

FOREIGNERS' RIGHTS IN THE AGE OF PANDEMICS – MIGRATION ASPECTS

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KEYWORDS

foreigners, migrants, human rights, pandemics, rights and freedoms

ABSTRACT

The content of the article is devoted to the situation of foreigners – migrants – entering and staying in the territory of Poland. All considerations refer to the conditions of the pandemic. The author asks whether the introduced legal solutions are consistent with the rights and freedoms, and whether the restrictions are constitutional and, in particular, proportional to the threat. The subject of the analysis focuses mainly on Polish sources of law issued during the first wave of the epidemic in Poland. Many voices currently indicate that the pandemic situation in the global world could repeat itself in the future. Hence, the present experience should be used as a reference point in the future.

I. INTRODUCTION

The 20th century, in particular its second half, was referred to as the age of migration. Everyone has got used to this condition – common and frequent movement for work, family visits, sightseeing, seeking protection, willingness to change in life. Poland has also evolved into a place of migrant destination, mainly employee migration. The subject of the analysis is the rights of migrants, especially foreigners, considered in the light of the current state of the pandemic associated with the occurrence of the SARS CoV-2 virus. As a result of the spread

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of the virus, legal solutions affecting the legal position of individuals were adopted. All over the world, the many restrictions and injunctions include: ban on leaving the house, movement restrictions, restrictions on crossing borders, bans on doing business, restrictions on the practice of certain aspects of religion, suspension of air connections, curfew, assembly bans, order to cover the mouth and nose in public space, the obligation to quarantine, no entry to cemeteries or forests and the obligations to install and use tracking applications.

Owing to the fact that we currently live in a global society, problems from other countries are relevant to countries from another continent. The importance of the problem is symbolized by the judgements of the highest courts, which repealed the introduced restrictions. Such an example is the intervention of the Supreme Court of India in relation to the respect for the rights of internal migrants¹. This case confirms that the rights of migrants in an era of a pandemic may be disproportionately violated.

The epidemic situation showed that the state has instruments that can significantly affect people's lives. Among many rights and freedoms, such as freedom of movement and freedom of assembly, or freedom to manifest one's religion in public by worshipping, praying, participating in rituals, practicing and teaching were limited. In addition, the possibility of crossing borders was limited. Above all, the restriction of freedom of movement and the possibility of crossing borders also had a great impact into the status of individuals. The current situation has taken a toll on all migrants, in particular, foreigners. For the purposes of this article, it is assumed that a migrant is any person who changes their place of stay, either temporarily or permanently, regardless of the legal status of the stay. However, the scope of considerations applies only to foreigners within the meaning of the Act on foreigners from 2013². Therefore, it applies to people who do not have Polish citizenship (citizens of other countries, stateless persons and people with unrecognized citizenship). The legal situation of internal migrants and Polish citizens remains beyond the scope of interest in this article.

Migration is a process that is inherent in human nature; only its scale has changed throughout history. This 'phenomenon must be attentively analyzed in a

¹ 'India must follow Supreme Court Orders to Protect 100 Million Migrant Workers: UN Rights Experts' (4 June 2020) <<https://news.un.org/en/story/2020/06/1065662>> accessed 21 August 2020; Chitranjali Negi, 'Human Rights Violations of Migrants Workers in India During COVID-19 Pandemic' (17 June 2020). Available at SSRN: <https://ssrn.com/abstract=3629773> or <http://dx.doi.org/10.2139/ssrn.3629773>; <https://www.ihrb.org/focus-areas/migrant-workers/video-covid19-internal-migrants-India>, accessed 26 August 2020; Geeta Pandey, 'Coronavirus in India: Desperate Migrant Workers Trapped in Lockdown' 22 April 2020 <<https://www.bbc.com/news/world-asia-india-52360757>> accessed 20 June 2020.

² Consolidated Text, 'Journal of Laws of 2020' item 35, as amended.

complex civilization context³. The relationship between globalization and migration is extremely strong⁴. Primarily, the literature distinguishes between internal and external migration. The statistical data presented by the Border Guard and Central Statistical Office show how the border traffic in Poland has been growing from year to year. In 2019, the border traffic grew again by 3.2% compared to 2018⁵. Of course, the greatest increase in passenger traffic across the border took place after 1989⁶.

Migration processes have been halted on an unprecedented scale in most recent history. For the sake of health and life protection, solutions have been adopted, which have worsened the legal position of foreigners. The proposed article is aimed at assessing the solutions adopted and aspires to answer the question whether the new restrictions are proportionate, necessary and whether they comply with the Constitution and legal acts classified as sources of human rights. The major task of the article is to investigate the relationship between fundamental rights and freedoms and legal provisions that have been introduced in Poland. Hence, the main thesis of this article is that legal regulations adopted in the first wave of the spread of the virus disproportionately limited the rights and freedoms of migrants, mainly freedom of movement. The author of the study primarily uses the formal dogmatic method, consisting in recalling and analysing of Polish law to present specific conclusions in the final phase.

II. RIGHTS OF MIGRANT FOREIGNERS

A migrant is a person who changes their place of residence, temporarily or permanently, under duress or without pressure. The migration process may extend beyond the territory of the country or concern internal movements. Taking into account the rights of migrants, it is highly recommended to focus on the situation of people who, according to national law, are its citizens or do not have the citizenship of a given country (foreigners).

Primarily, it should be noted that the rights of migrants are related to human rights. According to international human rights norms, which are based on the

³ Vasile Bogdan, 'Human Rights and Migration' (2017) 2 Cross-Border Journal for International Studies 3, 44.

⁴ Piotr Koryś and Marek Okólski, 'Czas globalnych migracji. Mobilność międzynarodowa w perspektywie globalizacji' (2004) Prace Migracyjne 55, 9.

⁵ <<https://stat.gov.pl/obszary-tematyczne/ceny-handel/handel/ruch-graniczny-oraz-wydatki-cudzoziemcow-w-polsce-i-polakow-za-granica-w-iv-kwartale-2019-roku,13,26.html>> accessed 10 August 2020.

⁶ Jan Białocerkiewicz, 'Nowe polskie prawo o cudzoziemcach' (2003 TNOiK „Dom Organizatora“) 202.

inherent dignity of every person, migrants enjoy the fundamental rights afforded to all persons regardless of their legal status in a state. Human rights are universal, which means that they belong to everyone, not only to citizens⁷. The concept of human rights goes beyond national interests⁸. At the same time, it is noted that '[m]igrants are often perceived as "less deserving" than citizens, as if only citizens should have access to the full enjoyment of human rights'⁹. There is no doubt that migrants have basic rights, which cannot be violated¹⁰. The difficulty is in defining content of fundamental rights.

However, between all human rights, several of them are closely linked to migrants¹¹. There is no doubt that human rights were also created for migrants and refugees¹². This is evident, especially in light of the content of the Universal Declaration of Human Rights – 'Everyone is entitled to all the rights and freedoms set forth in this Declaration...'¹³. Using words such as 'everyone's right', 'no one' or 'everyone has' signifies that every human right refers to any migrant. Some of the rights are typically linked to migrants such as the right to freedom of movement and residence within the borders of each state (art. 13 para. 1) or right to asylum from persecution (art. 14). Additionally, there are number of human rights – right to life, equality and freedom from discrimination in the enjoyment of human rights for all people, including migrants, protection against arbitrary arrest and detention, protection against torture or inhuman treatment, prohibition against collective expulsion, procedural safeguards in individual expulsion proceedings, family rights, protection against labour exploitation, right to social security, right to highest attainable standard of physical and mental health, right to primary education, freedom of movement and right to enjoy culture in community with others, which seem to be especially relevant when it comes to migrants¹⁴. Countries have the right to decide on access to their territories. However, upon

⁷ Witold Osiatyński, '*Prawa człowieka i ich granice*' (Społeczny Instytut Wydawniczy Znak 2011) 59.

⁸ Antoine Pécoud and Paul de Guchteneire, 'Between Global Governance and Human Rights - International Migration and the United Nations' (2007) 8 *Georgetown Journal of International Affairs* 2, 115–124.

⁹ *Ibid* 120.

¹⁰ Colin Grey, 'The Rights of Migration' 47.

¹¹ Massimo Frigo and Róisín Pillay (eds), '*Migration and International Human Rights Law A Practitioners' Guide*' (Updated Edition International Commission of Jurists 2014) 37.

¹² Office of the High Commissioner for Human Rights, '*Migration and Human Rights. Improving Human Rights-Based Governance of International Migration*' (2012), 8 <https://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf> accessed 20 June 2020.

¹³ <<https://www.un.org/en/universal-declaration-human-rights/>> accessed 16 June 2020.

¹⁴ The International Justice Resource Center <<https://ijrcenter.org/thematic-research-guides/immigration-migrants-rights/>> accessed 22 July 2020.

the issuance of a permit to enter the territory of the country, migrant foreigners obtain all the rights based on the international legal regulations being in force in a given country¹⁵. It is worth remembering that migrants' rights have limits and are not absolute in most cases¹⁶. Similarly, for example, freedom of movement and residence for persons in the EU has its limitations¹⁷.

The modern system of human rights protection is based on many legal acts of universal (UN system) and regional (including the Council of Europe, European Union) and also on the functioning of national sources. The rights of migrants can be easily distinguished in such acts as the Universal Declaration of Human Rights, Convention and protocol relating to the Status of Refugees the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁸, the Charter of Fundamental Rights of the European Union, as well as in many other regional sources. For many years, issues related to the rights of migrant workers have awoken great interest¹⁹. In this regard, it is worth mentioning the European Convention on the Legal Status of Migrant Workers from 1977 or International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Adopted by General Assembly resolution 45/158 of 18 December 1990. Currently the subject of migrant rights is expanding and gaining additional attention. The content of Global Compact for Safe, Orderly and Regular Migration is a perfect example in this regard. According to its text, 'The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle'²⁰. It should be noted that Poland and four other countries were against signing the pact.

¹⁵ Bożena Gronowska in B Gronowska, T Jasudowicz, M Balcerzak, M Lubiszewski and R Mizerski (eds), *Prawa człowieka i ich ochrona*, (Towarzystwo Naukowe Organizacji i Kierownictwa "Dom Organizatora" 2010), 468.

¹⁶ Ibid.

¹⁷ Paweł Dąbrowski, 'Cudzoziemiec niepożądany w polskim prawie o cudzoziemcach' (Wydawnictwo Uniwersytetu Warszawskiego 2011) 208.

¹⁸ See also additional protocols No. 4 (right to freedom of movement, prohibition of collective expulsion of foreigners), No. 7 (procedural guarantees in the expulsion of foreigners, No. 12 (general prohibition of discrimination).

¹⁹ Colin Grey, 'The Rights of Migration' (2014) 20 *Legal Theory* 1, 47. Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud, *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press 2009); Alfred de Zayas, 'Migration and Human Rights' (1992–1993) *Nordic Journal of International Law* 61, 243–252.

²⁰ Content of the art. 16 of Global Compact for Safe, Orderly and Regular Migration.

Constitutions of various countries contain provisions that constitute the source of human rights. The Constitution of the Republic of Poland does not explicitly mention the rights of migrants, but focuses on the rights of foreigners. If we take a closer look on its provisions, the two most important articles are an introduction to our considerations. According to Article 30, [t]he inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities. Secondly, anyone, being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution (art. 37 para. 1). It is emphasized in Polish literature that this provision is the source of the principle of universality of the exercise of rights and freedoms guaranteed in the constitution²¹. Today, this provision must also be considered in the context of the rights and freedoms guaranteed by the EU membership²². However, '[i]nternational human rights law does allow States to treat citizens and non-citizens differently if the difference in treatment serves a legitimate State objective and is proportional to its achievement'²³. In particular, citizens may entertain broader political rights. States in general may also decide who is entitled to enter and remain in the country.

Exemptions from the principle of universality with respect to foreigners shall be specified by statute (art. 37 para. 2). Therefore, every right and freedom included in the constitution is also granted to foreigners, unless the law provides otherwise. Article 37 para. 2 must be interpreted in accordance with art. 31 para. 3 of the Constitution. A foreigner is entitled to common and fundamental rights of every human being based on such values as dignity, freedom and equality²⁴. It is highlighting that differentiation of the position of entities may take place under certain conditions. According to the jurisprudence of the Constitutional Tribunal, these exceptions must be relevant, proportional and related to other constitutional values, principles or norms that justify different treatment of similar entities²⁵. One must agree with the conclusion that concern for the common good means

²¹ Leszek Garlicki and Marek Zubik, 'Artykuł 37' in L Garlicki and M Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz II* (Second publish Wydawnictwo Sejmowe 2016) 186; Jacek Chlebny, Wojciech Chróścielewski, Paweł Dańczak, Paweł Dąbrowski, Agnieszka Liszewska and Rafał Rogala, *Prawo o cudzoziemcach: komentarz* (Wydawnictwo CH Beck 2020) 15.

²² A. Wróbel, *Komentarz do art. 21 [w:] Karta Praw Podstawowych UE*. (Komentarz, Warszawa 2013) 750–753.

²³ The International Justice Resource Center <<https://ijrcenter.org/thematic-research-guides/immigration-migrants-rights/>> accessed 22 July 2020.

²⁴ Magdalena Kumela-Romańska, *Administracyjnoprawny status cudzoziemca w Polsce* (Wolters Kluwer 2017) 106.

²⁵ See the judgement of the Constitutional Court of 14 July 2015 (SK 26/14; LEX 175849)

respecting human freedoms and rights arising from the inherent and inalienable dignity of a person²⁶.

On the territory of the host country, a foreigner should always be treated according to a certain standard (ordinary, privileged, special) and human rights should always be respected. Unlawful actions can lead to state liability²⁷.

A significant part of constitutional rights and freedoms may be restricted. It should be added that: 'Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights' (art. 31 para. 3). This article sets the limits for interference by public administration²⁸. It is important to underline that there are no grounds for considering that the application of art. 31 para. 3 is excluded on the background of the detailed regulations contained in art. 37 para. 2²⁹.

It should be noted that, in general, human rights can also be restricted. The exception in this respect is ineligibility rights. For example, according to art. 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms: In time of war or other public emergency threatening the life of the nation, any high contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. The legality of the repeal of rights is determined by material and formal reasons³⁰. The first group includes: the nature of the emergency, the scope of rights and freedoms subject to derogation, compliance with general international law and proportionality of extraordinary measures (actions)³¹. The formal premise relates primarily to the obligation to submit relevant information to the General Secretary of the Council of Europe³².

²⁶ Barbara Kowalczyk, 'Polska jako dobro wspólne obywateli a migracje długoterminowe' (2018) XIX *Przedsiębiorczość i Zarządzanie* 9, part 1, 52.

²⁷ Jan Białocerkiewicz, 'Status prawny cudzoziemca w świetle standardów międzynarodowych' 70.

²⁸ Leszek Garlicki and Krzysztof Wojtysek, 'Artykuł 31' in L Garlicki and M Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz II* (Wydawnictwo Sejmowe 2016) 55–71.

²⁹ Ibid. 78.

³⁰ Leszek Garlicki in L Garlicki, P Hofmański and A Wróbel (eds), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1-18* (Wydawnictwo CH Beck, Warszawa 2010) 795–808.

³¹ Ibid. 779.

³² Ibid. 806.

The concept of human rights assumed that an individual needed protection from state power³³. The history of the last few months shows that the state can take advantage of the power with which it has been endowed. Under these extreme conditions, the system of human rights protection is justified. It must be admitted that some human rights may stay in conflict with others³⁴. For example, freedom of movement must give way to the right to life. Public threats may lead to derogation of some international obligations³⁵. Withdrawal should be determined by the degree of the threat, not its nature³⁶. However, it is important that their core should remain preserved. I fully accept the thesis that the legal status of a foreigner is primarily determined by given state's law, although the human person is protected by international legal regulations containing rights and freedoms³⁷. This set of standards will be the boundary of national legislation.

III. LEGAL MEASURES TAKEN DURING THE FIRST WAVE OF PANDEMIC

The first reactions corresponding to the spread of the virus could be observed already in early March 2020. The regulation of 27 February 2020 of the Minister of Health announced that the SARS-CoV-2 corona virus infection was covered by the regulations on preventing and combating infections and infectious diseases in humans³⁸.

First of all, a few air connections were suspended, international border controls were reintroduced, and some mass events were cancelled. Some local governments and universities took action even before the national government recommendations. Pursuant to article 46 Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans, the state of epidemic threat or state of epidemic is announced and cancelled by the minister competent for health matters in consultation with the minister competent for public

³³ Tadeusz Jasudowicz, *Administracja wobec praw człowieka* (Dom Organizatora TNOiK 1996); Ferdinando Parente, Bronisław Sitek, Iwona Florek, Human rights in the functioning of public administration = *Prawa człowieka w funkcjonowaniu administracji publicznej*; (Wyższa Szkoła Gospodarki Euroregionalnej w Józefowie 2018).

³⁴ Michael Freeman, *Prawa człowieka* (Sic! 2007), 11.

³⁵ Anna Michalska, 'Niebezpieczeństwo publiczne które zagraża życiu narodu' in T Jasudowicz (ed), *Prawa człowieka w sytuacjach nadzwyczajnych* (TNOiK „Dom Organizatora“ 1997) 11.

³⁶ *Ibid*, 25.

³⁷ Jan Białocerkiewicz, *Status prawny cudzoziemca w świetle standardów międzynarodowych*, 74–75.

³⁸ Regulation of the Minister of Health of 27 February 2020 on the SARS-CoV-2 coronavirus infection (Journal of Laws of 2020, item 325).

administration, at the request of the chief sanitary inspector³⁹. An epidemic emergency was introduced on 13 March 2020, and an epidemic was declared on 20 March 2020.

The content of the regulation specifying limitations, orders and bans in connection with the outbreak of the epidemic has undergone numerous changes. The biggest restrictions were imposed around Easter. Among the orders and bans were:

- the movement of passengers in rail transport with crossing the border of the Republic of Poland was suspended;
- the obligation to quarantine for 14 days from the day after crossing the state border, including people living in the same household, with the exceptions provided for in the regulation (e.g. drivers performing road transport as part of international road transport);
- prohibition of movement of persons staying in the territory of the Republic of Poland (one of the exceptions was meeting the necessary needs related to the current affairs of everyday life);
- temporary limitation of business activities related to the organization of events, fairs, exhibitions, conferences, cosmetic treatments, hotel services and rehabilitation services;
- an order that during the exercise of religious events in a given facility there should be a total of, both inside and outside the premises, not more than 5 participants (this order also applied to funerals);
- prohibition of public gatherings and private meetings, with the exception of one's closest relatives;
- the ban of the use of parks, lawns, promenades, boulevards, botanical gardens, zoos, playgrounds and historic sites, as well as beaches;
- obligation to cover the mouth and nose in the public collective transport and public places;
- moving around was possible if the social distance of 2 meters was kept; minors up to 13 years old could only move if accompanied by the person exercising parental authority, legal guardian or another adult;
- individual workstations must be at least 1.5 meters apart.

Pursuant to § 13, until further notice, the performance of tasks by a public administration office or organizational entities performing tasks of a public nature may be limited to:

- 1) only tasks necessary to provide assistance to citizens;
- 2) specific tasks by any given office or unit in a way that excludes direct service of clients.

³⁹ Act of 5 December 2008 on preventing and combating infections and infectious diseases in humans (Consolidated text, Journal of Laws of 2019, item 1239, as amended).

In fact, offices had been kept separate from contact with applicants.

An important topic for this discussion was the temporary suspension or limitation of border traffic at certain border crossing points, both external to the EU and with other EU member states. According to the regulation of the Minister of the Interior and Administration, from 13 March 2020 on the temporary suspension or restriction of border traffic at certain border crossing points, entry restrictions to Poland⁴⁰ applied to every person. The exceptions were Polish citizens and foreigners who found themselves in the group mentioned in the regulation. The exceptions were:

- 1) foreigners who are spouses or children of citizens of the Republic of Poland or who remain under the permanent care of citizens of the Republic of Poland;
- 2) foreigners with a Pole's Card;
- 3) heads of diplomatic missions and members of the mission's diplomatic and consular staff, i.e. persons with a diplomatic rank and members of their families;
- 4) foreigners with the right of permanent or temporary residence in the territory of the Republic of Poland;
- 5) foreigners with the right to work in the territory of the Republic of Poland, i.e. foreigners entitled to work on the same terms as Polish citizens, with a work permit, a certificate of entry in the record on seasonal work, a declaration of entrusting work to a foreigner in the territory of the Republic of Poland Polish, who:
 - a) perform work on the territory of the Republic of Poland or
 - b) present documents proving that employment will begin immediately after crossing the border;
- 6) foreigners who drive vehicles for the transport of passengers or goods, provided their journey takes place as part of professional activities.

Additionally, the prohibition of landing aircraft carrying civilian passengers in international traffic had a significant impact on the situation of migrants⁴¹. It must be admitted that the prohibition did not apply to persons mentioned in the previous paragraph returning to the territory of the Republic of Poland on chartered aircraft. In fact, the lack of flights almost completely stopped migratory movements.

⁴⁰ Regulation of the Minister of the Interior and Administration of 13 March 2020 on the temporary suspension or restriction of border traffic at certain border crossing points, entry restrictions to Poland (Journal of Laws of 2020, item 435).

⁴¹ Regulation of the Council of Ministers of 13 March 2020 on air traffic bans (Journal of Laws of 2020, item 436, as amended).

On 8 March 2020, the law on special solutions related to the corona virus entered into force (Further: COVID Act)⁴². The very extensive content of the act introduces, or allows for the introduction of, numerous obligations. Among many:

- obligation to install on a mobile device software, provided by the minister responsible for computerization, used to confirm the compliance with quarantine and use it to confirm the fulfilment of this obligation (art. 7e);
- possibility to set maximum prices and margins for products and products that can be used in relation to counteracting COVID-19 or whose availability is threatened;
- the possibility of imposing an obligation on a local government unit to perform a specific task in connection with counteracting COVID-19 (art. 10);
- the opportunity to give the convicted person a break in the execution of the imprisonment sentence (art. 14c para. 1);
- the opportunity to grant annual leave without the consent of the employee and without the leave plan (art. 15gc).

The above legal regulation, apart from regulating the matters of every entity located on the territory of Poland, contained solutions dedicated only to aliens.

There are a number of regulations during the epidemic that, in the context of this discussion, are assessed positively:

- extension of the deadline for submitting applications for granting residence permits (art. 15z);
- extension of the legality of the foreigner's stay in the territory of the Republic of Poland (art. 15z¹);
- work if they have valid work permit in the territory of the Republic of Poland, a valid declaration of the intention to entrust work or a valid seasonal work permit (art. 15z¹ paras. 2 and 3);
- extension of validity of residence cards (art. 15z²);
- extension of the validity of temporary identity certificates of a foreigner (art. 15z³);
- extending the repatriate's stay in an adaptation centre for repatriates (art. 15z⁴);
- performance of work by a foreigner on conditions other than those specified in the documents constituting the basis for the foreigner's legal work (art. 15z⁵);
- extension of the validity period of residence cards of a family member of an EU citizen, documents confirming the right of permanent residence,

⁴² Act of 2 March 2020 on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and the crisis situations caused by them (Journal of Laws of 2020, item 374, as amended).

- permanent residence cards of a family member of an EU citizen, Polish identity documents of a foreigner and permits for tolerated stay (art. 15z⁶);
- extension the validity period of a national visa and temporary residence permits (art. 15zd);
 - extension of the validity period of work permits for a foreigner (art. 15zzq);
 - extension of the deadline for a foreigner to leave the territory of the Republic of Poland (art. 15zzza);
 - extension of the period of a foreigner's voluntary return (art. 15zzzb).

The COVID Act also contains exceptions to the foreigner's obligation to have a work permit and the obligation to extend a work permit and a seasonal work permit (art. 15z⁷), extends the deadline for providing social assistance and medical care referred to in the Act on granting protection to foreigners in Poland (art. 15z⁸). The law also allows the citizens of the following countries: Republic of Armenia, Republic of Belarus; the Republic of Georgia, the Republic of Moldova; the Russian Federation and Ukraine – to apply for a national visa in the territory of this state, without having to submit the documents referred to in the Act from 12 December 2013 on foreigners in person (art. 15z⁹). Unfortunately, foreigners from other countries still have to apply personally.

IV. ASSESSMENT OF THE LEGAL MEASURES

The foundation of the assessment of the adopted legal solutions may be built on various perspectives. The model of legal assessment may be based on the constitution or norms of international law containing various human rights. The question arises whether all the conditions for limiting human rights have been respected. Have the material and formal conditions been met?

In accordance with the provisions of the Constitution, restrictions on the exercise of constitutional rights and freedoms may be established only by statute and only if they are necessary in a democratic state for its safety or public order, or for the protection of the environment, public health and morals, or freedoms and rights of other people; these limitations shall not violate the essence of freedoms and rights (art. 31 para. 3). It is, therefore, about finding balance, not eliminating a specific right or freedom⁴³.

Two conditions can be inferred from the Constitution: prohibition of excessive interference with rights and freedoms, and the necessity of restrictions. Therefore, each time questions should be asked about the following: the usefulness of the restriction to achieve the goal; the choice of the mildest restriction; the

⁴³ Judgment of 20 March 2006 (K 17/05; OTK ZU no. 3/A/2006, item. 30).

adequacy of the limitation to the purpose⁴⁴. From the prohibition of excessive interference, as the source of the general formula of proportionality, the Constitutional Tribunal derives three requirements: usefulness, necessity and proportionality in the narrow sense⁴⁵.

Each of the introduced restrictions had a chance to be positively assessed. First of all, there was a rational need for interference that directly contributed to the achievement of a constitutionally justified goal. It is easy to indicate specific values that were the aim of protection: life and health of citizens and foreigners residing in Poland and, in particular, the protection of people with disabilities and the elderly. Importantly, the introduced regulations, at least in the first wave of the spread of the virus, have largely achieved this goal. It should also be emphasized that the restrictions on constitutional rights and freedoms served to protect the values listed in art. 31 para. 3 of the Constitution. Pursuant to the requirement of proportionality (in the strict sense), restrictions on constitutional subjective rights cannot inadequately impose burdens on the subjects of rights and freedoms. Restrictions should be directly related and proportionate to the burden imposed⁴⁶. Most of the measures that have been taken could be recognized as proportional to the threat, especially, if we consider the state of knowledge about the virus at the beginning of the pandemics.

Undoubtedly, the threat is current, the effects affect the entire nation and the world, the functioning of social life has been disrupted and the uniqueness of the crisis requires the use of extraordinary measures⁴⁷. Once again, it must be emphasized that the exceptions and limitations to constitutional rights and freedoms can be accepted but must preserve the constitutional framework. Taking into account criteria mentioned above, the restrictions were justified. However it is worth noting that, according to the Constitution, only the introduction of extraordinary measures in such case may temporarily limit some human rights contained in it. This is determined by two basic criteria: there is a special threat and it cannot be dealt using ordinary constitutional measures⁴⁸, which means a serious and immediate threat to the basic interests of society and the normal functioning of state institutions⁴⁹.

⁴⁴ Judgment of 25 July 2013 (P 56/11; OTK ZU no. 6/A/2013, item. 85).

⁴⁵ Ibid. Judgment of 16 October 2014 (SK 20/12; OTK-A 2014/9/102).

⁴⁶ Judgment of 25 July 2013 (P 56/11; OTK ZU no. 6/A/2013, item. 85).

⁴⁷ Leszek Garlicki in L. Garlicki, P. Hofmański and A. Wróbel (eds), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1-18* (Wydawnictwo C.H. Beck, Warszawa 2010) 801.

⁴⁸ Leszek Wiśniewski, 'Stany nadzwyczajne w projekcie nowej Konstytucji RP' in T. Jasudowicz (ed), *Prawa człowieka w sytuacjach nadzwyczajnych* (TNOiK „Dom Organizatora“ 1997) 151.

⁴⁹ Krzysztof Wojtyśzek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP* (Kantor Wydawniczy „Zakamycze“ 1999) 250; Kazimierz Działocha,

It should be noted that the limitation of the rights and freedoms contained in the constitution could occur in the event of the introduction of one of the states of emergency. Such a state may be introduced in situations of special risk, if ordinary constitutional measures are insufficient. According to art. 233 para. 3 of the Constitution, the statute specifying the scope of limitations of the freedoms and rights of persons and citizens during states of natural disasters may limit the freedoms and rights such as freedom of economic activity, personal freedom, freedom of movement and sojourn on the territory of the Republic of Poland, the right to strike as well as freedom to work. Public compensations should cover losses of individuals and companies.

According to art. 2 of the Act of 18 April 2002 on the state of natural disaster⁵⁰, the state of natural disaster may be introduced to prevent the effects of natural disasters or technical failures bearing the hallmarks of a natural disaster and to remove them. At the same time, according to the content of the cited legal act on a natural disaster – it is understood as an event related to the action of natural forces, in particular, infectious diseases of people. Restrictions on human and civil freedoms and rights in a state of natural disaster apply, among others, to natural persons residing or temporarily staying in the area where the state of natural disaster was introduced (art. 20). Restrictions can range from ordering or prohibiting a particular mode of movement or prohibiting certain types of business.

It should be emphasized that neither of these states has been declared and the state of the epidemic does not belong to this group. From this perspective, some obligations and prohibitions do not have a sufficient legal basis. From this perspective, it could be said that the freedom of movement and other constitutional rights and freedoms have been restricted contrary to the Constitution.

The introduced regulations primarily affected the freedom of movement, both inside and outside the country. Generally, suspension of air traffic and closure of other countries' borders in connection with the SARS-CoV-2 virus pandemic disallowed many workers, member of families and repatriates, from coming to Poland and probably had significant impact on the situation of people who were seeking protection in European countries. The actual lack of flights indirectly blocked the majority of migratory movements based on air freight (e.g. people who have a permanent residence permit in Poland and at the same time have the citizenship of a country that does not border with Poland directly).

In accordance with the Regulation of the Council of Ministers of 7 August 2020 on the establishment of certain restrictions, orders and bans in connection

⁵⁰ 'Komentarz do art. 228' in K Działocha et al., L Garlicki (eds), 'Konstytucja Rzeczypospolitej Polskiej: komentarz. 4' (Wydawnictwo Sejmowe 2005) 3.

⁵⁰ Consolidated text Journal of Laws of 2017, item 1897 as amended.

with an epidemic⁵¹, the current regulations are created to precisely target the source and prevent the spread of the epidemic at the same time. Still, persons crossing the EU's external border must undergo a 14-day quarantine. This period may be shortened if the system's medical diagnostic laboratory publishes a negative result of the diagnostic test for SARS-CoV-2. However, test must be financed from public funds. This means that individuals or employers cannot submit the results of tests conducted on their own. Such legal regulations may result in a reduced supply of labour from abroad while the demand is increasing. On the other hand, the regulation contains numerous exceptions to this obligation, concerning, e.g. drivers, students and scholars.

A major problem indirectly affecting the implementation of human rights was the closure of offices (including consulates). It should be remembered that it was difficult to obtain, for example, a visa, which in some cases is a condition for entry into the territory of Poland. Currently, it is impossible to arrange a visit to the Greater Poland Voivodeship Office. For instance, making an appointment to give fingerprints is nearly impossible⁵². The lack of a residence card means that some of the rights cannot be exercised. Such an example is the childcare benefit under the 'Family 500+' program. Additionally, recognizing the stay as legal does not constitute an authorization to cross the border, which means that while staying in Poland is not an issue, things become complicated when individuals try to leave the territory and then return again. In this way, the negative effects are felt by migrants whose family members are on both sides of the border. Moreover, separating private entities from officials will make it more difficult to meet the standards relating to the right to a fair procedure and the right to an effective remedy.

However, the assessment of the majority of other introduced solutions in COVID Act can be perceived as acceptable. In particular, the above remark is related to regulations aimed at regulating the legal status of foreigners residing in and working in the territory of Poland. The regulations that allowed people called *quasi-citizens* in literature to cross the border should also be praised. It is worth mentioning that the term 'quasi-citizens' means foreigners who have lived in a given country for a very long time, have family ties in a given country and who are valuable in the light of the interests of the state⁵³. The exception to assessment invoked above is related to the local border traffic. Local border traffic refers to the regular and frequent crossing of the EU's external border by nationals of

⁵¹ Regulation of the Council of Ministers of 7 August 2020 on the establishment of certain restrictions, orders and bans in connection with an epidemic (Journal of Laws of 2020, item 1356, as amended).

⁵² <<https://rejestracjapoznan.poznan.uw.gov.pl/>> accessed 20 August 2020.

⁵³ Dorota Pudzianowska, *Obywatelstwo w procesie zmian* (Wolters Kluwer business 2013) 245.

neighbouring non-EU countries residing in the border areas of the EU for legitimate reasons⁵⁴. The content of the legal provisions proves that this movement has been suspended. It is worth noting that the essence of local border traffic assumes a preference for people who, for social, cultural or family reasons and for justified economic reasons, often cross the border. The author of this study believes that this group should also be covered by special regulations allowing entry to Poland even during a pandemic. Generally speaking, every person who obtained entry permission should enjoy freedom of movement. In my opinion, issuing an entry permission shall limit the possibility of arbitrary closing of borders.

V. CONCLUSION

The considerations presented above allow for the formulation of several conclusions. The introduced restrictions must comply with the constitutional provisions and basic human rights. In general, legal solutions introduced to limit the spread of the virus limited migrants' rights. However, in times of a crisis, some human rights give way to the realization of highly protected values (such as life or health). In terms of substantive limitations, they were in line with the principle of proportionality. Foreigners who have been called quasi-citizens were treated in the familiar way as citizens. According to constitutional provisions, migrants who seek protection, work in the EU, have family relationships and who are victims of trafficking were given special consideration. Unfortunately, the legislator seems to have forgotten about people who participate in local border traffic. At the same time, reasonable concern about the ban on flights should be raised.

It should be clearly emphasized that restriction of the freedoms and rights included in the Constitution requires the introduction of a state of emergency – state of natural disaster. The remark mentioned above is in line with the standpoint of the Commissioner for Human Rights⁵⁵. It is worth noting that when the text was written, individuals in other European countries also question the limitations imposed by individual governments.

⁵⁴ Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention (OJ L 405, 30 December 2006) 1–22.

⁵⁵ Koronawirus. Sposób ograniczenie poruszania się po kraju i uczestniczenia w mszach niezgodne z Konstytucją. RPO polemizuje z MZ <<https://www.rpo.gov.pl/pl/content/koronawirus-sposob-ograniczanie-poruszania-sie-po-kraju-i-uczestniczenia-w-mszach-niezgodne-z-konstytucja>> accessed 28 October 2020.

The experience gained so far allows us to propose to increase the EU's participation in crisis management. In this regard, the adoption of the Joint European Roadmap towards lifting COVID-19 containment measures is welcomed⁵⁶. In particular, it is important that in this document the principle of respect and solidarity between member states remains essential. The challenge for the future may be the adoption of legal solutions allowing the issuance of documents to foreigners whose country of origin has organized a return flight from a member state other than their place of residence. There have been cases which prove that this challenge has not been addressed properly.

To conclude, it seems fitting to recall the words of Janusz Korczak, who was a Polish and Jewish author, doctor and child rights activist of the early 20th century. Korczak's main message was '*there are no children, there are people*'⁵⁷. Today we are entitled and encouraged to say that *there are no migrants (foreigners), there are people*.

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⁵⁶ Joint European Roadmap towards lifting COVID-19 containment measures, <https://ec.europa.eu/info/sites/info/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf> accessed 22 August 2020.

⁵⁷ Janusz Korczak, *Prawo dziecka do szacunku* (Rzecznik Praw Dziecka 2012) <<https://www.sbc.org.pl/publication/345779>> accessed 28 August 2020, 6.

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