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The rights of foreigners in Polish Administrative Procedure – selected issues

ABSTRACT

Subject of research:

Nowadays, more and more attention is being paid to the issues of human rights. This applies not only to the first generation of human rights but also to political, economic, social and cultural rights. The guarantees for the protection and the execution of these rights should be enshrined in the provisions of the code of administrative procedure which governs proceedings before public administration bodies. However, taking into consideration today's diverse and multicultural society, the administrative procedure seems to be not flexible enough and insufficient to ensure the protection of the constitutional rights and freedoms of foreigners.

Purpose of research:

The aim of this paper is to analyze the adopted procedural solutions in proceedings before public administration bodies when one of the parties is a foreigner. This paper will focus on selected institutions of the administrative procedure in the context of the protection and implementation of the fundamental constitutional rights and freedoms of every person.

Methods:

The formal-dogmatic method, the system-structural method and the method of legal interpretation.

Keywords: rights of persons and citizens; rights of foreigners; administrative procedure

1. Introduction

Nowadays, more and more attention is being paid to the issues of human rights. This refers to the first generation of human rights as well as to political, economic, social and cultural rights. Those rights are expressed not only in constitutions of respective countries but also, and more importantly, in numerous international regulations, which set the world standards in this regard. The realization of the above-mentioned rights is very often dependant on the actions taken by the organs of public authority which shall function on the basis of, and within the limits of, the law¹. Consequently, the guarantees for the protection and the execution of these rights should be enshrined in the provisions of the code of administrative procedure, which governs proceedings before public administration bodies. Taking into account the aim of this paper it will be necessary to analyse legal solutions introduced into the Polish legal system, especially regulations governing administrative procedure, which concern foreigners. Our analysis will focus not only on special provisions applicable specifically to the latter but also on general principles guaranteeing protection of human rights for every person. As a starting point for our discussion we will adopt the European perspective, paying special attention to the values of the European Union (EU) as well as the measures conducive to the achievement of the objectives of the Treaties. Our analysis will concentrate on the language policy solutions and the rights arising therefrom.

The aim of this paper is to analyse the adopted procedural solutions in proceedings before public administration bodies when one of the parties is a foreigner. We will focus on selected institutions of the administrative procedure in the context of protection and implementation of fundamental constitutional rights and freedoms of every person, giving priority to the so-called right to communicate with public authorities in the language that one understands as a guarantor of the enforcement of the other rights.

In the first part we will discuss the subject of multilingualism in the EU and its implications in the area of the adopted legislative solutions. Then we will briefly present rights of foreigners in proceedings before public administration bodies, conferred on them by the Constitution

¹ According to Article 7 of the Constitution of the Republic of Poland of 2 April 1997 „The organs of public authority shall function on the basis of, and within the limits of, the law”

of the Republic of Poland² (Constitution), the Code of Administrative Procedure³ (CAP) and other special provisions. In the remainder of the paper, we will refer to and analyse the Polish language legislation and the guarantees resulting from it in the context of the protection of rights and freedoms of persons who do not hold Polish citizenship. Finally, we will consider if, taking into account today's diverse and multicultural society, the administrative procedure is flexible and sufficient enough to ensure the protection of constitutional rights and freedoms of foreigners.

2. Language policy of the European Union

In a multilingual European community languages not only play a key role in the everyday life, but they are also crucial in order to respect the rights of persons as well as cultural and linguistic diversity. And the respect for linguistic diversity is one of the fundamental values of the EU, which is incorporated into the primary legislation of the EU (European Parliament, 2017, p. 17).

The content of the preambles of both treaties (the Treaty on European Union⁴ (TEU) and the Treaty on the Functioning of the European Union⁵ (TFEU)) constitutes the axiological basis of the treaties and provisions contained therein. Taking into consideration the fact that, as of now, the EU is comprised of 28 member states and has 24 official languages (which are also authentic languages of the EU), the wording of the preamble of the TEU seems to play an important role in understanding the EU's institutional arrangements. According to the preamble of the TEU the High Contracting Parties of the Treaty have decided to establish the EU:

“ [...] confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

² The Constitution of the Republic of Poland of 2 April, 1997 (Journal of Laws of 1997, No. 78, item 483, as amended). English translation available at: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

³ The Act of 14 June 1960 – the Code of Administrative Procedure (Consolidated text: Journal of Laws of 2016, item 23, as amended). English translation available at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1329.

⁴ The Treaty on European union (Consolidated version 2016) – OJ C 202 (2016).

⁵ The Treaty on the Functioning of the European Union (Consolidated version 2016) – OJ C 202 (2016).

[...]

desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions, [...]

resolved to establish a citizenship common to nationals of their countries, [...]

resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity, in view of further steps to be taken in order to advance European integration, [...]"

The fact that the preamble contains references to the values such as the respect for the history, culture and traditions of the peoples of the member states, constitutes a declaration of the will to preserve the multicultural character of Europe also in its new institutional order. Moreover, pursuant to Article 3 (3) of the TEU, the EU shall both respect its rich cultural and linguistic diversity and ensure that its cultural heritage is safeguarded and enhanced. Additionally Article 4 (2) of the TEU constitutes the principle of the respect of the equality of all member states and their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. Similar provisions are contained in the Charter of Fundamental Rights of the European Union (Charter)⁶. According to its preamble the EU:

“[...] contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels [...]”

This declaration is subsequently repeated in Article 22 of the Charter, which states that the EU respects cultural, religious and linguistic diversity. Furthermore, Article 21 of the Charter prohibits any forms of discrimination on account of language. In addition to that, Article 41(4) of the Charter constitutes the every person's right to communicate with the institutions of the EU in one of the languages of the Treaties and to receive an answer in

⁶ The Charter of Fundamental Rights of the European Union (Consolidated version 2016) – OJ C 202 (2016).

the same language. The indicated right is considered to be one of the rights constituting the right to good administration (Mańko, 2017, p. 2).

The linguistic issues are also referred to in the TFEU. According to its Article 165 (1):

“The Union [recognize] [...] the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity [...]”.

Furthermore, according to Article 20 TFEU every citizen of the EU has the right to petition the European Parliament, apply to the European Ombudsman, and address the institutions and advisory bodies of the EU in any of the Treaty languages and obtain a reply in the same language. This is confirmed by Article 24 TFEU, which also regulates the right of every citizen to communicate with the institutions and bodies of the EU in any of the authentic Treaty languages. It should also be noted that according to Article 342 TFEU the rules governing the languages of the institutions of the EU are laid down by the Council, acting unanimously by means of regulations. There are two Council Regulations, which were issued separately for the then European Economic Community and Euratom in 1958⁷ and repeatedly amended afterwards, still in force as the legal acts defining the linguistic system of the EU (Mańko, 2017, p. 3). It is also worth mentioning that the European Parliament also (2017, p. 18):

“[...] has adopted a full multilingual language policy, meaning that all EU languages are equally important. All parliamentary documents are translated into all the official languages and every Member of the European Parliament has the right to speak in the language of his or her choice. [...]”

From all of the above-mentioned provisions it follows that the linguistic issues and the question of using a particular language are widely addressed in the primary and secondary law of the EU. Therefore, it can be said that the EU has a well-developed system of language rules, which constitutes the principle of multilingualism (Schilling, 2008, p. 1232). This is strongly connected with the fact that, as Czarnecki observes (2014, p. 38):

⁷ Council No 1 of 15 April 1958 determining the language to be used by the European Economic Community and Council Regulation No 1 of 15 April 1958 determining the language to be used by the European Atomic Energy Community.

“ [...] the democratic values, on which EU’s policy is based, clearly support multiculturalism and linguistic pluralism as a prerequisite for a common policy of transparent relations between the Community institutions and bodies”.

For the purposes of this article the most interesting element of the principle of multilingualism is the right of citizens of the EU to communicate with the EU institutions in any of the authentic languages of the EU, together with the right to get an answer in the language chosen by them. These legally guaranteed rights are not only a way of improving communication between the EU institutions and citizens of the EU but are also, as it was mentioned before, important components of the right to good administration which constitute a guarantee of the enforcement of the other rights and freedoms. And as Baaji states (2012, p. 3):

“[...] democratic entitlements of EU citizens play a role in the external element of institutional multilingualism, that is, in the external communication and interaction of EU institutions with European citizens and stakeholders. The EU policy here aims to ensure that EU citizens have equal access to EU institutions and the legislation that they adopt, without language barriers. [...]”

3. The rights of foreigners in proceedings before public administration bodies

The number of foreigners in Poland who hold valid documents authorising them to stay in the territory of the Republic of Poland has been increasing every year – from 146,000 in 2013 to over 234,000 in 2016⁸. Thus, it comes with no surprise that administrative proceedings either commenced by foreigners or when one of the parties is a foreigner have become more frequent. It must be noted that in proceedings before public administration bodies foreigners have certain rights, under both constitutional, statutory and international law, which overlap to a large extent with the rights conferred on Polish citizens. The most interesting and fundamental of those rights, in the context of administrative procedure, will be presented in this section.

⁸ Statistics available at: <https://udsc.gov.pl/ponad-234-tys-cudzoziemcow-z-prawem-pobytu-w-polsce/>.

The Constitution sets out several general principles referring to the rights of all persons and citizens. For instance, it requires all the public authorities to respect and protect the inherent and inalienable dignity of all persons, which constitutes a source of freedoms and rights of persons and citizens (Article 30). It also provides that all persons have the right to equal treatment by public authorities and no one shall be discriminated against in political, social or economic life for any reason whatsoever (Article 32 (1) and (2)). Consequently, foreigners shall be treated by all public authorities in the same manner as Polish citizens with due respect for human dignity. In this place it should be also pointed out that the Constitution provides that potential limitations on the constitutional rights and freedoms with respect to foreigners shall be specified by the statute (Article 37 (2)). Of the remaining constitutional rights and freedoms afforded to both citizens and foreigners, particular attention should be given to:

- 1) the right to submit petitions, proposals and complaints in the public interest, in his own interest or in the interests of another person – with his consent – to organs of public authority (Article 63 of the Constitution);
- 2) the right to appeal against decisions made at first stage of the proceeding (Article 78 of the Constitution);
- 3) the right of everyone whose constitutional freedoms or rights have been infringed to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution (Article 79 (1) of the Constitution)⁹;
- 4) the right to apply to the Ombudsman for assistance in protection of a person's freedoms or rights infringed by organs of public authority (Article 80 of the Constitution).

Furthermore, foreigners have been afforded the additional protection by the Constitution. Under Article 56 foreigners have the right of asylum in the Republic of Poland in accordance with principles specified by statute ((1)) and the right to be granted refugee status in

⁹ The right established in Article 79 (1) of the Constitution does not relate to the right of asylum and the right to be granted refugee status laid down in Article 56 of the Constitution.

accordance with international agreements to which the Republic of Poland is a party ((2)).

In addition to that, the Constitution sets out one of the fundamental principles governing the functioning of the public administration. According to its Article 7 all the organs of public authority shall function on the basis of, and within the limits of, the law. A similar provision has been included in the CAP, whose Article 6 says that public administration bodies shall act in accordance with the law. It basically means that all actions taken by the public authorities must comply with the law and be based on an appropriate legal basis. It follows that the organs of public authority are obliged to respect all the rights granted to foreigners in administrative procedure by the Constitution, the CAP and others statutes. Among those rights Wencel (2009, pp. 4-16) mentions:

- 1) the right to information which consists of: the right to obtain full and proper information regarding the factual and legal circumstances which may affect the establishment of the rights and the obligations that are the subject of the administrative proceedings as well as all the necessary clarifications and advice from the public administration bodies (Article 9 of the CAP); the right to be actively involved in each stage of proceedings and to express an opinion on the evidence and materials collected and the claims filed before any decision is issued (Article 10 of the CAP); public administration bodies' obligation to explain to the parties the basis for the rules used to decide a case, so that a decision may be implemented by the parties without the need for coercive measures (Article 11 of the CAP); the right to view the files and to make notes or copies thereof at each stage of the proceedings (Article 73 of the CAP);
- 2) the right to have one's case dealt with by a public administration body without undue delay (Article 12 of the CAP);
- 3) the right to be represented by an attorney unless the nature of the case requires it to enter a personal appearance. Any natural person having an unlimited legal capacity may act as attorney (Article 32 and 33 of the CAP);
- 4) the right to bring a petition, complaint or proposal to state bodies, local government bodies and social organisations and institutions (Article 221 of the CAP);
- 5) the right to communicate in the language intelligible to a foreigner.

The right to communicate in the language intelligible to a foreigner deserves a particular attention due to the fact that it constitutes a prerequisite for the actual exercise of the other rights granted to foreigners in proceedings before public administration bodies. Therefore, the other part of the paper will focus on the analysis of the right to communicate in the language intelligible to a foreigner in proceedings before public administration bodies in the light of selected issues of the Polish language policy as well as its fundamental importance in achieving the full enforcement of the rights and freedoms of the individual.

4. The Polish language policy

The Polish legislation, as it was already mentioned, grants foreigners numerous rights and freedoms which oftentimes overlap with the rights and freedoms conferred on Polish citizens. It must be taken into consideration that the enforcement of the most of those rights is very often dependant on the actions taken in the proceedings before public administration bodies, which shall function in compliance with the principle of the officialdom of the Polish language¹⁰. In this part of the paper the basic legal acts governing the issues of the use of the Polish language, both in private and in public, will be presented.

The Constitution contains two provisions which directly refer to linguistic issues. One of them is Article 27, located in Chapter I – the Republic, which states that “Polish shall be the official language in the Republic of Poland” and that this “shall not infringe upon national minority rights resulting from ratified international agreements”. Another one is Article 35, located in Chapter II – the Freedoms, Rights And Obligations Of Persons And Citizens, whose paragraph 1 guarantees “Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture”. In addition to that paragraph 2 sets out the right of national and ethnic minorities “to establish educational and cultural institutions, institutions designed to protect religious identity, as

¹⁰ The principle of the officialdom of the Polish language is expressed in Article 27 of the Constitution according to which Polish shall be the official language in the Republic of Poland.

well as to participate in the resolution of matters connected with their cultural identity”.

The principle set out in Article 27 of the Constitution, which mandates Polish as the official language of the Republic of Poland, is in principle addressed to the bodies and institutions which exercise public authority. This principle is further developed in the Act on the Polish Language¹¹, which obligates public administration bodies to use exclusively Polish language when fulfilling their tasks and duties. Its Article 4 sets out a catalogue of public bodies and institutions which shall use the Polish language as an official language. The indicated provision refers to all Polish Constitutional bodies, including inter alia public administration bodies and administrative courts. Moreover, Article 5 (1) of the Law on the Organisation of Common Courts¹², which is also applied to the proceedings before administrative courts on the basis of Article 29 (1) of the Law on the Organisation of Administrative Courts¹³, states that the official language of proceedings before common courts is the Polish language. It must be noted that Polish legislation does not contain separate provisions regulating the issue of so-called judicial language (Mostowik, Żukowski, 2001, p. 67). However, it seems that the constitutional obligation to use the Polish language, addressed to the public authorities, does not extend to the Polish citizens. The Constitution does not contain any provisions which impose the obligation of knowing the Polish language on Polish citizens¹⁴. Consequently, the requirement of knowing the official language of courts and public administration bodies certainly cannot be imposed on foreigners.

It is worth noting that quite detailed regulation of the issues concerning the protection of the Polish language in public life results from, to some

¹¹ The Act of 7 October 1999 on the Polish Language (Consolidated text: Journal of Laws of 2017, item 60, as amended).

¹² The Act of 27 July 2001 – The Law on the Organisation of Common Courts (Consolidated text: Journal of Laws of 2016, item 2062, as amended).

¹³ The Act of 25 July 2002 – the Law on the Organisation of Administrative Courts (Consolidated text: Journal of Laws of 2016, item 1066, as amended)

¹⁴ Furthermore, the Act on Polish Citizenship does not regulate this issue explicitly. Its Article 30 (2) provides that a foreigner (with the exceptions) applying for recognition as a Polish citizen should have officially confirmed knowledge of the Polish language. See the Act of 2 April 2009 on Polish Citizenship (Consolidated text: Journal of Laws of 2012, item 161, as amended).

extent, historic reasons. This is indicated by the wording of the preamble to the Act on the Polish Language, which says the Parliament of the Republic of Poland adopted this act having regard to the experience of history when the conquerors' and occupiers' fight with the Polish language was an instrument of denationalisation and to the fact that the Polish language constitutes a fundamental element of the national identity and presents a value of the national culture¹⁵.

The linguistic issues are also regulated by the Act on National and Ethnic Minorities and on the Regional Languages¹⁶. Its adoption constitutes a response to the commitments made by the Republic of Poland when acceding the Council of Europe's Framework Convention for the Protection of National Minorities and signing the European Charter for Regional or Minority Languages.

Among the most essential provisions of the above-mentioned Act one can identify the definition of the national and ethnic minority, the catalogue of minorities which are recognized as national minorities by the Act, the right to use, as supporting, the minority language as well as the official one before municipal authorities. The Act on National and Ethnic Minorities and on the Regional Languages obligates public authorities to take appropriate measures in order to support the activity aimed at protection, maintenance and development of cultural identity of the minorities¹⁷.

5. Rights of foreigners to use a language other than the official language before public administration bodies

It is worthwhile noting that the principle of the officialdom of the Polish language, which assumes that all the official actions of the public administration bodies as well as parties' documents and declarations of

¹⁵ The Preamble to the Act of 7 October 1999 on the Polish Language. English translation available at: http://www.polishlaw.com.pl/pdf/act28b_new.pdf.

¹⁶ The Act of 6 January 2005 on national and ethnic minorities and on the regional languages (Consolidated text: Journal of Laws of 2017, item 823). English translation available at: http://ksng.gugik.gov.pl/english/files/act_on_national_minorities.pdf.

¹⁷ See <http://mniejszosci.narodowe.mswia.gov.pl/mne/prawo/zapisy-z-konstytucji-r/6481,Podstawowe-prawa.html>.

will shall be performed in Polish language, is limited by certain special regulations. In the following part of the article, selected statutory regulations which allow foreigners, and in some cases also Polish citizens, to communicate with public administration bodies in a language other than the official language will be presented.

Taking into consideration the purpose of this article, regulations introduced by the Act on National and Ethnic Minorities and on the Regional Languages deserve special attention. This is due to the fact that they govern a number of linguistic issues, such as the use of minority languages as a supporting language before public administration bodies. Thus, Article 7 and 8 of the Act in question (located in Chapter 2 – The use of a minority language) provide for the right of people belonging to a minority to use and spell their first and last names according to the spelling rules of their respective minority language, in particular in the official register and identity documents, as well as the right to use freely their minority language in public and private life, spread and exchange information in their minority language, run information of a private nature in their minority language and learn their minority language or to be taught in this language. Whereas, according to Article 9 (1) it is permissible to use, as supporting, the minority language as well as the official one before the municipal authorities. However, this is restricted only to these municipalities where the number of minority residents, whose language is to be used as a supporting one, is no less than 20 percent of the total number of the municipality residents and who have been entered into the Official Register of Municipalities where a supporting language is used (Article 9 (2))¹⁸. The possibility to use the minority language as a supporting language is described in Article 9 (3), which states that persons belonging to a minority have the right to apply to the municipal authorities in the supporting language (both in written and oral form) and the right to obtain, on a person's distinct request, an answer in the supporting language (also in written or oral form). In addition to that, paragraphs 4-7 of Article 9 lay down further rules concerning the use of the supporting language, such as the right to submit an oral or written

¹⁸ The list of the municipalities which have been entered into the Official Register of Municipalities where a supporting language is used is available at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/rejstry/urzedowy-rejestr-gmin/6884,Urzedowy-Rejestr-Gmin-w-ktorych-jest-uzywany-jezyk-pomocniczy.html>.

application in the supporting language and the exclusive use of the official language in the appeal proceedings. What is particularly important is that any doubts shall be resolved on the basis of a document drawn up in the official language. It follows that the supporting language, under the provisions currently in force, may be used only “in addition to” the official language and never “instead of” it (Skora, 2005, p. 415).

In a slightly different context the issue of using a language other than the official language before public administration bodies is regulated by two other acts – the Act on Foreigners¹⁹ and the Act on granting protection to foreigners within the territory of the Republic of Poland²⁰. These two acts lay down comprehensive rules governing the administrative aspects concerning the foreigners’ stay within the territory of the Republic of Poland (Kamiński, 2011, p. 187). Therefore, both of them often constitute the legal basis in jurisdictional administrative procedure understood as (Kamiński, 2011, p. 186):

“[...] the type of proceeding which is conducted by public administration bodies in order to settle an individual administrative case by issuing a specific individual administrative act called an administrative decision. [...]”²¹

Moreover, bearing in mind foreigners’ particular status, the above-mentioned acts provide some specific procedural solutions to administrative proceedings where one of the parties is a foreigner (Kamiński, 2011, p. 190). As Kamiński observes (2011, p. 190) the aim of those specific procedural solutions is to:

“[...] simplify and expedite proceedings by mitigating certain procedural requirements, taking into account the particular nature of the subjective and objective circumstances of administrative cases which are the subject of proceedings governed by those acts. [...]”

¹⁹ The Act of 12 December 2013 on Foreigners (Consolidated text: Journal of Laws of 2016, item 1990). English translation available at: http://enbss.uw.edu.pl/wp-content/uploads/sites/91/2015/11/act_on_foreigners_en_EC.pdf.

²⁰ The Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (Consolidated text: Journal of Laws of 2016, item 1836). English translation available at: <https://emn.gov.pl/ese/legislation/polish-legal-acts/8783/The-main-legal-acts-regulating-the-situation-of-foreigners-in-Poland.html>

²¹ Regarding an administrative case and an administrative decision see: Kamiński, 2011, 186, and the literature listed therein.

The discussed distinctive procedural solutions, which stem from the particular nature of administrative cases involving foreigners, concern, *inter alia*, the principle expressed in Article 4 of the Act on the Polish Language. That is because the general obligation to use Polish as the official language applies to all actions taken by public administration bodies, regardless of whether the case is dealt with orally or in writing. With regard to the latter, according to Kamiński (2011, p. 191), the obligation to use the Polish language extends to:

“ [...] all the documentation in the files of the case, which also implies that the sworn translations are required in the case of source documents drawn up in a foreign language. [...] ”

Amongst the provisions of the Act on Foreigners particular attention should be paid to Articles 7 and 8. According to the former the administrative body instituting checks in relation to a foreigner shall instruct the foreigner in writing in a language understandable to him/her about the procedure and its principles, as well as about the rights granted to him/her and obligations imposed on him/her (Article 7 (1) point 2). Whereas the latter states that applications submitted in proceedings in front of a consul and documents drawn up in a foreign language, used as evidence in proceedings under the Act on Foreigners conducted in front of a consul, shall be submitted in the Polish language or in the language indicated by the consul (Article 8 (3)). On the other hand, according to Article 11 (1) of the Act on granting protection to foreigners within the territory of the Republic of Poland the authority carrying the proceedings, shall ensure – if need be – the translation into Polish of documents written in a foreign language, accepted as the evidence in the proceedings concerning refugee status or asylum.

The above-mentioned articles, together with other provisions of the Act on Foreigners and the Act on granting protection to foreigners within the territory of the Republic of Poland, constitute in Kamiński's view (2011, p. 192) a normative confirmation of the realization of the general principles of the administrative procedure, including the principle of informing the parties (Article 9 of the CAP) and the principle of active participation of the parties in administrative proceedings (Article 10 of the CAP). However, the question to be considered now is to what extent the adopted procedural

solutions (both in the CAP and other special regulations) guarantee the enforcement and protection of rights of foreigners in proceedings before public administration bodies. This question will be examined in the following section.

6. The right to communicate in an intelligible language as a guarantee of the enforcement of the majority of the rights and freedoms of the individual

6.1. Introduction

The right to communicate in an intelligible language is one of the rights mentioned in the section on the rights of foreigners in proceedings before institutions of public administration. We also gave this right the rank of a superior law, being simultaneously a guarantor of other rights. In this context, it is worth noting that this right is not directly expressed either in the Constitution nor in any of the specific acts of Polish law²². It is certain that the right to communicate in intelligible language is expressed in EU law, however, it is contained within the so-called right to good administration (Mańko, 2017, p. 2).

The issue of using a particular language as the issue going beyond the framework of the constitutional principles of the state were already mentioned by J. Trzciński, M. Wiącek and A. Wiltos²³. The authors noted that this issue should also be considered in the mark of individual rights and freedoms. In the Constitution we find many provisions that, although not directly, are related to the use of language in public and private life. Examples include Article 49 of the Constitution guaranteeing freedom of communication, Article 54 of the Constitution providing freedom of expression and the acquisition and dissemination of information, as

²² See Wencel K., „Prawa cudzoziemców w postępowaniu przed organami administracji publicznej”, *Analizy Raporty Ekspertyzy Stowarzyszenia Interwencji Prawnej*, 4, 2009.

²³ See Trzciński J., Wiącek M., „Znaczenie art. 27 Konstytucji dla statusu jednostki w RP”, *Państwo Prawa – Parlamentaryzm – Sądownictwo Konstytucyjne. Pamięci Profesora Zdzisława Czeszejki-Sochackiego*, (red. A. Jamróż), Białystok 2012; Wiltos A., „Znaczenie art. 27 Konstytucji dla ochrony praw i wolności jednostki”, *Przegląd Prawa Konstytucyjnego*, 4 (16), 2013.

well as Article 73 of the Constitution on the freedom of artistic creativity, scientific research and publication of their results, freedom of teaching, and the freedom to use cultural goods. All the aforementioned provisions take into account not only the content of any given statement or expression but also their form. In this way, they can be seen as a guarantee of communicating information in a language of one's own choice and presenting one's own views in it. Additionally, we should make a reference to a number of political rights and freedoms, and to the right to public information (Article 61 (1) of the Constitution) and the right to issue petitions and complaints in particular (Article 63 of the Constitution) as they appear to be exceptionally related to linguistic issues.

The protection of the language as a certain value, as a part of the national heritage, is mentioned explicitly only in Article 35 (1) of the Constitution, according to which the Republic of Poland shall ensure Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture. The importance of this regulation as the right of the individual is emphasized by the fact that, according to Article 233 (2) of the Constitution, even during the state of emergency limitation of the freedoms and rights of persons and citizens only by reason of, *inter alia*, language shall be prohibited. Such strong protection of the freedom of use of any language of choice results from the general rule set out in Article 32 of the Constitution, prohibiting discrimination in political, social or economic life for any reason whatsoever, and the cited provision of Article 233 (2) seems to detail the aforementioned provision (Trzciński, Wiącek, 2012, p. 305). The wide range of rights and freedoms that relate to the use of language in public and private life points to the role that language plays in our lives, not only as a means of communication but also as an element of our culture, and of individual and national identity (Wiltos, 2013, p.169-171).

Bearing in mind how important the right to communicate in intelligible language is to the protection of the rights and freedoms of individuals, we are going to analyze the already mentioned language-related solutions that one employs before public administration bodies. In the first place, we will refer to those provisions which allow the direct use of language other than the official language. In the second place, we will analyze those solutions which secure the assistance of an interpreter. Finally, we

will present selected case law of the Administrative Courts and of the Constitutional Tribunal related to linguistic matters in the administrative procedure where one of the parties is a foreign national.

6.2. Possibility to use a language other than the official in proceedings before a public administration body

In accordance with the rule stemming from Article 4 of the Act on the Polish Language the official language of all institutions of public administration is Polish. Some exceptions to this rule were shaped by specific acts due to the exceptional nature of the issues they dealt with. We have distinguished some of the rules that shape the deviation from the rule of using Polish language, among others, Article 7 (1) point 2 of the Act on Foreigners according to which the Administrative Body taking any action of control of a foreigner shall inform them in writing in a language which the foreigner understands of the rules and procedure and of one's rights and obligations. Similar regulations which prescribe the rules for giving instructions to foreigners or conducting a hearing in a language comprehensible to them can be found in Articles 173, 311, 314 (3), 327 (2), 402 (2) or 411 of the Act on Foreigners, or Articles 26 (3) item 2, 28 (1), 29 (1), 30 (1) item 5, 32 (3), 54 (5), 68 (2), 80a, 82a item 7, 88 (4), 89ca, 89d, 111, 118 of the Act on granting protection to foreigners within the territory of the Republic of Poland. It is worth noting that in the first group of situations the right to use a language other than the official one appertains only to an institution of public administration. It is the administrative institution that is vested with the power to pass on strictly defined information to a second party in a language intelligible to the other party. Moreover, there is a specified limit on the information that are to be given in a language other than the official one: information concerning the actions taken against an individual, issued orders, and certain rights of the parties to proceedings such as the right to appeal against a decision or the right to file a complaint against a court order. A foreigner must undertake all actions before a public administration body, in principle, in the official language, and thus in the Polish language²⁴.

²⁴ Leaving aside the issue of the use of a supporting language.

Any deviation from the principle of the officialdom of the Polish language introduced in the selected provisions of the Act on Foreigners and the Act on granting protection to foreigners within the territory of the Republic of Poland is therefore a passive right from the point of view of the foreigner. A public administration authority offers a very narrow range of information in a language other than the official language, and such information is limited to a strictly defined category of administrative matters (rules governing the entry, transit, stay and departure of foreigners from the territory of the Republic of Poland and the principles of granting protection to foreigners within the territory of the Republic of Poland), which seems to stand in stark opposition to the right to communicate in intelligible language. This kind of administrative procedure may restrict access to an active participation of foreigners in the proceedings and to the full exercise of their rights. Let us note that within the provisions contained in the analyzed acts, we find an implementation of the possibility of active use by a foreigner of the derogation from the principle of the officialdom of the Polish language only in Article 8 (3) of the Act on Foreigners and Article 82a item 7 of the Act on granting protection to foreigners within the territory of the Republic of Poland. For the former it is possible by submitting an application to the consul in the Polish language or the language indicated by the consul. As for the latter the right to active communication in the mother tongue with a public administration body is granted to foreigners who stay in guarded centers for foreigners. They can file complaints and motions concerning the functioning of the center and the conditions of stay therein submitted to the Head of the Office in their mother tongue (Article 82a item 7).

6.3. Possibility to use an interpreter in proceedings before public administration bodies

The regulation concerning the participation of the translator in proceedings before the public administration bodies and the possibility of presenting documents prepared in a foreign language, together with their translation into Polish, consist a separate group of regulations. The CAP mentions the language only once and it is precisely in the context of interpreter's involvement in proceedings before the public

administration. According to Article 69 (2) in minutes of hearings where the person giving evidence has done so in a foreign language, the Polish-language translation shall be recorded together with the name and address of the translator involved and the translator should sign the minutes of the hearing. The given provision therefore entitles the foreigner to use the help of an interpreter. However, it does not introduce any guarantee of the free provision of such assistance, suggesting that the aid in question is limited exclusively to the question of hearings. The issue of relevant regulations at the stage of judicial review of public administration activities is different, where, under Article 29 (1) of the Law on the Organisation of Administrative Courts where in matters not covered by the aforementioned law, there are applicable certain provisions of the Law on the Organisation of Common Courts, especially Article 5 (1). According to this provision the official language of proceedings before courts is the Polish language. A person who does not sufficiently speak the Polish language has the right to appear in court in a language of his / her choice, and be provided a free of charge interpreter (2). The granting of an interpreter to the person referred to in (2) shall be decided by the court competent to hear the case in the first instance. An application for an interpreter filed in the course of a case shall be presented to the court of the instance in which the case is pending (3). It was therefore necessary to introduce appropriate regulations on the free assistance of translators and interpreters to persons who do not speak nor understand sufficiently the official language at the stage of judicial proceedings. This seems to be the result of the need for the most complete realization of the content of Article 45 of the Constitution that guarantees that everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Regarding the problem of free interpreter assistance, it should be noted that although this right was not guaranteed directly in the Constitution, it stems from many constitutional rights and freedoms. According to Article 32 (1) all persons shall be equal before the law and all persons have the right to equal treatment by public authorities. Moreover, according to section 2 of the cited provision, no one shall be discriminated against in political, social or economic life for whatever reason. The absolute prohibition of discrimination, including the prohibition of discrimination on the grounds

of language, imposes on the public authorities the obligation to protect specifically those belonging to national minorities and those whose first language is not the official language of the Republic of Poland. Therefore language cannot be a relevant feature to limit any of the constitutionally guaranteed rights.

The Legislator shapes the issue of the interpreter's participation in administrative proceedings and the rules of using documents prepared in a foreign language together with their translations into the official language in a non-uniform manner. For example, the selected provisions of the Act on Foreigners and the Act on granting protection to foreigners within the territory of the Republic of Poland guarantee the free assistance of an interpreter, both in the scope of oral help and in the preparation of written translations. According to Article 179 and 327 (1) of the Act on Foreigners public authority conducting the proceedings with regards to the granting of a temporary residence permit for victims of human trafficking (Article 179) and on the issue of the decision on imposing the return obligation (Article 327 § 1) provide the foreigner who does not speak Polish sufficiently well with the help of an interpreter. According to Articles 11 (1), 44 (4) item 3 and 65 (2) of the Act on granting protection to foreigners within the territory of the Republic of Poland, the authority provides a translation into Polish of documents issued in a foreign language admitted as evidence in proceedings (11 (1)), as well as free assistance of an interpreter in a language understood by the applicant (44 (4) item 3) during the procedure for granting international protection or asylum. This provision is specially emphasised in the case of hearings involving an unaccompanied minor (65 (2)). In cases other than the ones already mentioned, the burden of professional translator assistance and the preparation of translations into the official language rests on the party that does not speak Polish sufficiently or which lacks the necessary documentation in that language. This is due to the general principle the officialdom of the Polish language. It also stems from a number of specific regulations, such Article 8 of the Act on Foreigners, according to which applications relating to procedures regulated by the Act on Foreigners shall be drawn up in the Polish language ((1)). In addition to that documents drawn up in a foreign language, used as evidence in proceedings conducted under the Act on Foreigners, shall be submitted together with

their translation into the Polish language made by a sworn interpreter ((2)). At this point, the question arises whether such a configuration of the administrative procedure does not violate the constitutional principle of fair and efficient functioning of public institutions, as well as the aforementioned constitutional rights and freedoms, which can be drawn, for example, from article 32 of the Constitution.

6.4. Selected case law of the Administrative Courts and of the Constitutional Tribunal related to linguistic matters in the administrative proceedings where one of the parties is a foreign national

It is possible to observe the importance of protecting the rights and freedoms of individuals under the right to communicate in intelligible language on the basis of the case law of the Polish Administrative Courts and the Constitutional Tribunal.

In the resolution of 14 May 1997 the Constitutional Tribunal²⁵, referring to a regulation granting non-Polish speakers the right to speak in court in their mother tongue and to use an interpreter free of charge, noted that:

“[...] the realisation of this provision is a prerequisite for the correctness and the fairness of the trial wherein all participants are granted the opportunity to participate in it fully and consciously. [...]“

Similarly, the Voivodeship Administrative Court in Warsaw noted in judgment of 29 September 2009²⁶, in which the regulation resulting from Article 5 of the Law on the Organisation of Common Courts was defined as the procedural right pertaining to the party. On the other hand, the Supreme Administrative Court in judgment of 30 October 2008²⁷ stated that

“[...] the right to a free use of the interpreter’s assistance [...] the administrative court should inform the foreigner about this right according to Article 6 of the Law on the Procedure Before Administrative Courts [...] whenever there may be a reasonable doubt as to the extent of the foreigner’s Polish language mastery

²⁵ Resolution of the Constitutional Tribunal of 13 May 1997, W 7/96.

²⁶ Judgment of the Voivodeship Administrative Court in Warsaw of 29 September 2009, V SA/Wa 697/09.

²⁷ Judgment of the Supreme Administrative Court of 30 October 2008, II OSK 1097/07.

and knowledge. [...] Inadequate knowledge of the Polish language can lead to limitation of the possibility of defending oneself before an administrative court, thus violating the right to a fair trial.“

The fact that the lack of knowledge of the official language may actually affect the limitation of the rights of the parties during the administrative procedure has been pointed out by the Voivodeship Administrative Court in Warsaw in judgment of 23 February 2012²⁸, noting that:

“[...] It is not sufficient to instruct a party concerning the application [...], as there is no caution of the time and means of appeal available in the language understood by the foreigner. The obligation stemming from Article [7 (1) item 2] of the Act on Foreigners concerning the necessity to instruct the foreigner about the rules and procedure, and the rights, and responsibilities the foreigner has, should be understood more broadly as a means of instructing them about the possibilities of appealing against the court's decision in the case of a unfavourable sentence for the foreigner. The possibility to challenge an unfavourable decision is part of the procedure and the application of such possibility is provided for by law. [...] Failure by the authority to comply with Article [7 (1) item 2] is a breach that should be taken into account during the appeal proceedings. Had we accepted that it would be sufficient to instruct a foreigner at the moment of application without instruction in a language understandable to that foreigner, it would form a legal illusion and the foreigner would not be able to benefit from the right to appeal the decision”.

Moreover, the Voivodeship Administrative Court in Warsaw stated in sentence of 20 March 2014²⁹ that:

„[...] there is no justification for excluding the foreigner's right to receive the content of the decision in a language the foreigner understands [...] dealing with the suspension of the execution of the decision of expulsion, as well as information on the procedure and time-limit for appealing such decision. The effect of adopting a restrictive literal interpretation [...] would be to limit the right to court guaranteed to them in Article 45 (1) of the

²⁸ Judgment of the Voivodeship Administrative Court in Warsaw of 23 February 2012, V SA/Wa 2402/11.

²⁹ Judgment of the Voivodeship Administrative Court in Warsaw of 20 March 2014, IV SA/Wa 2750/13.

Constitution of the Republic of Poland concerning the control of decisions settling the accidental issues that were issued in the course of proceedings on the granting of refugee status, and their legitimation specified in the Act on Foreigners and the Act on granting protection to foreigners within the territory of the Republic of Poland would be illusory in this regard”.

7. Conclusions

In view of the foregoing considerations, it should be noted that in today's diverse and multicultural society the issue of communication in an intelligible language constitutes a major challenge for both parties of this process. Full and conscious participation in the process of communication is even more important when it influences the enforcement of our rights and freedoms. The realization of the above-mentioned rights is very often dependant on the actions taken before the public administration bodies which operate, under the applicable national rules, in the official language. Therefore, a foreigner who is a party to the administrative proceeding is confronted by a challenge of communicating in a language that he or she either does not know or know inadequately.

In accordance with the provisions in force, Polish is the official language in the Republic of Poland (Article 27 (1) of the Constitution) and any deviation from this principle must be clearly stated in the specific act. We have already distinguished three acts that shape the deviation from the principle of the officialdom of the Polish language – the Act on National and Ethnic Minorities and on the Regional Languages, the Act on Foreigners and the Act on Granting Protection to Foreigners within the Territory of the Republic of Poland. The former introduces a possibility of using the supporting language alongside the official language while the other two provide for that strictly defined category of administrative actions can be taken in a language intelligible to a foreigner. The aim of such a configuration of the administrative procedure was, as Kamiński points out (2011, p. 192), to confirm normatively the realization of the general principles of the administrative procedure.

However, the detailed analysis of the provisions of the CAP, specific legislative acts and the case law of the Administrative Courts and the Constitutional Tribunal revealed a number of problems arising from the adopted legal and procedural solutions.

In the first place, it should be observed that the scope of the regulations imposing the obligation to instruct a party that does not speak Polish sufficiently about his rights and obligations appears to be insufficient. The instructions given by public administration bodies tend to be formulated in a negligent manner, missing a lot of key information for a foreigner. Furthermore, the formal requirements concerning the discussed instructions are quite restrictive and shaped in a non-uniform manner which makes the protection resulting from the instructions illusory. Moreover, it follows from the case law of the Administrative Courts that special provisions concerning the obligation to instruct a foreigner about his rights do not apply to decisions settling the accidental issues.

It is also worth noting that within the legal framework which allows a foreigner to use the help of a translator, the burden of professional assistance and the preparation of translations into the official language rests, in general, on the party that does not speak Polish sufficiently or which lacks the necessary documentation in that language. The State provides, under the relevant provisions, the free assistance of translators to persons who do not speak nor understand sufficiently the official language only at the stage of judicial proceedings, completely overlooking administrative procedure in this context.

As Schilling points out (2008, p. 1241), it is difficult to think of a general principle of international law requiring the respect of the right to communicate in an intelligible language. However, it cannot be forgotten that mutual understanding is a prerequisite for the full and conscious participation in both administrative and judicial proceedings. The EU, founded on the values of respect for the rights and freedoms of individuals, sets the standards for communication in diverse and multicultural society. The Republic of Poland, as one of the members of such a society, should endeavour to respect the values common to all Europeans. It seems that among those values we can find certain standards in relations between public administration bodies and individuals. Those standards are expressed through the right to good administration which consists of, *inter alia*, the right to communicate in an intelligible language as a guarantee of the enforcement of the majority of the rights and freedoms of the individual.

Bibliography

Legislation:

The Constitution of the Republic of Poland of 2 April, 1997 (Journal of Laws of 1997, No. 78, item 483, as amended). English translation available at: <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

The Treaty on European union (Consolidated version 2016) – OJ C 202 (2016).

The Treaty on the Functioning of the European Union (Consolidated version 2016) – OJ C 202 (2016).

The Charter of Fundamental Rights of the European Union (2016) – OJ C 202 (2016).

Council No 1 of 15 April 1958 determining the language to be used by the European Economic Community and Council Regulation No 1 of 15 April 1958 determining the language to be used by the European Atomic Energy Community.

The *Act of 14 June 1960 – the Code of Administrative Procedure* (Consolidated text: Journal of Laws of 2016, item 23, as amended). English translation available at: http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1329.

The *Act of 7 October 1999 on the Polish Language*. http://www.polishlaw.com.pl/pdf/act28b_new.pdf.

The Act of 27 July 2001 – The Law on the Organisation of Common Courts (Consolidated text: Journal of Laws of 2016, item 2062, as amended).

The Act of 25 July 2002 – the Law on the Organisation of Administrative Courts (Consolidated text: Journal of Laws of 2016, item 1066, as amended).

The Act of 13 June 2003 on *granting protection to foreigners* within the territory of the Republic of Poland Foreigners (Consolidated text: Journal of Laws of 2016, item 1836). <https://emn.gov.pl/ese/legislation/polish-legal-acts/8783,The-main-legal-acts-regulating-the-situation-of-foreigners-in-Poland.html>.

The Act of 6 January 2005 on national and ethnic minorities and on the regional languages (Consolidated text: Journal of Laws of 2017, item 823). English translation available at: http://ksng.gugik.gov.pl/english/files/act_on_national_minorities.pdf

The Act of 12 December 2013 on Foreigners (Consolidated text: Journal of Laws of 2016, item 1990).

http://enbss.uw.edu.pl/wp-content/uploads/sites/91/2015/11/act_on_foreigners_en_EC.pdf

Court jurisdiction:

Resolution of the Constitutional Tribunal of 13 May 1997, W 7/96.

Judgment of the Supreme Administrative Court of 30 October 2008, II OSK 1097/07.

Judgment of the Voivodeship Administrative Court in Warsaw of 29 September 2009, V SA/Wa 697/09.

Judgment of the Voivodeship Administrative Court in Warsaw of 23 February 2012, V SA/Wa 2402/11.

Judgment of the Voivodeship Administrative Court in Warsaw of 20 March 2014, IV SA/Wa 2750/13.

Literature:

Baaij C. J. W., "The EU Policy on Institutional Multilingualism: Between Principles and Practicality", *International Journal of Language and Law*, 1 (2012)

Czarnecki P., *Komentarz. Ustawa o języku polskim*, Warszawa 2014

European Parliament, „Culture and education”, *Fact Sheets On The European Union*, PE 600.418

Kamiński M., „Postępowania administracyjne szczególne (odrębne) w sprawach uregulowanych w ustawach o cudzoziemcach oraz o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej”, *Studia Gdańskie. Wizje i rzeczywistość*, 2011 (8)

Mańko R., "Legal aspects of EU multilingualism", *European Parliamentary Research Service*, PE 595.914

Mostowik P., Żukowski W., *Ustawa o języku polskim. Komentarz*, Warszawa 2001

Schilling T., "Language Rights in the European Union", *German Law Journal* Vol. 09 No. 10 (2008)

Skibińska E., *Prawo Unii Europejskiej z wprowadzeniem*, Warszawa 2012

Skora A., „Wniesienie podania w języku mniejszości narodowej do organu administracji publicznej”, *Gdańskie studia prawnicze*, (red. A. Szmyt), t. XIV, 2005

Trzcіński J., Wiącek M., „Znaczenie art. 27 Konstytucji dla statusu jednostki w RP”, *Państwo Prawa – Parlamentaryzm – Sądownictwo Konstytucyjne. Pamięci Profesora Zdzisława Czeszejki-Sochackiego*, (red. A. Jamróz), Białystok 2012

Wencel K., „*Prawa cudzoziemców w postępowaniu przed organami administracji publicznej*”, *Analizy Raporty Ekspertyzy Stowarzyszenia Interwencji Prawnej*, 4, 2009

Wiltos A., „Znaczenie art. 27 Konstytucji dla ochrony praw i wolności jednostki”, *Przegląd Prawa Konstytucyjnego*, 2013/Nr 4 (16)

Websites:

<https://udsc.gov.pl/ponad-234-tys-cudzoziemcow-z-prawem-pobytu-w-polsce/>

<http://mniejszosci.narodowe.mswia.gov.pl/mne/prawo/zapisy-z-konstytucji-r/6481,Podstawowe-prawa.html>

<http://mniejszosci.narodowe.mswia.gov.pl/mne/rejestry/urzedowy-rejestr-gmin/6884,Urzedowy-Rejestr-Gmin-w-ktorych-jest-uzywany-jezyk-pomocniczy.html>