более тесному сотрудничеству и выход на более высокий уровень интеграции. Но необходимого экономического прорыва этот межгосударственный союз дать не мог из-за ограниченности сотрудничества. Причины вступления Республики Беларусь в Евразийский экономический союз является экономическими (необходимость повышения конкурентоспособности национальных экономик в условиях глобальной экономики), политическими (военные конфликты рядом с границами государств-членов, политическая воля и желание более тесной интеграции), социальными (миграционные процессы в государствах-членах).

Ключевые слова: Республика Беларусь, региональные интеграционные образования, Содружество Независимых Государств, Союз России и Белоруссии, Евразийский экономический союз.

Horupa T. Belarus as a Subject of International Organizations in the Postsoviet Space: Historical and Legal Aspects. In the article the author considers the place and role of Belarus in modern integrative formations/alignments, reveals the objective prerequisites for its entry into the regional integrative educational system in the postsoviet space of the late twentieth and early twenty first century. The study of the issue gives grounds to conclude that the need of Belarus to join the Commonwealth of Independent States was dictated by the necessity to establish international cooperation of a newly-formed sovereign state with the former Soviet republics. However, the gap in the international economic relations that were not preserved and deepened in the CIS, has led to the economic crisis in Belarus and other former Soviet countries. Establishment of the Union between Russia and Belarus can be explained by the political necessity, which was based on aspirations of the people of these countries for closer cooperation and desire to reach a higher level of integration. However, this interstate union could not give the necessary economic breakthrough due to the limited cooperation ties. Having analyzed the historical aspect of formation and development of the Eurasian Economic Union, the author classified the reasons for Belarus accession to the Union into the following groups: economic (the need to improve the competitiveness of national economies in the global economy); political (military conflicts close to the borders of the Member States, the political will and desire for closer integration); social (migration processes in the Member States).

Key words: Republic of Belarus, the regional integration formations, the Commonwealth of Independent States, the Union of Russia and Belarus, the Eurasian Economic Union.

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Applying Alternatives to Detention of Foreigners in Poland (2014-2015)

The above findings from the monitoring confirm that the provisions implementing alternatives to detention into Polish law are not a dead letter. The Polish Border Guard regularly resorts to the new measures safeguarding the procedure and in most cases the alternative measures serve their purpose. Thanks to the introduction of alternatives to detention many foreigners, including many families with children, have avoided the traumatic effects of deprivation of liberty. From the court practice it emerges that some courts also noticed the possibility to disregard the Border Guard's motions and order alternatives to detention. The fact that this mechanism is rarely applied seems to be caused, in our view, by the fact that the Border Guard prepares the motions to place a foreigner in a guarded centre in a very solid way.

Key word: detention, foreigners, minors unaccompanied, Border Guard, court, Poland.

Initial remarks. The present article has been prepared on the basis of research conducted as part of the project «Monitoring of the use of alternatives to detention of foreigners», completed by the Rule of Law Institute in June 2016 [1]. The project involved the examination of the use of alternatives to detention of foreigners, which are a relatively new instrument in the Polish law on foreigners and which have been introduced with the new act on foreigners, in force since 1 May 2014.

The starting point for pursuing research work was an earlier monitoring of judicial orders, on which foreigners were placed in guarded centers for foreigners, which was conducted by the Rule of Law Institute in the years 2012-2013 [2]. Initially, the rudimentary monitoring covered the period from 1 May 2014 to 30 June 2015. However, in the course of the project the timeframe was extended and the data was gathered until the end of 2015.

The accepted research methodology entailed collecting data on the use of alternatives to detention from the Polish Border Guard Headquarters and requesting (under the freedom of information act) information from 26 first instance courts in Poland on the number of motions from the Border Guard for placing a foreigner in a guarded centre and their outcome [3]. The subsequent stage of research included an analysis of the collected statistical data and court files. The conclusions reached are detailed in the current article. We believe that publishing the research results and creating access to the recommendations which we have drafted will contribute to the strengthening of rights of all migrants. The authors of this article were members of the project's research team [4].

Alternatives to detention, their regulation and implementation in Polish law. It is commonly assumed in migration law that if a foreigner's stay on the territory of the receiving country is undesirable, they should return to their country of origin or to any other country which will accept them. In such a case, a return decision is issued obliging the foreigner to return [5]. In a situation when there is a likelihood that the foreigner will not fulfill this obligation, the law permits detention of the irregular migrant [6].

It should be emphasized that deprivation of liberty in order to safeguard a foreigner's return is treated as a measure of last resort and is criticized on numerous occasions in the doctrine of human rights [7]. International law, as well as European Union and national legal instruments provide safeguards against arbitrary detention – it is suffice to mention e.g. the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights (Art.9) [8], the Geneva Convention relating to the status of refugees (Art. 26, 31) [9], the European Convention of Human Rights (Art. 5 and abundant case-law) [10] and the Charter of Fundamental Rights (Art. 6, 18, 19 and 47) [11].

One of the ways of making return policy more humanitarian was to implement a set of legal instruments for alternatives to detention of foreigners [12]. In accordance with the definition transpiring from the reception conditions directive [13], alternatives to detention include «non-custodial measures used to monitor and limit the movement of third-country nationals in advance of compulsory return or deciding on the individual's right to remain in the Member State, such as regular reporting, the surrender of a financial guarantee or travel documents, electronic monitoring» [14]. Moreover, the preamble to the reception conditions directive states that «detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants» [15].

The foundations of Polish migration law are created by the two acts of Parliament: Act on granting protection to foreigners within the territory of the Republic of Poland of 2003 [16] and Act on foreigners of 2013 [17]. The basis for using alternatives to detention in the Polish legal system is Art. 317(1) of the Act on foreigners [18]. In accordance with its provisions, in the return decision (until the time of voluntary return) a foreigner may be obliged to: 1) report at specified intervals to the authority indicated in the ruling – until the date of voluntary return; 2) pay a security deposit of an amount specified in the decision, no lower than twice the amount of the minimum wage stipulated by minimum wage regulations; 3) provide the deposit to the body indicated in the decision of the travel document; 4) reside in the place designated in the decision – until the day of voluntary return.

Thus, Polish legislators decided to introduce four alternative measures. It is worth emphasizing that the definition provided in the reception conditions directive includes an open catalogue of possible measures, which might be adopted by Member States. In accordance with the provisions of Art. 317(2) AF, the return decision may permit the use of one or several alternative measures, provided for in the act.

The wording of the above provision has been criticized in the doctrine of human rights – primarily due to the lack of immediate enforceability of the part of the decision imposing alternative measures. For instance, in a situation when a foreigner appeals against the return decision, the obligation to comply with alternative measures is also suspended, which may in turn impact on the effectiveness of the guarantee function of the provision [19].

Results of the monitoring of the use of detention and alternatives to detention with regard to foreigners in Poland in the years 2014-2015. Use of detention and alternatives to detention by the Border Guard authorities. The harmonization of Polish law with the EU legal system in the area of detention and the use of alternatives to detention resulted in a change in the practice of placing foreigners in guarded centers

[20] – alternative measures are more and more often applied and the number of foreigners placed in guarded centres is decreasing.

In 2013, a total of 1 755 foreigners were placed in guarded centres. After the new law came into force in 2014, the number decreased by one quarter (1322 foreigners). The year 2015 was another to witness a decrease in the number of foreigners placed in detention (1051).

Simultaneously, the Border Guard has started to resort to alternatives to detention provided for in the Act on foreigners and the Act on granting protection since 1 May 2014. The two major measures safeguarding the course of the procedure include the foreigner's obligation to reside in the place designated in the decision and to report to the Border Guard authority. The alternative of placing the travel document in the deposit (used only with regard to foreigners not applying for refugee status) or paying a security deposit are used extremely rarely.

Types and number of alternatives to detention used. From the data for 2015 (the first full year of using alternatives to detention) it transpires that the Polish Border Guard detained a total of 6249 foreigners, out of which under the Act on foreigners – 5824, and under the Act on granting protection – 425 foreigners. Alternatives to detention were used in a total of 768 cases, whereas 1051 foreigners were placed in guarded centres. The remaining persons (4 430 foreigners) were either released within 48 hours under Art. 394(5) AF or they were subject to other measures under Art. 394(4)(d-e) AF. From the explanations provided during interviews with Border Guard officers, it emerges that in many cases the Border Guard has carried out administrative duties in relation to foreigners without resorting to detention. It is further confirmed by the data published by the Head of the Office for Foreigners [21], according to which in 2015 the decisions obliging a foreigner to return were issued to 13 783 persons. It means that the majority of them were not detained and detention or alternatives to detention (a total of 1819 cases) were applied with regard to approximately 13% of foreigners with return decisions.

The greatest number of alternatives to detention was used within the area of competences of the Nadodrzański Border Guard Unit – 46,48% of the total number of alternatives to detention applied on the territory of the Republic of Poland.

With regard to the nationality of the persons subjected to alternative measures by the Border Guard, the most numerous group was that of nationals of the Russian Federation (39,8%) and nationals of Ukraine (17,3%).

The use of alternatives to detention with regard to nationality (2015). A noteworthy point is that in the first year of using alternatives to detention, from among the foreigners subjected to alternative measures under the Act on foreigners, as many as 67,46% of them did not comply with the applied alternatives. Of the foreigners applying for international protection in Poland in 2014, only 34% did not comply with the applied alternatives. In all, in the period between May and December 2014, a total of 166 foreigners (45,60%) out of 364 who were subjected to alternative measures did not comply with the applied alternatives [22]. In comparison, in 2015, out of a total of 768 foreigners subjected to alternatives to detention by the Border Guard authority, 243 persons did not comply with the ordered measures, which makes 31,64% of the total.

The most numerous group of foreigners who did not comply with the ordered alternatives to detention was that of nationals of the Russian Federation (89 out of 306 persons subjected to alternative measures did not comply with the ruling, which is 29,09%) and of Syria (38 out of 72 persons subjected to alternative measures did not comply with the ruling, which is 57,78%) [23].

The justification for the application of alternatives to detention may be further strengthened by the level of successfully completed return operations of foreigners with regard to whom alternatives were applied directly before the enforcement of the return decision. Only 21 out of 768 foreigners were forcibly returned. The remaining 504 foreigners who conformed to the alternative measures safeguarding the return procedure did not leave the territory of Poland. It may mean that it was impossible to properly implement a return decision with regard to many of them. Thus, it was right not to place them in guarded centres, since detention, as a rule, should be used in order to prepare return. As the return was impossible, the use of detention would have been unjustified.

On the other hand, it might be argued that using alternatives to detention makes it impossible to enforce return decisions, as only 2,7% foreigners submitted to alternatives to detention were successfully returned. For the sake of comparison, from the Border Guard data it transpires that in 2015, there were 577 foreigners transferred directly from guarded centres to Poland's border in order to enforce the return decision, which places the enforceability at the level of 46,27% of the total number of foreigners detained in those centers [24].

The collected data denotes a constant decrease in the number of foreigners placed in guarded centres in Poland. In so far as before the new law on foreigners came into force in 2013, there were 1 755 foreigners placed in guarded centres, the numbers of the following years (2014 – 1332 and 2015 – 1051) denote a decreasing tendency in the detention of foreigners in Poland. It must be attributed to the increasing number of situations where alternatives to detention were applied. In the years 2013-2015 six guarded centres for foreigners were operating in Poland. One of them (guarded centre in Lesznowola) was being modernized in the years 2015-2016 hence foreigners were not placed there.

An increase in the length of the average period of detention in guarded centres in the years 2014-2015 may be a sign of lengthy return procedures. In so far as in 2014 the average period of stay was 66,3 days (even including the prolonged stay of foreigners in the guarded centre in Lesznowola), in 2015 the period of stay increased to 74,6 days. In spite of an increase in the average period of stay (and a temporary closure of the guarded centre in Lesznowola), the use of guarded centres for foreigners amounted to between 30% (Kętrzyn) and 65% (Krosno Odrzańskie). Even though the year 2015 was a year of «migration crisis in Europe», this data shows that this crisis has not affected Poland and has not caused overcrowding in guarded centres. Among the foreigners placed in guarded centres in Poland the biggest group in the years 2014-2015 was that of citizens of the Russian Federation (mostly of Chechen nationality). The other groups included nationals of Vietnam, Ukraine, Pakistan and Georgia.

The group which deserves special care is that of unaccompanied minors. In so far as it is possible to place such a minor in a guarded centre under the Act on foreigners [25], the Act on granting protection does not allow to place a minor in a guarded centre, if he or she seeks international protection [26]. In 2015, as many as 159 minor foreigners were placed in guarded centres (minors can be placed only in Kętrzyn, Biała Podlaska and Przemyśl), out of whom 31 remained unaccompanied. The average period of stay of unaccompanied minors in a guarded centre for foreigners in 2015 was 82,4 days (in comparison with 74,6 days for all foreigners). This data suggests that families with children are generally detained longer than foreigners without children. One might venture a claim that the average period of stay of families with children in guarded centres might be even longer, as unaccompanied minors placed in guarded centres under the Act on foreigners generally remain there for a short period of time and are released as soon as they have filed an application for a refugee status.

The use of detention and alternatives to detention by Polish courts. From the data provided by courts it emerges that the work volume of courts with regard to migration cases varies. Three district courts (District Court for the Capital City of Warsaw, District Court in Słubice and District Court in Biała Podlaska) issued in the time period under research over 100 rulings each. It is also the three above-mentioned courts that had the biggest impact on applying alternatives to detention in order to safeguard the procedure. The fact that it is those three courts that issue so many rulings on detention results from the provisions of the Act on foreigners, which in Art. 201(2) lays down that the ruling to place [a foreigner] in a guarded centre is issued upon the motion of a Polish Border Guard authority by a district court with jurisdiction over the place of stay of a foreigner. From the statistics it emerges that apart from Warsaw, the locations with the largest number of foreigners subjected to detention are Słubice (for foreigners apprehended after having crossed the Polish-German border illegally or transferred under the Dublin Regulation) and Biała Podlaska (within the jurisdiction of the district court there is a Polish-Belarusian border crossing in Terespol, where the highest proportion of applications for refugee status is submitted.

Rulings from selected 26 district courts on requests from the Border Guard to place a foreigner in a guarded centre (total of 939 rulings; data from the courts from the period from 1 April 2014 to 31 may 2015)

The court	Number of detention rulings	Number of alternatives to detention rulings	Border Guard's motions rejected by the courts without using alternatives to detention
DC for the Capital City of Warsaw	292	36	11
DC in Słubice*	139	0	2

DC in Biała Podlaska	123	7	2
DC in Zgorzelec	85	0	
DC for Łódź-Śródmieście	60	1	
DC for Wrocław-Fabryczna	30	0	
DC in Przemyśl*	24	0	
DC for Kraków-Krowodrza	22	0	
DC Gdańsk-Północ	18	0	
DC in Kalisz	16	0	
DC Lublin-Zachód	14	0	
DC in Żary	12	0	8
DC in Lesko	10	0	
DC in Kętrzyn	7	0	
DC in Chełm	6	0	
DC in Bielsk Podlaski	4	1	
DC in Białystok	2	2	
DC in Hrubieszów	3	0	
DC in Legnica	2	0	
DC in Braniewo, DC in Wałbrzych, DC in Racibórz, DC for Warszawa-Śródmieście, DC in Cieszyn, DC in Wołomin, DC Szczecin-Centrum	0	0	0
Total	869	47	23
Percent	92,5%	5%	2,5%

In practice the competence to use alternatives to detention belongs primarily to the Border Guard authority. This is why one should look at the court statistics remembering that judges were taking decisions only in these cases where Border Guard has not applied appropriate alternative to detention themselves.

Conclusions from the analysis of the research data. On the basis of the monitoring and analysis of files conducted by the project team, the following conclusions and recommendations have been drawn.

First of all, it should be stated that the introduction of alternatives to detention in opposition to placing foreigners in guarded centres made it possible to avoid situations where a large group of foreigners would be deprived of liberty. Before alternative measures became available, foreigners would have been placed in guarded centres.

Both the statistics and personal interviews with people administering alternatives to detention confirm that alternative measures of safeguarding the procedure were necessary and have been applied, in accordance with the intention of the legislator, by the Border Guard authority since 1 May 2014. Due to the fact that the Border Guard opted for alternatives to detention, the number of foreigners placed in guarded centres in the last two years decreased by 40% (in 2013 detention was used against 1755 foreigners and in 2015 only against 1051). Simultaneously, in the years 2014-2015 non-custodial supervision measures were used with regard to 1132 foreigners.

A particularly positive emphasis should be put on the fact that the vast majority of foreigners comply with the alternatives to detention imposed on them.

In 2014, after the first few months of using alternatives to detention, 166 out of 364 foreigners (45,60%) did not comply with them. In 2015, out of a total number of 768 foreigners against whom alternatives to detention were ordered by the Border Guard, only 243 foreigners did not comply, which makes it 31,64% of the total. These figures should be analysed together with the statistics showing the number of discontinued proceedings for granting international protection in Poland, which to some extent concerned the same individuals. To illustrate, in 2015 the proceedings for granting international protection were discontinued with regard to 8 724 out of 12 238 foreigners for whom the Head of the Office for Foreigners issued a decision in the first instance. It most probably means that from among the cases examined in 2015, in as many as 71% of cases foreigners did not stay in the open centres and left Poland, abandoning in a sense their attempt to receive protection in Poland. In the years 2014 and 2013 the proportion of people who did not comply with the requirement of staying in Poland until the end of the procedure for granting refugee status was similar and was respectively 67% and 84% [27]. These figures attests to the fact that a large number of migrations to Poland in search of international protection are of transit nature (perhaps it would be more appropriate to speak of migration through Poland). Thus, the enforceability indicator in the case of foreigners conforming to the decisions on alternative measures at the level of 55% and 68% should be considered as high.

It seems that the Border Guard is making a steady improvement in identifying cases in which the use of alternatives to detention is sufficient from the perspective of safeguarding the purposes of the procedure. At the same time, a vast majority of persons submitted to alternatives to detention regarded them in a very positive way. It would be worth considering in what way alternatives to detention should be applied in order to safeguard the procedure with regard to persons who are undoubtedly in transit (which is often manifested by the lack of a permanent place of residence in Poland and an attempt to cross the EU internal border illegally).

The catalogue of alternatives to detention available in the Polish legal system is appropriate and their application should be based on an individual assessment of a foreigner's situation.

The alternatives to detention used in the years 2014-2015 consisted primarily in requiring a foreigner to reside in a designated place or reporting to the Border Guard authority. In the years 2014-2015 there was an increase in the latter measure. Placing the travel document in the deposit and paying a security deposit have rarely been used due to the situation of foreigners. However, it does not mean that introducing the two latter alternatives to detention into the Polish migration law was unnecessary. On the contrary, they may provide in some cases a very effective alternative measure safeguarding the proper course of the procedure. In practice, in future one might expect fewer instances of ordering foreigners to reside in a designated address due to the fact that foreigners' place of residence quite often changes for various reasons. On the other hand, an obligation to report to the Border Guard authority [28] can be reconciled with changes in the place of residence and may be applied upon releasing from guarded centres the foreigners under return procedures who do not have any place of residence in Poland. Of course, the obligation which is used in inland regions to reside in a designated place and imposed on persons with strong professional or family ties with Poland is very often entirely sufficient. However, such an obligation should be seen differently when applied with regard to persons whose stay in Poland bears all the features of a temporary nature (e.g. foreigners transferred to Poland under the Dublin procedures or apprehended after crossing the Polish border illegally).

Another conclusion which can be drawn after analysing court files is the fact that in ruling on placing a foreigner in a guarded centre – apart from few exceptions – the courts rely on the motions of the Border Guard.

Out of 939 rulings in detention cases issued in the years 2014-2015 by the selected 26 district courts in Poland in 869 cases (92,5%) the courts ruled in accordance with the motion. While paying respect to the meticulousness of the border Guard in drafting motions for placing a foreigner in a guarded centre, it should be stated that the officers from the migration department of the Border Guard who deal with migration issues on a daily basis have a huge advantage over the majority of judges from criminal courts, who have to issue judgment on the basis of migration laws [29] which often change and which they do not have time to learn thoroughly. Apart from that, a foreigner remains available at the court's disposal for a much shorter time, hence the court must, as a matter of fact, rely in its judgment to some extent on the evidence prepared by the requesting Border Guard authority.

In the light of the conducted monitoring, a postulate which still remains valid is that of transferring all migration cases into the hands of migration judges, which is a practice in other legal systems (e.g. in the

Netherlands). Nevertheless, until it happens, judges from criminal divisions who may be assigned to work on migration cases should undergo appropriate training.

However, what is worrying is that on the basis of the reasoning of the courts in rulings on placing a foreigner in a guarded centre it is often impossible to determine if and how the court has examined the possibility of subjecting a foreigner to alternatives to detention. In the case of both migration acts, it is the court's duty to determine whether there is a possibility of applying alternatives to detention. In the light of Mahdi judgement it clearly transpires that detention must be ordered in writing with reasons being given in fact and in law. The requirement that a decision be adopted in writing must be understood as necessarily covering all decisions concerning extension of detention, given that … in both cases the person concerned must be in a position to know the reasons for the decision taken concerning him [30]. Apart from that, as it is clear from the established case-law the obligation to communicate those reasons is necessary both to enable the third-country national concerned to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and also to put that court fully in a position to carry out the review of the legality of the decision in question [31].

In the context of the above provisions and the CJEU's case-law it might be held against many of the rulings that they were issued in breach of the abovementioned provisions of migration laws resulting from the insufficient assessment of available alternatives to detention, and especially due to the lack of reasons in fact and in law for not applying alternatives to detention [32]. In many cases courts only indicate the reasons for applying detention and do not refer at all to the possibility of applying alternatives to detention [33] or they refer to the possibility of applying alternatives to detention but in a way suggesting a lack of understanding of the applicants' rights in the refugee procedure [34].

Moreover, it seems that Polish authorities often do not treat the existence of contraindications to placing foreigners in guarded centres seriously enough.

In the light of the provisions of the Act on foreigners, a ruling on detention of foreigners in a guarded centre or in a detention centre for foreigners is not issued if: 1) it could pose a threat to the life or health of a foreigner; 2) a foreigner's physical and psychological condition could justify a presumption that the foreigner has experienced violence [35]. In a similar vein, the Act on granting protection prohibits the use of detention of foreigners in the case when: 1) it may cause a serious threat to his/her life or health; 2) their physical and mental shape indicates that they have been subjected to violence; 3) they are unaccompanied minors or persons with disabilities [36]. Nevertheless, even if from the case files (foreigner's statements, medical or psychological documentation, etc.) it transpires that a foreigner belongs or may belong to a vulnerable group of people deserving particular care, the Border Guard authority requests and courts issue rulings on placing such persons in detention. This practice was pointed out by the Polish Supreme Court last year [37]. However, it should be noted that courts issuing rulings on detention are in the majority of cases aware of the necessity to refer in the reasons for the ruling to the existence of contraindications or the lack thereof [38]. It usually happens though that under the pressure of time the ruling on detention of a foreigner at the court's disposal is motivated by a single, succinct sentence: «The court has not found any contraindications specified in Art. 88a(3) of the abovementioned act» [39] or «Mr … is a healthy man, which precludes all risk that placing him in a guarded centre might pose a threat to his life or health» [40]. It seems that in spite of difficulties in identifying contraindications in such a short time both the Border Guard authority and the courts should exercise due diligence in determining the lack of such [41]. On the other hand, what merits a positive assessment is the fact of releasing foreigners from detention by the commanding officer of the Border Guard unit in charge of the guarded centre in the case of identifying the existence of contraindications already during a foreigner's stay in the guarded centre. Yet quite often it would have been possible to avoid placing a foreigner in a guarded centre if the requesting authority or the court had been more conscientious in examining the situation of a person belonging to a vulnerable group, especially if this person had already indicated the existence of contraindications.

An objection which can be formulated from the analysis of court records is that not enough attention has been paid to the welfare of the children placed in guarded centres.

The Act on foreigners imposes a duty on the court examining a motion to place a foreigner in a guarded centre along with a minor foreigner under his/her custody to also take the best interest of the minor foreigner into account [42]. Examples of placing children along with their parents in guarded centres should therefore be taken as an indication of a common assumption that if a parent is being detained, it is better not to separate the members of the family. It seems though that it would be better to assume a different optic. As a matter of fact, even though it might be considered justifiable to place a foreigner in a guarded centre in

accordance with the applicable statutory provisions, it might not necessarily be so when taking into account the psychophysical development of the child accompanying a foreigner and thus the court might derogate from applying a custodial measure on a foreigner. The courts do not take into account Art. 17(1) of the Return Directive, which provides that «families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time». In practice, rarely can one find in Polish courts' rulings the reasons why in the given case the application of detention is necessary and why the given period of time is considered as «the shortest appropriate» one.

It is also worth considering an introduction of a complete prohibition on placing unaccompanied minors in guarded centres irrespective of their status and the creation of a highly specialized care centre prepared to receive minor foreigners. A decentralized system which is a consequence of adopting the Act on supporting the family and foster care system [43], which is currently in force, definitely has an impact on the fact that those children very often escape from the institutions which are not prepared to provide proper care and support to them. It would be advisable to reintroduce at least one foster care centre specializing in supporting foreign children coming to Poland.

Another conclusion from the monitoring relates to the fact that the periods of time for placing a foreigner in a guarded centre are defined in a very imprecise way, which leads to a common practice of «correcting obvious typing mistakes».

In Polish law the maximum period of stay of a foreigner in a guarded centre for the first time is defined as no more than 3 months [44] and also as 60 days [45]. These time periods may be subsequently extended. From the analysis of the rulings it transpires that the courts always place foreigners in guarded centres for the maximum period of time provided for in the law. This is connected with a certain significant problem. It often occurs that the judges exceed the time-limits prescribed by the law in their time calculations. The analysis shows that some courts assume that the first day of detention is the day when a foreigner was apprehended by the Border Guard and others take the first day to be the day of issuing the ruling on placing a foreigner in a guarded centre. It seems that the first approach is the proper one as under the rules of criminal procedure «detention counts towards any subsequent enforcement of the penalty of deprivation of liberty». Similar conclusions may be drawn from an analysis of EU directives, which define detention as the whole period from the moment of apprehending a foreigner (factual deprivation of liberty). Such a problem would not have also occurred if the courts had not ordered the maximum time period provided for in the law, but e.g. would adjust the time-frame to the average period of stay in a guarded centre, which in 2015 was 74 days.

Upon release from a guarded centre due to the occurrence of a contraindication (a threat to a foreigner's life or health, a presumption that a foreigner has been subjected to violence) [46] foreigners who are not asylum seekers are often released onto the street and they are offered no help from the state so that they could survive the period of time necessary for conducting the return procedure. The alternative measures used in such situations towards persons who do not have any place of residence in Poland are ineffective. In order to remedy this situation, it would be advisable to create a specialized open reception centre which would provide care to persons who cannot under law be placed in a guarded centre.

On the basis of the conducted research it also emerges that with regard to the judicial review of court rulings placing foreigners in guarded centres, the average wait for receiving the final decision is significantly shorter, even though the complaints are not yet examined within 7 days, as provided in the statutory time-limit. Moreover, in many cases second instance courts (Lublin, Przemyśl, Białystok, Gorzów Wielkopolski) quashed the decisions of the district courts and ordered the release of foreigners from guarded centres. It must be emphasized that such decisions contribute to the increased protection of migrants' rights.

At the time of conducting the monitoring, a fundamental change in migration law also occurred [47]. Since 13 November 2015, it is no longer allowed to detain a foreigner in a guarded centre if it is necessary to «prevent abuse in proceedings for granting the refugee status». The abovementioned legal basis was often abused in placing foreigners in guarded centres (including those who filed the application for international protection for the first time). Since such courts' decisions were not compliant with the provisions of the recast reception directive and return directive, the change should be assessed in a very positive light. However, the change in law has not been noted by some Polish courts which in their written reasons were still referring to the necessity to prevent abuse in the proceedings. A new unsolved problem has also occurred, whether the persons placed on this basis in guarded centres should not be automatically released when the new provisions of law entered into force and whether leaving them in guarded centres does not entail further liability of the state for unlawful deprivation of liberty.

Conclusions. The above findings from the monitoring confirm that the provisions implementing alternatives to detention into Polish law are not a dead letter. The Polish Border Guard regularly resorts to

the new measures safeguarding the procedure and in most cases the alternative measures serve their purpose. Thanks to the introduction of alternatives to detention many foreigners, including many families with children, have avoided the traumatic effects of deprivation of liberty. From the court practice it emerges that some courts also noticed the possibility to disregard the Border Guard's motions and order alternatives to detention. The fact that this mechanism is rarely applied seems to be caused, in our view, by the fact that the Border Guard prepares the motions to place a foreigner in a guarded centre in a very solid way. Applying migration law on a daily basis and having more time than the court to prepare a request to place a foreigner in a guarded centre, the Border Guard has a clear advantage over the court. The court, having very little time in which a foreigner is at its disposal, rarely can afford to question the correctness of the Border Guard's motion.

The court rulings quite often do not include sufficient reasons in fact and in law which would justify the use of detention. Despite acting under the pressure of time to place a foreigner in a guarded centre, the courts should provide more detailed explanations of the reasons why the use of alternatives to detention is not sufficient and refer to the existence or the lack of contraindications to detention. Finally, a lot can be improved in the area of establishing the length of time for placing foreigners in guarded centres.

It seems that most of the above problems result from the fact that the matters of foreigners are examined by the judges from criminal divisions who rarely deal with migration law (with the exception of a few courts in Poland). In our view, a growing number of migration cases, also in the context of a recent mass migration of Ukrainian citizens to Poland justifies launching a discussion on establishing specialized migration courts in Poland. It would be a less costly and more effective solution than training in migration law all judges from criminal divisions, who currently according to the jurisdiction rules (the factual place of residence of the foreigner) may hear detention cases in more than 300 first instance courts in Poland.

One of the problems which requires undertaking legislative initiative is to introduce a prohibition on applying administrative detention on minor foreigners (including unaccompanied minors). Placing unaccompanied minors in guarded centres under the Act on foreigners, in the light of the conducted monitoring, does not safeguard in any way the course of their ongoing return procedure. For this reason, it is advisable to create a specialized centre which could receive children (unaccompanied minors) undergoing the return or refugee procedure. The situation is similar in the case of persons with regard to whom there are contraindications to placing them in guarded centres. There is a need for creating an open centre which would satisfy their basic life needs during the return procedure.

Sources and Literature

1. The current article includes findings of the monitoring published in Polish in the report «Applying alternatives to detention of foreigners in Poland in the years 2014-2015», which is also available on the website of the Rule of Law Institute: http://panstwoprawa.org/publication/ stosowanie-alternatyw-detencji-cudzoziemcow. More on the project activities also on the website of the Rule of Law Institute: http://panstwoprawa.org/project/monitoring-stosowania-alternatyw-do-detencji-cudzoziemcow. The project «Monitoring of applying alternatives to detention of foreigners» was financed under the European Economic Area Financial Mechanism's the Citizens for Democracy Programme.
2. Sieniow T. Stosowanie detencji wobec cudzoziemców. Raport z monitoringu i rekomendacje // The use of detention of foreigners. Report from the monitoring and recommendations. – Lublin, 2013. The report develops and updates the analysis on the legal capacity in the area of international standards of protecting foreigners against arbitrary detention.
3. The number of district courts in Poland at the time of conducting the monitoring was changing (due to the so-called «Gowin reform») and amounted to around 300 courts. However, monitoring the number of cases on foreigners in so many small courts exceeded the overall framework of the current monitoring.
4. We would like to thank Iryna Kozak, Sylwia Paduchowska and Damian Buczek from the Rule of Law Institute for their research support and express our gratitude to the Helsinki Foundation for Human Rights, the Halina Nieć Legal Aid Centre, the Association for Legal Intervention and Caritas for sharing their perspective on the practice of detention in Poland.
5. In European Union law, the issues of returns of foreigners were harmonized in the so-called Return Directive (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008).
6. The minimum standards of detention were harmonized on the EU level in Art. 15 of the directive 2008/115.

7. PICUM Position Paper on EU Return Directive, Brussels 2015. The report may be downloaded from the website: www.picum.org.
8. The International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, Journal of Laws of 1977, No. 38, Item 167.
9. The Convention Relating to the Status of Refugees drawn up in Geneva on 28 July 1951, Journal of Laws of 1991, No. 119, Item 515.
10.The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Journal of Laws of 1993, No. 61, Item 284, as amended.
11. The Charter of Fundamental Rights of the European Union, OJ C 326/02, 26.10.2012.
12. See: Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention, UNHCR 2012, http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html. See: Point 4.3. Alternatives to detention need to be considered, p. 22 and next.
13. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180, 29.6.2013. In accordance with the provisions of Art. 8.4 «Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law».
14. Asylum and Migration. Glossary 3.0, EMN 2014, p. 25. Glossary is available on the website: https://emn.gov.pl/esm/publikacje/nasze-publikacje/slownik-esm.
15. Point 20 of the preamble to the directive 2013/33. A report on the use of alternatives to the detention of foreigners was prepared by the EMN (The use of detention and alternatives to detention in the context of immigration policies Synthesis Report for the EMN Focussed Study 2014) and FRA (Paper: Alternatives to detention for asylum seekers and people in return procedures, FRA 2015). Apart from that, an invaluable source of information on alternatives to detention is the report prepared by the Odysseus Network – Philippe de Bruycker (ed.), Alice Bloomfield, Evangelia (Lilian) Tsourdi, Joanna Pétin, Alternatives to immigration and asylum detention in the EU. Time for implementation, 2015 (http://odysseus-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf). See also: There are alternatives. A handbook for preventing unnecessary immigration detention (revised version), International Detention Coalition 2015, http://idcoalition.org/publication/view/there-are-alternatives-revised-edition/; A. Edwards. Back to basics: The right to liberty and security of person and 'alternatives to detention' of asylum-seekers, stateless persons, and other migrants. UNHCR Legal and Protection Policy Research Series. – Geneva, 2011.
16. Act of 13 June 2003, Journal of Laws 2016. 1836 – consolidated text [hereafter: Act on granting protection or AGP].
17. Act of 12 December 2013, Journal of Laws 2016. 1990 – consolidated text [hereafter: Act on foreigners or AF].
18. On the subject of using detention and alternative measures see: Detencja. Stosowanie detencji oraz środków alternatywnych do detencji w kontekście polityki imigracyjnej, Raport przygotowany przez Krajowy Punkt Kontaktowy Europejskiej Sieci Migracyjnej w Polsce [Detention. The use of detention and alternatives to detention in the context of migration policy. Report prepared by the National Contact Point of the EMN in Poland], Warsaw 2014, p. 37 and next. The Report is available on the website: https://emn.gov.pl/esm/publikacje/nasze-publikacje/stosowanie-detencji-ora/13139,Raport-krajowy.html.
19. Dąbrowski P. Komentarz do art. 317 ustawy o cudzoziemcach [Commentary to Art. 317 of the Act on foreigners], [in:] Ustawa o cudzoziemcach. Komentarz [Act on foreigners. Commentary], ed. J. Chlebny. – Warsaw, 2015, – P. 734.
20. The data presented and analyzed in this section comes from the department for foreigners of the Border Guard Headquarters.
21. Annual data for 2015 is available on the website: www.udsc.gov.pl.
22. Data provided at the consultation meeting in Supraśl (1-10 April 2015).
23. Data provided by the department for foreigners of the Border Guard Headquarters as of 19 April 2016.
24. In accordance with the data provided by the department for foreigners of the Border Guard Headquarters the number of foreigners who arrived in 2015 (1 051) and foreigners already detained in guarded centres as of 1 January 2015 (196) was 1 247 persons.
25. Art. 397 AF: «A minor foreigner residing within the territory of the Republic of Poland unattended may be placed in a guarded facility, provided that he/she has reached the age of 15 years old».

26. Art. 88a(3)(3) AGP provides that an applicant is not placed in a guarded centre nor in the arrest for foreigners in a situation when he/she is an unaccompanied minor.
27. In 2013 the Head of the Office for Foreigners issued decisions on granting refugee status to 19 369 foreigners, while 163 361 persons received the decision on either discontinuing the examination or rejecting the application. In 2014 the numbers were respectively 8 285 (decision on granting) and 5 556 (discontinuation). The data comes from the lists of figures on proceedings in migration cases in the years 2013, 2014 and 2015, available on the website: www.udsc.gov.pl.
28. In practice, the Border Guard usually obliges a foreigner to report every 2 weeks or once a month (a commonly used formula: «every first Thursday of the month»).
29. It sometimes happens that even the courts which deal with migration cases on a regular basis may demonstrate a lack of understanding of the legal institutions. For instance, the District Court in Biała Podlaska, while refusing to grant the request of the Border Guard (quite accurately) on account of «the welfare of minor children, who attend public schools, identify with the place where they reside and their identity is rooted in the fact that they live in Poland», also added that «there is no way to hold it against a foreigner in accordance with Art 389(1)(3) AF … that the foreigner did not leave the territory of the Republic of Poland within the period of time specified in the return decision due to the fact that the return decision was issued without a time-limit». The ruling of the District Court in Biała Podlaska, II Criminal Department of 12 September 2015, Ref. No. II Ko 105/15. Therefore, even if the District Court in Biała Podlaska has problems with understanding the structure of issuing the return decision without determining the time-limit for voluntary return, can it be realistically expected that courts which receive a migration case once every few years should have a sound knowledge of migration laws?
30. Judgement of the CJEU in case Baszir Mohamed Ali Mahdi of 5 June 2014 (C-146/14 PPU), par. 44.
31. Case Mahdi, par. 45 and also cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation / Council and Comission, p. 337.
32. For example, see: the ruling of the District Court in Grójec II Criminal Division of 17 November 2015, Ref. No. II Ko 4124/15.
33. Instead of many compare the ruling of the District Court for Wrocław Fabryczna II Criminal Division of 23 April 2015, Ref. No. II Kp 665/15.
34. It often happens that courts point out to persons in the refugee procedure who are entitled to social benefits available to asylum seekers that they do not have a permanent place of residence or sufficient financial resources. Cf. the ruling of a District Court Szczecin Prawobrzeże and Zachód in Szczecin VI Criminal Division of 13 January 2016, Ref. No. VI Ko/Cu 10/16, in which the court stated that «There is no possibility of applying alternatives to detention indicated in Art. 88 par. of the act of 13 June 2013 as the foreigner has got no permanent place of residence on the territory of the Republic of Poland, as well as no financial means». As can be seen in the above example, the court in one single sentence: 1) was imprecise in referring to the legal basis for its decision (the court has not included the number of the paragraph); 2) gave a wrong date of the act; 3) provided arguments whose validity with regard to foreigners seeking international protection and having the right to stay in a reception centre where all basic life needs are taken care of can easily be refuted.
35. Art. 400 AF.
36. Art. 88a(3) AGP.
37. Cf. the judgement of the Supreme Court – Criminal Chamber of 4 February 2015, Ref. No. III KK 33/14 which on the grounds of the provisions of the Act on foreigners of 2003 as well as the Act on granting protection confirmed the obligation of releasing a foreigner from a guarded centre in case of a presumption that the applicant's physical and mental shape indicate that they have been subjected to violence, as well as when their stay in a guarded centre would pose a threat to their life or health.
38. Sometimes, the existence of such an awareness can be inferred from the transcript of the personal interview («foreigner … unmarried, childless, of good health, without psychiatric, drug treatment or neurological record») although it is not reflected in the reasons for the ruling. Ruling of the District Court for the Capital City of Warsaw III Criminal Division of 20 March 2015, Ref. No. III Ko 350/15.
39. Ruling of the District Court in Bielsko Biała III Criminal Division of 3 March 2016, Ref. No. III Ko 35/16.
40. Ruling of the District Court in Biała Podlaska VII Criminal Division of 5 August 2016, Ref. No. VII Ko 109/15.
41. For example in the case of a Chechen applicant who in the course of a hearing in front of the court declared «I am generally in good health. I have been in detention so many times, also in Russia, that I will not be able to mentally survive detention». The District Court Lublin-Zachód ruled that «There are no

sufficient premises to find that the foreigner's physical and psychological condition could justify a presumption that the foreigner has experienced violence», ruling of the District Court Lublin-Zachód of 8 April 2015, Ref. No. III Ko 737/15.
42. Art. 401(3) AF.
43. Act of 9 June 2011 concerning family support and foster care, Journal of Laws of 2015, Item 332, as amended.
44. Art. 203(1), AF: A court of law, in its ruling ordering to place a foreigner in a guarded centre or in a detention centre for foreigners, shall indicate the period of stay in a guarded centre or in a detention centre for foreigners, but not more than 3 months.
45. Article 89(1) of the AGP: The court renders a ruling to detain the applicant or the person on behalf of whom the applicant is acting in a guarded centre or a detention centre for the period of up to 60 days.
46. Art. 400 AF or Art. 88a(3) AF.
47. Act of 10 September 2015 amending the Act on granting protection to foreigners on the territory of the Republic of Poland and some other acts, Journal of Laws 2015.1607.

Косинська А., Сєньов Т. Застосування альтернатив затриманню іноземців у Польщі (2014-2015 рр.). У статті проаналізовано положення польського законодавства щодо запровадження альтернатив ув'язненню затриманих іноземців. Автори стверджують, що результати моніторингу цього питання підтверджують, що ці ініціативи не є «мертвим законом». Польська прикордонна служба регулярно звертається до нових заходів, які передбачені у зв'язку із процедурою затримання іноземців, і в більшості випадків альтернативні заходи досягають мети. Завдяки впровадженню альтернатив для затримання багато іноземців, у тому числі багато сімей з дітьми, уникли негативних наслідків позбавлення волі. Аналіз моніторингу судової практики показує, що деякі суди вважають можливим відкоригувати дії Прикордонної служби та застосовувати альтернативи затриманню. Той факт, що цей механізм застосовується рідко, на думку авторів, викликаний тим, що Прикордонна служба готує звернення щодо розміщення іноземця в охоронюваному центрі досить фундаментально. Застосовуючи законодавство про міграцію щодня і маючи більше часу, ніж суд, для підготовки запиту про розміщення іноземця в охоронному центрі, Прикордонна служба має явну перевагу перед судом. Суд, маючи дуже мало часу, доки справа за участі іноземного мігранта знаходиться у їхньому віданні, рідко може дозволити собі засумніватися в правильності звернення Прикордонної служби. Одна з проблем, що вимагає законодавчої ініціативи, полягає в тому, щоб запровадити заборону на адміністративне затримання неповнолітніх іноземців (включаючи неповнолітніх без супроводу).

Ключові слова: затримання, іноземці, неповнолітні без супроводу, Прикордонна служба, суд, Польща.

Косинска А., Сеньов Т. Применение альтернатив задержанию иностранцев в Польше (2014-2015 гг.). В статье проанализированы положения польского законодательства о введении альтернатив заключению задержанных иностранцев. Авторы утверждают, что результаты мониторинга этого вопроса подтверждают, что эти инициативы не является «мертвым законом». Польская пограничная служба регулярно использует нове меры, предусмотренные в связи с процедурой задержания иностранцев, и в большинстве случаев альтернативные меры достигают цели. Благодаря внедрению альтернатив задержанию много иностранцев, в том числе много семей с детьми, избежали негативных последствий лишения свободы. Анализ мониторинга судебной практики показывает, что некоторые суды считают возможным откорректировать действия Пограничной службы и применять альтернативы задержанию. Тот факт, что этот механизм применяется редко, по мнению авторов, вызван тем, что Пограничная служба готовит обращение о размещении иностранца в охраняемом центре достаточно фундаментально. Применяя законодательство о миграции ежедневно и имея больше времени, чем суд, для подготовки запроса о размещении иностранца в охранном центре, Пограничная служба имеет явное преимущество перед судом. Суд, имея очень мало времени, пока дело с участием иностранного мигранта находится в их ведении, редко может позволить себе усомниться в правильности обращения Пограничной службы. Одна из проблем, которая требует законодательной инициативы, заключается в том, чтобы ввести запрет на административное задержание несовершеннолетних иностранцев (включая несовершеннолетних без сопровождения).

Ключевые слова: задержание, иностранцы, несовершеннолетние без сопровождения, Пограничная служба, суд, Польша.