposed to a practice of ill-treatment, the protection provided in articles 48/3 and 48/4 of the Aliens Act of 15 December 1980⁹² has to be applied** when the applicant demonstrates that there are serious motifs to believe he is part of the targeted group and that this practice exists. This occurs when a specific community is the victim of a group persecution, to be interpreted as a persecution resulting from a systematic policy, capable of hitting without distinction every member of the determined group for the sole reason of his membership of the group.⁹³”*

This approach is confirmed by the European Court of Human Rights, although the Court will not interpret the 1951 Geneva Convention or the Directives related to asylum, again their jurisprudence on article 3 European Convention of Human Rights is *mutatis mutandis* most interesting for the interpretation of the individual character of fear.

In the judgment NA v. UK⁹⁴ the ECtHR explains very clearly in which situations a general situation of violence can entail a violation of Article 3 in the event of an expulsion. The Court notes in § 114 till 117 that:

“However, a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion (see H.L.R., cited above, § 41). (...) §115. From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

§ 116. Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group

⁹² Art. 48/3 Belgian Aliens Law of 15 December 1980 concerns the conditions for granting a refugee status. Art. 48/4 Belgian Aliens Law of 15 December 1980 concerns the conditions for granting subsidiary protection.

⁹³ Council for Alien Law Litigation (General Assembly), 24 June 2010, n° 45.396, 15. (translated by the author from French). In the same sense but regarding Art. 3 ECHR: CALL (General Assembly), 26 March 2010, n° 40.964, 7-8. CALL (General Assembly), 26 March 2010, n° 40.965, 7-8.

⁹⁴ ECtHR, 17 July 2008, 25.904/07, NA v. UK. In the same sense: ECtHR, 11 January 2007, 1948/04, Salah Sheekh v. the Netherlands, § 148; ECtHR, 20 January 2011, 58.359/08, NS v. Denmark, § 74; ECtHR, 21 January 2011, 30.696/09, MSS v. Belgium and Greece, § 359.

concerned (see Saadi v. Italy, cited above, § 132). In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see Salah Sheekh, cited above, § 148). The Court's findings in that case as to the treatment of the Ashraf clan in certain parts of Somalia, and the fact that the applicant's membership of the Ashraf clan was not disputed, were sufficient for the Court to conclude that his expulsion would be in violation of Article 3.

§ 117. In determining whether it should or should not insist on further special distinguishing features, it follows that the Court may take account of the general situation of violence in a country. It considers that it is appropriate for it to do so if that general situation makes it more likely that the authorities (or any persons or group of persons where the danger emanates from them) will systematically ill-treat the group in question (see Salah Sheekh, § 148; Saadi v. Italy, §§ 132 and 143; and, by converse implication, Thampibillai, §§ 64 and 65; Venkadajalasarma, §§ 66 and 67, all cited above)."

According to the authors of the report, only applications of people belonging to a small group of persons, well-known persons or persons who are able to prove to be the subject of targeted persecutions by their authorities are taken into consideration by the Polish authorities. This is not in line with the guidelines in the UNHCR Handbook and with ECtHR jurisprudence.

c) Persecution

Article 9 of the Qualification Directive defines "acts of persecution" as:

1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:
 - (a) be **sufficiently serious by their nature or repetition** as to constitute a severe violation of basic human rights, in particular the rights from which a derogation cannot be made under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
 - (b) be an **accumulation of various measures**, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)
2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:
 - (a) acts of physical or mental violence, including acts of sexual violence;
 - (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
 - (c) prosecution or punishment, which is disproportionate or discriminatory;
 - (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
 - (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12 (2);
 - (f) acts of gender-specific or child-specific nature.⁹⁵

⁹⁵ Art. 9, 3 QD. "In accordance with Article 2 (c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1".

According to GAJEWSKA's report on persecution⁹⁶, although this article contains a non-exhaustive list of possible acts of persecution, Polish authorities interpret persecution in a very restricted way giving several examples.

Cases of abuse of power

The report refers to a case where a person was kidnapped by masked soldiers and thrown in a pit where he was held until he revealed the names of resistance fighters. In this case, the applicant was not regarded to have suffered persecution.⁹⁷

“A severe and unwarranted beating by officers of the Moscow police force is not an act of planned or deliberate persecution, but rather an abuse of power by the officers concerned⁹⁸.”

The report specifies that there are many such cases in regard to people of Chechen “nationality⁹⁹” and although the situation in their country of origin is such that, on account of their nationality, they can be arbitrarily killed, this is not regarded as persecution.

The 1951 Convention or the Qualification Directive do not indicate that persecution cannot be the result of abuse of power by the State. According to Article 6 QD actors of persecution or serious harm include the State; parties or organisations controlling the State or a substantial part of the territory of the State; or non-State-actors if the State (or the just mentioned parties and organisations) are unable or unwilling to provide protection. We agree with the authors of the report that officers of the Moscow police force, represent the State and that the State should protect citizens against violence committed by representatives from the State.

⁹⁶ A. GAJEWSKA, “Definicja uchodźcy: prześladowanie. Analiza decyzji administracyjnych w sprawach o nadanie statusu uchodźcy”, Uniwersytet Warszawski wydział prawa I administracji klinika prawa, Warszawa, 2007, 27. (A. GAJEWSKA, “Definition of refugees: **persecution**. Analysis of administrative decisions regarding granting refugee status”, Warsaw University, faculty of law and administration, Law Clinic, Warsaw, 2007, 17.

⁹⁷ A. GAJEWSKA, “Definition of refugees: **persecution**. Analysis of administrative decisions regarding granting refugee status”, Warsaw University, faculty of law and administration, Law Clinic, Warsaw, 2007, 5-6.

⁹⁸ Head of the Office for Foreigners, 29 May 2002, GMU-II-2499/SU/99, 5.

⁹⁹ “nationality” in the sense of the 1951 Convention, UNHCR Handbook § 74 - 76:

§74. The term “nationality” in this context is not to be understood only as “citizenship”. It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term “race”. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.

§75. The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific “nationality”.

§76. Whereas in most cases persecution for reason of nationality is feared by persons belonging to a national minority, there have been many cases in various continents where a person belonging to a majority group may fear persecution by a dominant minority.

Acts of a criminal nature

The Council for Refugees stated that:

“Regarding the threats from Wahhabis raised by the Applicant, it must be stated that, within the meaning of the Geneva Convention, acts of a de facto criminal nature do not constitute persecution.”¹⁰⁰

Again, one can ask on which legal basis this statement can be based. According to Art. 9 QD, acts of persecution can take the form of acts of physical or mental violence. It is clear that, these acts will very often contravene penal law dispositions. One can agree with the statement made by the Court in the Alifanova case cited in the report that *“while most acts of persecution are criminal in nature, not all criminal acts can be considered acts of persecution”¹⁰¹*. According to us, the reason why “not all criminal acts can be considered acts of persecution” is linked to the degree of seriousness of the acts (either by themselves sufficiently serious or because of their accumulation and repetition sufficiently serious) and if the acts can be linked to the five grounds of Art. 1, A 2 of the 1951 Convention¹⁰².

Non-state actors

Notwithstanding the contents of Art. 6, c QD, according to the above mentioned report, Polish asylum authorities do not accept the fact that non-State actors can be actors of persecution¹⁰³. Unfortunately, a decision of the Supreme Administrative Court, accepting that non-State actors could be the source of persecution, has not been followed very often¹⁰⁴.

Decisions of the Head of the Office for Foreigners do mention the requirement of an “institutionalised” form of persecution, that is, persecution must be the result of actions undertaken by state institutions.

“The biography of Mr M.T. does not justify the assertion that he was subject to individual, intentional and long-term persecution by representatives of the Russian authorities”¹⁰⁵.

“In the sociological sense, blood vengeance is a custom characteristic of tribal societies which allows relatives to exact direct revenge for a criminal act (especially murder) perpetrated on a member of their family. It should be stated that family

¹⁰⁰ Council for Refugees, 13 June 2003, RdU-335-IS/03, 7.

¹⁰¹ A. GAJEWSKA, “Definition of refugees: **persecution**. Analysis of administrative decisions regarding granting refugee status”, Warsaw University, faculty of law and administration, Law Clinic, Warsaw, 2007, 7.

¹⁰² UNHCR Handbook § 51: “There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.”

¹⁰³ A. GAJEWSKA, “Definition of refugees: **persecution**. Analysis of administrative decisions regarding granting refugee status”, Warsaw University, faculty of law and administration, Law Clinic, Warsaw, 2007, 9.

¹⁰⁴ *Idem*, 11.

¹⁰⁵ Head of the Office for Foreigners, 8 May 2003, DP-II-1563/SU/2002, 7.

vendettas do not fall within the scope of persecution by state authorities and as such cannot be considered in light of the Geneva Convention¹⁰⁶.”

According to the UNHCR position on Claims for Refugee Status Under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud¹⁰⁷ it is clear that “an application for asylum based on an individual’s fear of persecution because of his membership of a family or clan engaged in a blood feud may, depending on the particular circumstances of the individual case, lead to a recognition of refugee status under the 1951 Convention.¹⁰⁸ “More specifically on the topic of “agents of persecution”, UNHCR states in its position: “*the question of who the agent of persecution is arises in cases involving blood feud. While persecution is most often perpetrated by the authorities of a country, serious discriminatory acts or other offences committed by the local populace, or by individuals, can also be considered persecution for the purposes of the refugee definition, if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection. There is thus scope within the refugee definition to recognize both State and non-State agents of persecution.*¹⁰⁹” Some State practices will be partially in line with the UNHCR position. For example in Belgium, while most judges will consider applications based on blood feud in the context of the 1951 Convention and grant refugee status, some judges will not. However, in these cases, the dissenting judges will not base themselves on the fact that persecution could not be executed by non-State agents, but will rather discuss the causal link with one of the five Convention grounds and consider blood feud issues in the context of subsidiary protection, refusing to follow the UNHCR opinion that this could be linked to “membership of a particular social group”.

In the frame of the application of the subsidiary protection status, more specifically article 15b Qualification Directive¹¹⁰, some national legislations refer to the jurisprudence on art. 3 of the European Convention of Human Rights (further ECHR) because of the strong link between the scope of both articles. As regards non-state actors, jurisprudence of the ECtHR is clear, article 3 ECHR may also apply when the danger emanates from persons or groups who are not public officials. For example: judgment *Abdolkhani and Karimnia v. Turkey*¹¹¹

§ 74: “Owing to the absolute character of the right guaranteed by Article 3, the existence of the obligation not to expel is not dependent on whether the risk of ill-treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public

¹⁰⁶ Head of the Office for Foreigners, 31 January 2007, DP-II-2243/SU/2006, 4.

¹⁰⁷ UN High Commissioner for Refugees, *UNHCR Position on Claims for Refugee Status Under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud*, 17 March 2006, available at: <http://www.unhcr.org/refworld/docid/44201a574.html> [accessed 29 March 2011]

¹⁰⁸ *Idem*, 7.

¹⁰⁹ *Idem*, 3.

¹¹⁰ Article 15 QD “Serious harm consists of: (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;

¹¹¹ ECtHR, 22 September 2009, 30.471/08, *Abdolkhani and Karimnia v. Turkey*, § 74. In the same sense: ECtHR, 29 April 1997, 24.573/94, *HLR v. France*, §40.

officials. What is relevant in this context is whether an applicant is able to obtain protection against and seek redress for the acts perpetrated against him or her (see Salah Sheekh, cited above, § 147)."

Protection from the State must be requested even if protection is illusory

According to the report, seeking protection from the authorities in the country of origin is regarded by the Polish asylum authorities as a necessary condition to prove the failure of state protection, even if it is of common knowledge that protection for certain minorities does not exist in certain countries of origin.

"...criminal acts cannot constitute a basis for the granting of refugee status since, as the Supreme Administrative Court stated in its judgments of 9 July 1999 (case ref.: V SA 239/99) and 30 November 2000 (case ref.: V SA 1437/2000): 'A person who fears illegal acts undertaken by persons operating outside the legal system in his country of origin, and has not exhausted all possibilities for obtaining protection in his country of origin, cannot be considered a refugee, even if obtaining such protection is illusory and highly unlikely.'¹¹²"

Of course, we agree on the subsidiary character of international protection as regards national protection, but it is clear that international protection is required if national protection does not exist. If the authorities are responsible for the persecution, it is unreasonable to expect asylum seekers to address themselves to their persecutors to ask for protection. (see also *infra* part 5 on "unwilling or unable to avail himself of the protection of that country or former habitual residence")

The definition of a refugee includes the well-founded fear of being persecuted for reasons listed under the Convention, being outside the country of nationality or habitual residence in case of statelessness, and if one is **unable or, owing to such fear, is unwilling to avail himself or herself to the protection of that country.**

According to § 98 of the UNHCR Handbook, "being unable" to avail himself of such protection *also implies that the circumstances are such that they are beyond the will of the person concerned, situations of ineffective protection or denial of protection*¹¹³.

According to this definition, even if there would be some protection available, one can be a refugee unwilling to avail himself of the protection of the country, when there is a well-founded fear for refusing it¹¹⁴. So according to the Handbook **only if the protection of the**

¹¹² Head of the Office for Foreigners, 21 December 2006, DP-II-1140/SU/2006, 6.

¹¹³ UNHCR Handbook § 98 being unable" to avail himself of such protection *implies also the circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.*

¹¹⁴ UNHCR Handbook § 100. "The term unwilling refers to refugees who refuse to accept the protection of the Government of the country of their nationality. It is qualified by the phrase "owing to such fear". Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country "owing to well-founded fear of persecution". Whenever

country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person is not in need for international protection and is not a refugee.

No past persecution, no well-founded fear for persecution

As indicated in art. 4,4 QD, “*the fact that an applicant has already been subject to persecution or serious harm (or direct threats of such persecution or serious harm) is a **serious indication** of the applicant’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated*”. However, nowhere is it indicated that the absence of past persecution or threats can exclude someone from being a refugee. This is also confirmed by the UNHCR Handbook § 45 stating that “*(...) It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word “fear” refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution*”.

In Polish asylum decisions, one gets the impression that past persecution is not only an indication but is **required** for being granted refugee protection¹¹⁵.

“The applicant does not fulfil the criteria (of the earlier definition of persecution), since she has indicated no problems of a religious, ethnic, or political nature. Indeed, she states that she has never belonged to any political organisation or other grouping. Nor has she ever been arrested or imprisoned. Therefore, in this case, the circumstances of persecution as listed in the Geneva Convention are not present¹¹⁶.”

We agree with the authors that the reference made to the fact that the applicant was never arrested or imprisoned could only be an indication but can never be a sufficient reason *in itself* for not granting refugee status¹¹⁷.

d) “For reasons of race, religion, nationality, membership of a particular social group or political opinion”

Membership of an organisation

Very often, asylum applicants are not granted a refugee protection status because they are not members of a political, religious, social, ethnic or other organisations¹¹⁸. We agree with the

the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee”.

¹¹⁵ Decision transferred by SIP, assessed by the Belgian Refugee Council: Head of the Office for Foreigners, 2 September 2009, DPU-420-2960/SU/2008. In the same sense: decision directly received by the Belgian Refugee Council: Head of the Office for Foreigners, 20 November 2009, DPU-420-2284/SU/2009.

¹¹⁶ Head of the Office for Foreigners, 29 June 2001, GMU-II-2737/Su/2000, 3.

¹¹⁷ A. GAJEWSKA, “Definition of refugees: **persecution**. Analysis of administrative decisions regarding granting refugee status”, Warsaw University, faculty of law and administration, Law Clinic, Warsaw, 2007, 16.

¹¹⁸ A. GAJEWSKA, “**Definition of refugees: well-founded fear of persecution**. Analysis of administrative decisions regarding granting refugee status”, Warsaw university, faculty of law and administration, Law Clinic, Warsaw, 2007, 10. Decision of the Head of the Office for Foreigners, 12/8/2005, DP-II-2771/SU/2004, 4. Decision received by SIP, assessed by the Belgian Refugee Council: Head of the Office for Foreigners, 2

authors of the report that membership of an organisation is not required by the 1951 Convention to qualify as a refugee. The very fact that a person does not belong to an organisation does not exclude the possibility of a well-founded fear of persecution.

“Nationality”

In the section where we described the interpretation of the individual character of the fear in relation to armed conflict (see *supra p. 18*), we could have developed this rather problematic approach also under this constitutive element “for reasons of nationality”. After assessment of several Polish decisions in Chechen files, we observe a reluctance to accord refugee status because of the non-acceptance of a link to the situation of most Chechen claims and “nationality” as interpreted in the Handbook.

e) “Unwilling ... or unable ... to avail himself of the protection of that country or former habitual residence”

Internal flight or relocation alternative (IFA)

According to the ECRE guidelines on Chechens, Polish decisions to reject applications for refugee status are now more likely to mention the internal flight alternative¹¹⁹(IFA), whereas previously it was mentioned only in cases where people had links to other regions in Russia. Decisions in 2009 and 2010 even included references to the fact that although it is difficult to acquire a registration of residence for Chechens in Russia, it is possible to bribe officials to get it...¹²⁰¹²¹

According to UNHCR, the assessment of an internal flight alternative requires two main sets of analyses, the relevance analysis and the reasonableness analysis. In the framework of assessing the IFA for Chechens in Russia, the **relevance** analysis excludes in most of the cases the existence of an IFA because the agent of persecution is in most cases the State, or the State condones the persecution. The guidelines observe that “*The need for an analysis of internal relocation only arises where the fear of being persecuted is limited to a specific part of the country, outside of which the feared harm cannot materialise. In practical terms, this normally excludes cases where the feared persecution emanates from or is condoned or tolerated by State agents, including the official party in one-party States, as these are presumed to exercise authority in all parts of the country. Under such circumstances the*

September 2009, DPU-420-2960/SU/2008. Judgment received by SIP, assessed by the Belgian Refugee Council: Council for Refugees, 12 August 2010, RdU-588-I/S/10. Decision received by SIP, assessed by the Belgian Refugee Council: Head of the Office for Foreigners, 26 November 2006, DP-II-3325/SU/2004 confirmed by judgment Council for Refugees, 14 February 2007, RdU-52/1/S/07. Decision directly received by the Belgian Refugee Council: Head of the Office for Foreigners, 20 November 2009, DPU-420-2284/SU/2009.

¹¹⁹ Decision received by SIP, assessed by the Belgian Refugee Council: Head of the Office for Foreigners, 2 September 2009, DPU-420-2960/SU/2008. Judgment received by SIP, assessed by the Belgian Refugee Council: Council for Refugees, 12 August 2010, RdU-588-I/S/10. Decision directly received by the Belgian Refugee Council: Head of the Office for Foreigners, 20 November 2009, DPU-420-2284/SU/2009. Decision directly received by the Belgian refugee Council: Head of the Office for Foreigners, 20 July 2010, DPU-420-1634/SU/2009. Decision directly received by the Belgian Refugee Council, Head of the Office for Foreigners, 20 November 2010, DPU-420-1404/SU/2008.

¹²⁰ ECRE has got this information from the Polish Helsinki Foundation for Human Rights.

¹²¹ ECRE, Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum seekers and refugees in Europe, revised March 2011, 13.

*person is threatened with persecution countrywide unless exceptionally it is clearly established that the risk of persecution stems from an authority of the State whose power is clearly limited to a specific geographical area or where the State itself only has control over certain parts of the country.*¹²²

This point of view is reflected in the last UNHCR interim guidance note on Chechnya¹²³. Although over the past few years we have noted a significant decrease in the level and scope of military activity and an overall improvement in the security situation, military incidents still take place in the Chechen Republic. There have been continuing reports of human rights concerns which made UNHCR conclude to the following “**groups at risk**”: members of illegal armed formations and their relatives, political opponents of the federal or Chechen authorities, human rights activists, persons who have held official positions in the previous administration of former President Aslan Maskhadov, those who may have lodged complaints with regional or international human rights bodies and, in particular circumstances women and children. Therefore, concerning the availability of an internal flight or relocation alternative (IFA), UNHCR is clear that this question should be assessed on a case-by-case basis in light of the requisite relevance and reasonableness analysis and taking into account the individual circumstances of the case. UNHCR states in the interim guidance note: “*UNHCR’s assessment is, however, that an internal flight or relocation alternative **should not be considered to be available** within either the Chechen Republic or other regions of the Russian Federation for **Chechen asylum-seekers fleeing persecution in the meaning of Article 1 A of the 1951 Convention.**”*

So to this day, when asylum-seekers make credible statements about being part of these “groups at risk”, in the vast majority of the cases the feared persecution emanates from or is condoned or tolerated by State agents which makes the question on IFA irrelevant and an IFA not available according to UNHCR.

¹²² UN High Commissioner for Refugees, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at: <http://www.unhcr.org/refworld/docid/3f2791a44.html> [accessed 15 April 2011]

¹²³ UNHCR, *Interim Guidance for Assessing the International Protection Needs of Asylum-Seekers from the Chechen Republic of the Russian Federation*, 7 April 2009 (translation of UNHCR, *Hinweise des UNHCR zur Prüfung von Anträgen auf internationalen Schutz von Asylsuchenden aus der russischen Teilrepublik Tschetschenien*. 7 April 2009) This Interim Guidance Note should be read together with the UNHCR "Clarification on the assessment of applications for international protection made by asylum-seekers from the Chechen Republic of the Russian Federation", letter from UNHCR on the assessment of applications for international protection made by asylum-seekers from Chechnya, 11 November 2009

Conclusion

As the Polish asylum system is rather young in comparison to the system in other European Union countries who have decades of experience in asylum matters, we can observe both positive points and some major points of concern. One very positive point is the existence of a non-EU based national protection status foreseen in the Polish legislation, based on articles 2 (right to life), 3 (prohibition of torture), 4 (prohibition of slavery and forced labour), 5 (right to liberty and security), 6 (right to fair trial) or 8 (right to family life) of the European Convention on Human Rights and Fundamental Freedoms and the UN Convention on the Rights of the Child. Poland hereby can provide in an additional protection next to the protection based on minimum standards foreseen by the European Union and the standards foreseen by the 1951 Convention. However, according to our assessment above, there is still room for improvement: refugee status is not always accorded where it should be, because of a very strict interpretation or sometimes misinterpretation of the constitutive elements of the refugee definition which leads to clear protection gaps. An interpretation which is often not in line with the UNHCR guidelines, UNHCR Handbook and the ECtHR jurisprudence is applied by the Polish asylum authorities. One has to take into consideration the declaratory character of the refugee status determination which means that a person is a refugee because he fulfils the criteria of the 1951 Convention, he does not become a refugee because a State formally determines him as oneⁱ. This can have some serious consequences on what is called “asylum shopping”. In some situations refugees who are not formally recognised as such do have well-founded reasons to introduce an asylum application in other countries in the need to find justice to be formally recognised as refugees and to find the protection they need. The existence of huge differences in protection in between Member States puts some corner principles of the Common European Asylum System, such as the principle of the inter-State confidence on which the Dublin Regulation is based at risk.

An Maes
Senior legal officer
Belgian Refugee Council
amaes@cbar-bchv.be

ⁱ¹⁰⁶ UNHCR Handbook § 28. “A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”