

The principle of fostering parties' confidence in public authorities in administrative proceedings regarding foreigners or refugees – selected issues

Abstract

One of the principles provided by the Polish Code of Administrative Procedure is that of fostering citizens' confidence in public authorities. It is a declarative principle which derives from the constitutional principle of the democratic rule of law. It functions in the jurisprudence of the Constitutional Tribunal.

This principle is a source of two directives for the administrative authorities' officials: firstly, an official should be competent and kind with a petitioner, and secondly, under the same (or similar) facts of case and legal environment, similar decisions should be adopted. Otherwise people will lose their reliance on administrative bodies. This principle is best manifested in administrative proceedings regarding foreigners or refugees.

Keywords: principle, public authority, foreigners, refugees, administrative procedure.

I Democracy is not only the right of the majority, but also guarantees of respect for the rights of minorities. And in Poland, foreigners and persons applying for refugee status are a minority. They are in a special situation. They stay on the territory of a foreign country which they are not citizens of, among people with a different mentality, culture, customs, using a foreign language, often incomprehensible at all. Public authorities dealing with their affairs act on the basis of regulations worded in a foreign language and unknown to them. Not every case of a foreigner or a person applying for refugee status as handled by these authorities is going to result in a positive outcome. However, in each of the proceedings aimed at resolving the case of such persons, the general principle of administrative proceedings should be implemented with particular care, defined as the principle of fostering confidence in public authorities.

II Firstly, it should be clarified that in Polish legal language the term ‘foreigner’ does not necessarily mean a natural person. In the legal definition contained in Article 1 (2) of the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners [consolidated text: Journal of Laws of 2017, item 2278], the term is defined as follows: “The foreigner, within the meaning of this Act, is:

- 1) natural person without Polish citizenship;
- 2) legal person based abroad;
- 3) non-corporate company of persons referred to in points 1 or 2, based abroad, established in compliance with the legislation of foreign states;
- 4) legal person and non-corporate commercial company based in the territory of the Republic of Poland, controlled directly or indirectly by persons or companies referred to in points 1, 2 and 3.”

However, most of the comments contained herein will refer to the issues related to participation in administrative proceedings of a natural person commonly referred to as a ‘foreigner’.

III According to the data of the Office for Foreigners, Poland is the second most frequently chosen country by foreigners in the European Union. The UK is the leader in terms of the number of visas and residence permits issued. However, when Brexit becomes a reality, it is most likely that Poland will be the European leader in receiving migrants.

The number of foreigners applying for residence permits in Poland has been growing steadily since 2014. In 2017, applications for residence permits in Poland were submitted by 202 thousand foreigners. The number of applications for legalization of stay filed at Polish public administration bodies has grown by 33% and 71% in comparison with 2016 and 2015, respectively. Temporary migrations predominate. In 2017, as many as 88% of applications concerned temporary residence permits (up to 3 years), 10% permanent residence, and 2% long-term EU residents. 87% of all submitted applications were accepted, 9% were rejected and a small number of cases were discontinued. [<https://udsc.gov.pl/zezwozenia-na-pobyt-w-2017-r- podsumowanie/>].

The main applicants for residence permits in Poland were citizens of countries outside the European Union (192 thousand). The number of applicants from the EU amounted to mere 10 thousand. Most often, those willing to live in Poland were the citizens of Ukraine. It was they who filed the majority (62%) of the applications (125 thousand in total). Residence permits were also applied for by 9.5 thousand Belarusians, 8 thousand Indians, 6.4 thousand

Vietnamese and 6 thousand Chinese. The growing interest in legalizing one's stay in Poland is particularly noticeable among the citizens of Belarus (who apply for permanent residence more frequently) and India (who apply for temporary residence more frequently), who in 2017 submitted respectively 98% and 95% more applications than in 2016. In the case of citizens of EU Member States, in 2017 the stay in Poland was most frequently registered by Germans (2.3 thousand), Italians (1.1 thousand), Bulgarians (0.8 thousand), and citizens of Romania and the United Kingdom (0.7 thousand each). [<https://udsc.gov.pl/zezwozenia-na-pobyt-w-2017-r-podsumowanie/>].

In the same year 2017, 3 thousand people applied for international protection, i.e. for refugee status or subsidiary protection. This means that the number of applications for protection decreased by 60%. Under international law, it is irrelevant whether a war is taking place in the country of origin of an asylum-seeker. A person who is threatened with persecution for reasons of race, religion, nationality, belonging to a particular social group or political views, shall be considered a refugee. Each such case must be examined on its own merits. 93% of the applicants came from the countries of the former USSR, as many as 71% were submitted by the Chechen minority. Only 8% received some form of international protection: 170 people from Ukraine, 43 from Russia and 19 from Syria, 11 from Tajikistan and 5 from Belarus. 1.3 thousand people (41%) received negative decisions and more than half of the cases (51%) were discontinued. [<https://udsc.gov.pl/uchodzczy-2/uchodzczy/sprawozdania/>]

Participation of foreigners in administrative proceedings is not limited to issues related to obtaining Polish citizenship, asylum, refugee status or a residence permit. Natural persons who do not have Polish citizenship are also parties to proceedings in cases concerning social assistance, health benefits and benefits from the social security system. The number of foreigners who work or conduct business activity in Poland has been growing. Legal employment means that they pay contributions from which the Social Insurance Institution (ZUS) pays current benefits. For example, 330,000 foreigners were registered at ZUS for insurance until 31 March 2017. Most of them in Mazovia – 96,500, the least in the Świętokrzyskie Voivodship – ca. 3.5 thousand. In total, in the beginning of 2017 in Poland 227,503 Ukrainians, 16,040 Belarusians, 6,682 Vietnamese and representatives of 83 other nationalities were insured in ZUS. [<https://codziennikmlawski.pl/2017/06/21/liczba-cudzoziemcow-pracujacych-w-polsce-rosnie/>]

In 2016, 57,119 foreigners studied at Polish universities. For comparison,

in 1990 the number was only 4.3 thousand, and in 2000 – 6,563 persons. Among them, European students accounted for 83.3% (47.6 thousand in total). The largest group were Ukrainians (53.6%). Each of these persons is a party to proceedings concerning enrolment and removal from the list of students, awarding scholarships or ordering reimbursement of benefits unduly paid. [<https://www.studenckamarka.pl/serwis.php?s=73&pok=2060>].

Acquisition by a foreigner of the ownership right or the right of perpetual usufruct of a real property or acquisition or taking up by a foreigner of shares in commercial companies with their registered office in Poland which are owners or perpetual usufructuaries of real property located in Poland requires a permit from the Minister in charge of internal affairs. Between 1991 and 2016, 41,219 such decisions were issued (e.g. in 1991 – 635, in 1992 – 1238, in 1999 – 3641, in 2014 – 591, in 2015 – 659 and in 2016 – 608 decisions). In 2016, foreigners submitted 486 applications. 478 concerned acquisition of real estate, 8 acquisition of shares and stocks. The Minister issued 781 decisions, including 356 permits (252 for the acquisition of land property, 96 for the acquisition of residential premises and 8 for the acquisition of shares in companies), 7 promises, 35 negative decisions, 9 amending decisions, 1888 discontinuance decisions and 13 confirming decisions. Among those interested in purchase were Ukrainians (109 permits), Belarusians (33 permits), Russians (16 permits), Armenians (10 permits) and Chinese (10 permits). <http://orka.sejm.gov.pl/Druki8ka.nsf/0/B2A218D57A06BD8DC12580F900378867/%24File/1462.pdf>

In addition, foreigners in Poland apply to public administration bodies in matters related to conducting business activity, construction investments, public information.

All these matters are settled through administrative decisions. It shall be noted here that proceedings in matters settled in the form of this administrative act should be conducted in accordance with the provisions of the Act of 14 June 1960 – Code of Administrative Procedure, in force in Poland continuously since 1 January 1961 [Sejm of the Republic of Poland 2017].

- IV In Chapter 2 of Part I of the Code of Administrative Procedure, a catalogue of general principles of administrative proceedings has been included. One of them is the principle with the broadest scope – that of increasing the trust of citizens in the State bodies, to be found in Article 8 of the Code of Administrative Procedure. This has already been expressed in the original wording of the Code, albeit with different words from those used today.

In the Code adopted on 14 June 1960, Article 6 of Chapter 1 entitled 'General Principles' of Part I of the Code, used to read as follows: "State administration bodies should conduct their proceedings in such a way as to increase the trust of citizens in State bodies". In the first edition of his commentary (dated 1961), E. Iserzon stated that, at first sight, the rule of conduct specified in Article 6 was vague. He claimed that this provision only expressed a demand as to the 'climate' that should prevail in the office in order to foster citizens' trust in public bodies. The author pointed out that this is an issue of humanization of relations in administration, which belongs not only to the field of administrative law, but also to the science of administration. Various material and moral means are used to achieve the desired climate: "appropriate reception facilities, designed and arranged in such a way as to contribute to an atmosphere of mutual trust and friendliness, appropriate staff training, etc." [Iserzon 1961, p. 26]. The author, citing Langrod's views [1959, p. 912], emphasized that the issue of administrative proceedings goes beyond the boundaries of the science of administrative law. It also requires an approach involving the science of administration. It has been pointed out that this is an issue in which, apart from strictly legal elements, psychological, sociological or economic ones also play a very important role. "The issue of the <<climate>> between the administration and the <administered> is crucial in this respect... Administrative proceedings can be a decisive element of mutual trust between the state and the citizen, of targeted cooperation, and a symbol of common interest... It has advantages that (...) are an effective means of *infusing confidence in the public mind*." According to E. Iserzon, the legal instruments used for this humanisation are the institutions provided for in the Code of Administrative Procedure. "Their strict observance in the spirit of benevolence for citizens and upholding the interests of the community leads to the implementation of the postulate expressed in Article 6 of the Code of Administrative Procedure" [Iserzon 1961, p. 27].

Since the Code's amendment in 1980, the principle of confidence has been expressed in Article 8. Its wording was further modified by the amending acts of 3 December 2010 and 7 April 2017. As of 1 June 2017, it has been expressed as follows: "Public administration bodies shall conduct proceedings in a manner that fosters confidence of its participants in public authority, guided by the principles of proportionality, impartiality and equal treatment". In the second decade of the 21st century, replacement

of the words “increase the trust” with “foster confidence” draws attention to the legislator’s awareness that it is not a duty or natural characteristic for the participants in a procedure to have trust in a public authority. It is the administrative authorities who are responsible for exercising due diligence in the exercise of their statutory powers in order to achieve the objective set out by the authors of the Code of Administrative Procedure: “to infuse confidence in the public mind”.

A number of legal guarantees for the individual derive from this principle in case law and literature, such as the requirement to conduct proceedings and resolve cases lawfully and fairly, to act in a manner that is understandable to participants, the obligation to conduct exhaustive investigations, the obligation to settle doubts in favour of participants, and the prohibition to exploit their unawareness or mistakes, as well as the need to ensure predictability and consistency of actions of public administration bodies.

V The principle of fostering confidence has the broadest scope among all the general principles of administrative proceedings. The source of this principle in the Polish legal system is Article 2 of the Constitution of the Republic of Poland, in which the legislator stipulated that the Republic of Poland is a democratic state governed by the rule of law. In interpreting this provision, the Constitutional Tribunal has stipulated several standards expressing the rules, compliance with which will allow to build citizens’ trust in the state. The principle expressed in Article 8 of the Code of Administrative forms a keystone which integrates all the general principles of administrative proceedings. It covers a wide range of other general principles [Łaszczycza, Martysz, Matan 2005, p. 137]. And each of them should also be observed in administrative proceedings in which a foreigner or a refugee is a party or another participant. I am going to analyse some of them below.

The duty to respect the dignity of an individual should be derived from the principle of fostering confidence in public authorities. This imperative is the cornerstone of all human rights protection systems. In interpreting it in accordance with Article 30 of the Constitution of the Republic of Poland, public administration bodies should treat every natural person, including those who do not have Polish citizenship, with due respect, dignity and understanding, regardless of the matter they are dealing with and regardless of the outcome of proceedings. While respecting human dignity, cultural differences must be respected.

The obligation stemming from the principle under examination is to that of equal treatment. According to Article 32 of the Constitution of the Republic of Poland, everyone is equal before the law, and no one may be discriminated against in political or economic life on any ground. Restrictions on foreigners' rights may be imposed only by an act. An example is the Act on the Acquisition of Real Estate by Foreigners, in force since 1920. Although literally until 31 May 2017 the principle of equal treatment was not included in the wording of Article 8 of the Code of Administrative Procedure, such an injunction was one of the components of the principle of confidence. It is unlawful for a decision to be taken in respect of an individual which differs from a previous decision and relates to a similar factual and legal situation [e.g. judgment of the Supreme Administrative Court of 26 October 1984, II SA 1161/84].

The implementation of the principle of confidence is also reflected in the respect for the constitutional principle of the rule of law. Since, in accordance with Article 7 of the Constitution of the Republic of Poland and Article 6 of the Code of Administrative Procedure, public authorities may act only on the basis of the provisions of generally applicable law, it is unacceptable, for example, to demand from a foreigner documents not specified by the legislator or information not relevant to the administrative case under consideration, or to decide on the basis of beliefs or circumstances which do not constitute a statutory premise.

In Article 7 of the Code of Administrative Procedure *in fine*, the legislator stipulated that when resolving an administrative matter, a public administration body is obliged to take into account *ex officio* the public interest and the legitimate interest of citizens. This principle applies to decisions based on administrative discretion. Although literally referring to the interests of 'citizens', it is appropriate, when applying systemic interpretation, to assume that this principle should be respected in respect of each individual. Therefore, to determine *a priori* that public interest outweighs private interest, without taking account of the overall situation and the consequences for the individual, should be assessed as a breach of the principle of confidence [judgment of the Supreme Administrative Court of 23 October 1982, II SA 1031/82].

Undisputedly, detailed explanation of the factual state in accordance with the principle of objective truth expressed in Article 7 and Article 77 (1) of the Code of Administrative Procedure is yet another form of implementation of the principle of confidence. Especially when considering cases concerning persons who do not know the language and legal regulations on the basis of which their cases are

settled, a breach of this principle is equivalent to a gross violation of the law and an action preventing confidence in Polish public authorities.

Public authorities' compliance with the principle of providing due and exhaustive information to parties to proceedings, as laid down in Article 9 of the Code of Administrative Procedure, in the case of foreigners may only be acknowledged if such information has been provided in a manner that is comprehensible to the foreigner. Acting in accordance with the injunction expressed in Article 9 of the Code of Administrative Procedure, one should bear in mind that foreigners in contact with the authorities of a foreign state are more awkward than Polish citizens, they do not know the law and do not understand the specific legal language, let alone the specific official jargon. Consideration should be given to whether they have access to an interpreter or a lawyer. The right to information and that provided for in Article 9 of the Code of Administrative Procedure, and to public information, which according to Article 2 of the Act of 6 September 2001 on Access to Public Information is vested in everyone, i.e. also in a natural person who does not have Polish citizenship, shall be exercised only if the information provided by a public authority is adjusted to their perception and, as far as possible, provided in a language they understand. Special provisions may express this obligation explicitly. Thus, through Article 7 of the Act on Foreigners, the legislator unequivocally ordered that in the so-called legalisation proceedings the authorities are obliged to instruct the foreigner in a language that they understand about the rules and procedures of proceedings and about their rights and obligations. Article 53 (2) and Article 54e (2) of the Act of 14 June 2003 on Granting Protection to Aliens within the Territory of the Republic of Poland lay down the obligation for the authority to inform the applicant in writing in a language which they understand about the legal basis of the decision, the decision itself and the available remedies. Article 30 (6) of the Act stipulates that the Border Guard authority competent to receive an application for international protection shall provide assistance of an interpreter in submitting the application. However, there is no general provision, e.g. in the Code of Administrative Procedure, which provides for the right of a foreigner to communicate in an intelligible language or the right to a free interpreter. It is from the general principles expressed in Arts. 8, 9, 10 and 11 of the Code of Administrative Procedure that such a right shall be derived. If a Polish citizen has the right to information and active participation in proceedings, then a message sent by an official to a foreigner must be

understandable for the person to whom it is addressed. Without denying Article 27 of the Constitution of the Republic of Poland, through which the legislator indicated that the official language is Polish, it seems justified to claim that employees of public administration bodies referring to Articles 4 and 5 of the Act of 7 October 1999 on the Polish Language in relation to persons who do not speak that language and who participate in administrative proceedings, is an action contrary to the analysed principle of confidence. It should also be remembered that Article 14 of the European Parliament's European Code of Good Administrative Behaviour adopted in September 2001, which is the so-called soft law, sets out the principle of replying to letters in a citizen's language. <https://www.rpo.gov.pl/pliki/1192700305.pdf>

It is worth noting that the second sentence of Article 9 of the Code of Administrative Procedure obliges public administration bodies to take care not only of the parties to the proceedings, but also of its other participants, ensuring that they do not suffer any damage as a result of ignorance of the provisions of law. The authors of the 1960 Code, back when Poland was a country much more closed to people from other countries than it is today, took care of guarantees for foreigners in administrative proceedings. In its Article 64 (2) (now Article 69 (2)), it was ordered as follows: "In the minutes of the hearing of the person who gave the testimony in a foreign language, the content of the testimony submitted should be provided in the translation into Polish, indicating the person and address of the interpreter; the interpreter shall sign the report of the hearing." The content of this provision unequivocally proves that for the authors of the Code, it was undisputed that a person who did not speak Polish should act with the assistance of an interpreter when performing a procedural action before a public administration body.

The principle of information is linked to the principle of the party's active participation in every stage of the administrative procedure. A reservation should be made that, in accordance with the letter of the law, the action of the body conducting the proceedings is not equivalent to the action taken in accordance with the spirit of the law and the implementation of this principle. For example, just providing a foreigner with access to the case file does not mean that they were able to exercise their right to review the evidence collected. If the file is in Polish, then a person who is not fluent in this language will exercise the 'right of access', but will not be able to exercise their right to participate actively in the proceedings concerning them. Infringement of the principle of information, e.g. by not communicating the content of the case file, the rights of appeal or the

right to participate in appeal proceedings initiated by another entity in a manner that is comprehensible to the party, shall prevent the party from knowingly and actively exercising their rights, including the right to present their standpoint, views or statements.

Separately from the principle of information, the legislator expressed the principle of persuasion (Articles 11, 107 (1) and 124 (2) of the Code of Administrative Procedure). A precise statement of reasons for an administrative decision is one of the most important factors for strengthening confidence. The reasoning wherein the authority failed to explain why some evidence had been accepted and other rejected, and to reveal the reasons for its (particularly discretionary) decision, seriously undermines trust [judgment of the Supreme Administrative Court of 22 October 1981, I SA 2147/81]. The principle of confidence is also undermined by a vague statement of reasons, or making reference to non-statutory statements [judgment of the Supreme Administrative Court of 8 June 2000, V SA 2278/99]. Especially in proceedings aimed at issuing decisions unfavourable for foreigners, e.g. refusing to grant the refugee status or to issue a residence permit, which gives rise to the necessity to leave the territory of Poland, it is essential that the determining authority explain the validity of the premises it followed on its own initiative and unilaterally. In doing so, care should be taken to avoid, as far as possible, the use of coercive measures. It should be emphasised that through Article 18 of the Act of 17 June 1966 on Enforcement Proceedings in Administration, both the principle of persuasion and the principle of fostering confidence in public authorities are applied in administrative coercive procedure.

There is no doubt that only those public authorities that process matters quickly deserve to be trusted. The passage of time makes even the right decision lose its value. The principle of speed is particularly important in cases concerning natural persons who do not have Polish citizenship. Staying on the territory of a foreign country with a sense of one's indefinite status, uncertainty as to the future of oneself and one's nearest, fearing deportation as a result of simply not considering an application for refugee status or a residence permit on time, is a huge stress that has a destructive impact not only on the applicant, but also on the members of their family. Since for some cases concerning persons who do not have Polish citizenship the legislator sets longer time limits than those specified in Article 35 (3) of the Code of Administrative Procedure (granting the refugee status: 6 months, a permit to settle: 3 months), they should be observed all the more.

Summary

Polish public administration bodies are conducting an ever growing number of proceedings aimed at resolving rights or obligations of natural persons who do not have Polish citizenship. In some authorities – as in the case of voivods, for example, it is still growing, but only a margin of cases, other authorities were established solely to deal with the affairs of such persons, such as the President of the Office for Foreigners or the Council for Refugees. Administrative proceedings are a sequence of actions aimed at issuing a sovereign decision in the form of an administrative decision. Employees of the administration authorities exercise the powers conferred by the State or local authority. However, when deciding on the rights or obligations of individual entities, especially natural persons who are not Polish citizens, stay on a foreign territory and often do not speak Polish fluently, such employees should not use this power in a manner leading to abuse of the law or human rights violations. Such behaviour should be prevented by the principle of fostering confidence in public authorities and an absolute injunction to comply with it, as set out in the Polish Code of Administrative Procedure.

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